H-1B Specialty Occupations

This visa category applies to people who wish to perform services in a specialty occupation.

Eligibility Criteria

The job must meet one of the following criteria to qualify as a specialty occupation:

- Bachelor's or higher degree or its equivalent is normally the minimum entry requirement for the position
- The degree requirement for the job is common to the industry or the job is so complex or unique that it can be performed only by an individual with a degree
- The employer normally requires a degree or its equivalent for the position
- The nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree.*

For you to qualify to accept a job offer in a specialty occupation you must meet one of the following criteria:

- Have completed a U.S. bachelor's or higher degree required by the specific specialty occupation from an accredited college or university
- Hold a foreign degree that is the equivalent to a U.S. bachelor's or higher degree in the specialty occupation
- Hold an unrestricted state license, registration, or certification which authorizes you to fully practice the specialty occupation and be engaged in that specialty in the state of intended employment
- Have education, training, or progressively responsible experience in the specialty that is equivalent to the completion of such a degree, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Family of H-1B Visa Holders

Your spouse and unmarried children under 21 years of age may seek admission in the H-4 nonimmigrant classification. Family members in the H-4 nonimmigrant classification may not engage in employment in the United States.

Period of Stay

As an H-1B nonimmigrant, you may be admitted for a period of up to three years. Your time period may be extended, but generally cannot go beyond a total of six years unless certain exceptions apply.

Return Transportation for Beneficiary

Your employer will be liable for the reasonable costs of your return transportation if your employer terminates you before the end of your period of authorized stay. Your employer is not responsible for the costs of your return transportation if you voluntarily resign your position.

H-1B Cap

The H-1B visa has an annual numerical limit "cap" of 65,000 visas each fiscal year. The first 20,000 petitions filed on behalf of beneficiaries with a U.S. master's degree or higher are exempt from the cap. Additionally, H-1B workers who are petitioned for or employed at an institution of higher education or its affiliated or related nonprofit entities or a nonprofit research organization, or a government research organization are not subject to this numerical cap. H-1B petitions filed to change employers, extend the amount of time a current H-1B worker may remain in the United States, to change the terms of employment for current H-1B workers or to allow current H-1B workers to work concurrently in a second H-1B position or the change the conditions of employment. Once an H-1B beneficiary has entered into an H-1B quota, the beneficiary shall be able to use his/her 6 years under H-1B, whether continuously by renewing while in the United States or even if they have resided outside the United States and want to return again as H-1B.

For immigration purposes a fiscal year starts each October 1. For instance fiscal year 2011 started on October 1, 2010. H-1B petitioners are allowed to file H-1B petitions subject to cap 6 months prior to the commencement of each fiscal year.

Statistics H-1B Cap for the last four years

- For Fiscal Year 2011 the H-1B cap was reached on January 26, 2011
- For Fiscal Year 2010 the H-1B cap was reached on December 22, 2009
- For Fiscal Year 2009 the H-1B cap was reached on April 8, 2008
- For Fiscal Year 2008 the H-1B cap was reached on April 3, 2007

Decoupling H-4 and L-2 Time from H-1B and L-1 Time

Any time spent in H-4 status will not count against the six-year maximum period of admission applicable to H-1B aliens. Thus, an alien who was previously an H-4 dependent and subsequently becomes an H-1B principal will be entitled to the maximum period of stay applicable to the classification.

For example, a husband and wife who come to the United States as a principal H-1B and dependent H-4 spouse may maintain status for six years, and then change status to H-4 and H-1B respectively. Note that, upon the switch, the new "principal alien" would be subject to the H-1B cap if not independently exempt. USCIS will consider, in the context of any applications for change of status from H-4 to H-1B, whether the H-4 alien complied with the requirements of accompanying or joining the H-1B alien, and whether the alien otherwise maintained valid nonimmigrant status.

Maintenance of H-4 status continues to be tied to the principal's maintenance of H-1B status. Thus, H-4 dependents may only maintain such status as long as the principal holds H-1B status.

Periods of Stay in H-1B Status Beyond the Six Year Maximum

In sections 106 and 104(c) of AC21, Congress provided exemptions to the six-year maximum period of stay rules for certain H-1B aliens who were being sponsored by employers for permanent residence and were subject to lengthy processing delays. Though both provisions of AC21 use the term "extension of stay," eligibility for the exemptions is not restricted solely to requests for extensions of stay while in the United States. Aliens who are eligible for the 7th year extension may be granted an extension of stay regardless of whether they are currently in the United States or abroad and regardless of whether they currently hold H-1B status. Further, in examining eligibility for the 7th year extension, USCIS will focus on whether the alien is eligible for an additional period of admission in H-1B status, rather than whether the alien is currently in H-1B status that is about to expire and seeking an extension of that status in the United States.

Note: The burden of proof rests with the petitioner and alien to establish his or her eligibility for any additional periods of stay in H-1B status beyond the six year maximum, including evidence of job requirements, alien credentials, labor condition application approval, previous H-1B Memorandum for Service Center Directors, et al.

The limitation on the total period of stay does not apply to H-1B aliens when:

(A) 365 days or more have passed since the filing of any application for permanent labor certification, that is required or used by the alien to obtain status as an EB immigrant; or

(B) 365 days or more have passed since the filing of an EB immigrant petition; or

(C) The alien is the beneficiary of an approved EB immigration petition and is not able to file to adjust status to U.S. permanent legal residence based on the unavailability of an immigrant visa number.

Note: A timely and non-frivolous I-140 appeal pending at the AAO allows an alien to request an H-1B extension beyond the 6-year limit.
Note: The statute does not require that the labor certification or immigrant petition must be from the same employer requesting the H-1B extension.

H-1B Portability (Change of Employers)

Changing employers - An H-1B worker can change employers, but first the new employer must file a labor condition application and then file a new H-1B petition. If the worker is already an H-1B, he or she can then begin the employment as described in the petition without waiting for USCIS to approve the petition. This is called a "portability provision," and it only applies to someone already in valid H-1B status.
The portability provision also applies to a H-1B holder who is in a 'period of stay authorized by the Attorney General' based on a timely filed extension of H-1B status petition filed on his/her behalf, who then seeks to start working for a different H-1B employer upon that employer's filing of a petition.
If the beneficiary previously held H-1B status, but now holds an intervening status (like an H-4 or F-1), the employer should expedite the petition with premium processing and wait for the approval before placing the employee on payroll as the Portability provision allowing to start working for the new employer upon filing does not apply in this situation.
In order to port, the beneficiary should include evidence that he/she has maintained status and has worked for the current employer according to the provision of the petition filed on his/her behalf, including copies of paystubs as of the time of the filing the second petition with new employer.

H-1B Remainder Policy:

The six-year period of maximum authorized admission accrues only during periods when the alien is lawfully admitted and physically present in the United States.
There have been instances where an alien who was previously admitted to the United States in H-1B status, but did not exhaust his or her entire period of admission, seeks readmission to the United States in H-1B status for the "remainder" of his or her initial six-year period of maximum admission, rather than seeking a new six-year period of admission. The "remainder" period of the initial six-year admission period refers to the full six-year period of admission minus the period of time that the alien previously spent in the United States in valid H-1B status. For example, an alien who spent five years in the United States in H-1B status and then remained outside the United States for less than a year, could seek to be admitted for the remainder of the initial six-year period, i.e. a total of one year without being subject to the cap. . If the alien was previously counted toward the H-1B numerical limitations in relation to the time that has accrued against the six-year maximum period of admission, the alien would not be subject to the H-1B cap. If the alien was not previously counted against the H-1B

numerical limitations (i.e. because cap-exempt), the alien will be counted against the H-1B cap unless he or she is eligible for another exemption.

In the alternative, admission as a "new" H-1B alien refers to a petition filed on behalf of an H-1B alien who seeks to qualify for a new six-year admission period (without regard to the alien's eligibility for any "remaining" admission period) after having been outside the United States for more than one year. For example, the alien who spent five years in the United States in H-1B status and then remained outside the United States for at least a complete year, is eligible to apply for a "new" period of H-1B status based on his or her absence of at least one year from the United States. Most petitioners electing this option will seek a three-year H-1B petition approval, allowing for the possibility of later seeking a three-year H-1B extension.

Note: The burden of proof rests with the alien to show that he or she has been outside the United States for one year or more and is eligible for a new six-year period, or that he or she held H-1B status in the past and is eligible to apply for admission for the H-1B "remainder" time. Petitions should be submitted with documentary evidence of previous H-1B status such return tickets, evidence of salaries paid during the H-1B status while in the United States, etc.

Recapture of Unused H-1B Visa Validity

The six-year period of maximum authorized admission accrues only during periods when the alien is lawfully admitted and physically present in the United States. If during the 6 year allowed period, the H-1B beneficiary travel outside the United States for periods of at least 24 hours, that time can be recapture in order to extend the H-1B maximum allowed period. It is highly recommended that, at a minimum, H-1B visa holders provide a detailed list of dates of each exit and re-entry and that this list is backed with copies of CBP issued I-94s and passport exit/entry stamps. However, other forms of objective evidence, including plane tickets and frequent flyer miles, will also be considered.

Recapture is not necessary for certain H-1B visa holders. Specifically, H-1B holders who do not reside continuously in the U.S. and engage in employment that: is seasonally or intermittent; is for an aggregate period of six months or less per year; or is part-time (and the employee resides abroad and regularly commutes to the U.S). In these situations, extensions must clearly demonstrate, that the employee qualifies for the exception to the time limitation. The regulation requires "clear and convincing proof," such as exit and entry records, copies of tax returns of the employee, and records demonstrating employment abroad.

H-1B Audits

In October of 2010 the U.S. Citizenship and Immigration Services' (USCIS) Office of Fraud Detection and National Security (FDNS) commenced an assessment of the H-1B program. The FDNS which was created in 2004 consist of approximately 650 Immigration Officers, Intelligent Research Specialist and Analyst located in field offices throughout the United States. Additionally, FDNS has contracted with multiple private investigation firms to conduct site visits.. FDNS officers collect information during site visits to verify information for pending or already approved petitions. Although most visits occurred post adjudication, a USCIS adjudicators office may refer an H-1B petition to FDNS for a site visit prior to the completion of

the adjudication. This may occur with H-1B extensions and H-1B change of employers. A subpoena is not required as instructions of the H-1B applications clearly states that the USCIS may verify information including through unannounced physical site inspections and that it may provide opportunity to address any adverse or derogatory information through the submitting of a Notice of Intent to Revoke which must be responded in a limited period, normally 33 days, with supporting documents and a statement. If compliance fails, a termination or revocation of an approval will take place.

a. **What to Expect?**

The FDNS will normally request to speak with the representative who signed the I-129 petition, and if not available, the officer will ask to speak with another representative. The officer will ask information such as employer's type of business, number of employees, tax returns, quarterly wage reports and any other document to confirm the company is a bona fide business. The officer will ask specific information about the H-1B employee/s including job title, salary, working hours, work location and may ask for copies of most recent paystub and last W-2. Thereafter, the officer may request a tour of the employer's facility and will take photographs. If the H-1B employees is available, the office may ask questions about job duties, title, salary, job locations, current address, academic background.

b. **What Information Should Always Have an Employer On Hand?**

The Petition letter, the LCA (Labor Condition Application) and the I-129 Petition form which indicates the most relevant information: Position, Job Duties, Salary and Job Location. Employer should also have available information regarding paystubs and quarterly wage reports, as this information is essential to comply with the H-1B program. Most Notices of Intent to Revoke are received by the H-1B employer months after the site visit was conducted and the most normal compliance reviews refer to Job Title, Salary, working hours, and job location. If you are an H-1B employer and the terms of employment have changed, you should contact your counsel to make the corresponding amendments with USCIS, including changes on position, working hours, salary and job location. It is recommended that an employed does not simply "guess" about any information provided during a site visit and it is recommended for Employer to follow up with FDNS officers to provide accurate information after a site visit.

c. **What if after a Site Visit an H-1B Employer Receives a Notice of Intent to Revoke?**

The Notice of Intent to Revoke will contain information regarding the date of the site visit, the name of the representative interviewed and the specific information gathered during the site visit including H-1B employees working at the site, job titles, job locations, salaries, working hours and job duties. The Notice will address each of the deficiencies and any document obtained at the site visit to support such assessment, if any. The H-1B employer should normally have 30 days to respond with supporting documents.

d. **What if the Employer fails to comply with the H-1B requirements?**

There is a "good faith exception" so that an employer is considered to have complied with the LCA requirements "notwithstanding a technical or procedural failure to meet such requirements. For the failure to comply to fall outside of the rubric of the "good faith exception", it must be shown that the violation was a willful failure which requires knowledge or reckless disregard." The burden of proof in establishing such willful omissions is with the USCIS, but the most relevant aspect is that the absence of a showing of a substantial, willful violation may prevent the employer to be subject the civil penalties. In determining whether a petitioner falls within the "good faith exception", the DOL looks at 1) previous history of violations, 2) the number of workers affected by the violations, 3) the gravity of the violation, 4) the violator's good faith compliance efforts, 5) the violator's explanation, 6)the violator's commitment to future compliance, and 7) the extent of the financial gain by the violation or the extent of others' loss.

e. **Can an H-1B Employer be penalized for not complying with H-1B regulations?**

Any derogatory information obtained during a site visit could be used to deny a petition if the site-visit occurs prior to adjudication or to revoke an approved H-1B petition, and could defer to ICE for further investigation of fraud which could lead to civil penalties and criminal prosecution. Willful failure to comply with all LCA requirements may result in a fine ($1,000 to $35,000 per violation) and a debarment from all future approvals of any Nonimmigrant, Immigrant Petitions of Permanent Labor Certifications for at least one year.