

H-1B OVERVIEW **[8 CFR § 214.2(h)]**

The H-1B category is designed for temporary employment in a “*specialty occupation.*”

A “specialty occupation” is defined as one that requires the “*theoretical and practical application of a body of highly specialized knowledge.*”

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 an employee to qualify to accept a job offer in a specialty occupation they 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 that employee 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.

The H-1B employer must meet the prevailing wage required by the U.S. Department of Labor and pay the higher of the prevailing wage or the actual wage. The “actual wage” is defined as the average salary for employees with the same title and similar educational background employed in the same institution. If the position is part of a bargaining unit, then the prevailing wage is determined by the Collective Bargaining Agreement in effect at the time of the application.

The H-1B petitioning process consists of the following steps:

- (1) Verifying the Employer’s Federal Employer Identification Number (FEIN) with the U.S. Department of Labor.
- (2) Determining a prevailing wage for the position.
- (3) Obtaining a certified Labor Condition Application (LCA – Form ETA9035) from the U.S. Department of Labor
- (4) Filing Form I-129, Petition for a Nonimmigrant Worker, along with supporting documentation, with the USCIS Service Center in California.
- (5) Once the petition has been approved, if the employee wishes to travel abroad, they must apply for an H-1B visa at a U.S. Consulate abroad. If they do not travel abroad, they do not need to obtain a new visa in their passport, even if their current visa has expired, or is in a different category.

Special Considerations:

Fees

Required:

\$460.00	base Form I-129 (H-1B) filing fee (for all petitions)
\$500.00	one-time anti-fraud fee (first time only for all petitions; not required on extensions)
\$1,500.00/\$750.00	American Competitiveness and Workplace Improvement Act (ACWIA) fee – (not required for Institutions of Higher Education) – required on 1 st time filing and 1 st extension for non-higher education employers - \$1,500 for employer with 26 or more employees/\$750 for employer with 25 or fewer employees

Note: these fees, and attorney fees and costs for preparing the petition, **must be paid by the employer.**

Optional:

\$1,225.00	premium processing fee, submitted if processing is required within 15 calendar days; must be paid by the employer if premium processing is required by business necessity; may be paid by the employee if premium processing is not required by business necessity, but because of the employee's own personal needs (e.g., travel plans, etc.)
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Dependents:

\$370.00	If the prospective H-1B employee has dependents, then this fee is required to change or extend their dependent status – one fee for all dependents (spouse and children). With the state, this fee is usually paid by the H-1B employee, unless special arrangements have been made with the employer.
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Processing time

A petition may be filed up to 6 months prior to the start date of the intended H-1B employment. The USCIS California Service Center may take up to 4-5 months to process a new H-1B petition. A request for premium processing may be submitted to the USCIS, with an additional \$1,225 fee. USCIS is required to process premium processing requests within 15 calendar days.

Duration

The maximum length of employment requested at one time is 3 years. H-1B authorization can be extended for up to 6 years total. If a permanent residency application has been filed on behalf of the beneficiary, and has been pending for over one year, then it is possible to extend H-1 B status beyond 6 years.

Family members

Family members who are residing with the prospective H-1B employee in the U.S. may need to file an application for a change of status to H-4, if they are currently in another status, or to extend their H-4 status, if the prospective H-1B employee is currently working for another employer in the U.S. The application is usually submitted along with the H-1B petition.

Change in terms of employment

Such as: different appointment and responsibilities, significant change in salary level, new employment location – may require filing a new, or amended, H-1B petition.

H-1B Cap (**not** applicable to Higher Education employers)

The current annual cap on the H-1B category is 65,000. H-1B petitions submitted by Higher Education employers are not subject to the annual cap. Neither are H-1B extensions, H-1B transfers (H-1B petitions for prospective employees who are currently employed in H-1B status with another employer), or amended petitions.

Once the cap number has been reached, the USCIS will not accept any new cap-subject H-1B petitions for that Fiscal Year (October 1 – September 30). USCIS resumes acceptance of cap-subject H-1B petitions on April 1, 6 months prior to the first day of the new federal fiscal year (October 1), but with a start date of H-1B employment no earlier than October 1.

Up to 6,800 visas may be set aside from the cap of 65,000 during each fiscal year for the H-1B1 program under the terms of the legislation implementing the U.S.-Chile and U.S.-Singapore Free Trade Agreements. Unused numbers in this pool are made available for H-1B use for the next fiscal year.

Some petitions are also exempt from the cap under the advanced degree exemption provided to the first 20,000 petitions filed for a beneficiary who has obtained a U.S. master's degree or higher.

Termination of employment

If the employer terminates the H-1B employee's employment prior to the expiration date listed on the H-1B petition, the employer is responsible for providing the cost of return transportation to the terminated H-1B employee's home country. If the H-1 B employee is the one who decides to end employment, the employer is NOT responsible for the cost of return transportation.