

H-1B Visa

The H-1B, “specialty occupation” visa is the most commonly used visa for employment purposes. To qualify for an H-1B visa, the position must require the theoretical and practical application of a body of highly specialized knowledge. To approve an H-1B application, the USCIS requires the position to require a Bachelor’s level degree (or the equivalent) in a specialized field and the foreign national to possess a Bachelor’s degree (or equivalent) in this field.

An approval for H-1B status is company and position specific. Therefore, any time an individual changes employers, or there is a material change in the position, an employer must file a new H-1B petition on behalf of the foreign national.

The current law allows only 65,000 new H-1B approvals per year, with an additional 20,000 reserved for H-1B applicants who have Master’s or PhD degrees from US institutions. However, only those individuals who are receiving H-1B classification for the first time (with some narrow exceptions for educational, research and governmental institutions) are counted toward the numerical cap. Therefore, the 65,000 cap does not limit the filing of extensions of stay for those wishing to work concurrently with one or more H-1B employers or those employers petitioning for a subsequent approval in H-1B status (based on either a change in employers, a change in positions at the same employer, or a simple extension of status).

The employer must file a Labor Condition Application (LCA) with the Department of Labor before filing the petition for H-1B non-immigrant classification with the USCIS. This application requires the employer to assert that it will pay the employee at least 100% of the prevailing wage for the position, that the position’s working conditions will not have an adverse effect on similarly situated U.S. workers, and that no labor dispute or lockout exists at the place of employment. A copy of this application must be conspicuously posted at the principal place of business. The application does not contain the employee’s name, but it does list the title of the position and the corresponding salary (which may be listed as a salary range).

Upon approval of the LCA, the H-1B petition is filed with the USCIS. Employers must pay the filing fees for the H-1B classification which include: the USCIS Form I-129 filing fee (\$320), a one-time Fraud Detection and Prevention fee (\$500), and an H-1B Education and Training Fee (\$1,500). Certain educational institutions and nonprofit or government research organizations are exempt from the Education and Training Fee. Of special note, the Education and Training fee is reduced to \$750 for employers with less than 26 full-time employees. Additionally, if the employer wishes for the USCIS to approve the application within 15 days, it can file a Form I-907 request for premium processing and pay an additional \$1,000 filing fee.

If the H-1B petition is approved, it is valid for a period of three years, and the authorized stay may be extended for a maximum of six years. If an employer files a labor certification within 365 days of the foreign national reaching his or her six-year cap in H-1B status, the employee may be eligible to extend his or her status in one-year increments until the adjustment of status application is adjudicated. Unlike some other non-immigrant classifications, H-1B status allows H-1B visa holders to have both non-immigrant and immigrant intent. In other words, the foreign national does not need to prove that s/he has a foreign residence to which s/he intends

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to return. This allows the foreign national to maintain H-1B status while simultaneously filing an application for permanent residence without jeopardizing his or her H-1B status.

Individuals who have held H-1B status in the past and are in the US pursuant to a lawful entry may be eligible to begin working for a new H-1B employer upon the filing of the new H-1B application, pursuant to a recent law allowing H-1B “portability.” However, eligibility for portability is limited, and individuals and companies seeking to benefit from this provision should confirm that this law is applicable in their situation. Those candidates who do not qualify for portability must wait for the USCIS to approve the H-1B petition before commencing employment.

Spouses and children of H-1B visa holders are eligible for H-4 classification. However, H-4 visa holders are not authorized to work in the US.

Steps for applying for H-1B status:

- 1) The employer and the prospective employee complete an on-line questionnaire and forward all relevant documentation/information to LMH.
- 2) LMH evaluates the materials for H-1B dependency and other eligibility criteria; develops case filing strategy.
- 3) LMH analyzes proffered wage for prevailing wage obligation and either submits prevailing wage request to State Employment Security Agency (SESA), or relies upon on-line OES data or an alternative wage source for proof that the employer has met prevailing wage obligations.
- 4) LMH prepares the Labor Condition Application (LCA), forwards the LCA and the LCA file to Company.
- 5) Company signs one copy of the LCA and returns to LMH and posts two copies of the LCA at worksite for ten business days.
- 6) Company maintains LCA on site in a public access file with other legally required documentation.
- 7) Once LCA has been posted by the employer, LMH files the LCA with the Department of Labor (processing time is 1-2 weeks).
- 8) LMH obtains an educational equivalency evaluation of academic degree (if gained from a non-US institution) and/or experience to submit proof of completion of Bachelor’s degree (if necessary)
- 9) LMH prepares final documents for review by foreign national, company, and candidate’s spouse and children (if necessary).
- 10) Company and foreign national review forms for accuracy, sign, and return final documents to LMH.
- 11) LMH conducts final review and prepares packet for filing with the appropriate USCIS Service Center.