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Basic Fact Sheet on H-1B Visas

The H-1B nonimmigrant temporary visa is for “persons who will perform services in *specialty occupations* on a temporary basis,” and allows for employer-specific employment in the U.S. The employee may only work for the employer who filed the H-1B petition and can only perform the job included in the petition.

The definition of “specialty occupation is the key to eligibility for the H-1B visa. A “**specialty occupation**” is: “an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation.” The USCIS closely scrutinizes qualification as a “specialty occupation.

The regulation states that a “specialty occupation” is one in which:

1. a baccalaureate of higher degree or its equivalent is normally the minimum requirement for the position;
2. the degree requirement is common to the industry in parallel positions among similar organizations;
3. the employer normally requires a degree or its equivalent for the position; or
4. the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

To qualify for H-1B status, the foreign national **must possess the required degree or its equivalent or possess a certificate or license** that permits the alien to immediately practice the profession in the state of intended employment.

As a general matter, to require a degree alone is insufficient for H-1B purposes. The degree requirement must specify the relevant concentration needed to perform the duties of the job. If any concentration is acceptable for the position, then the job is likely not to be considered a “specialty occupation.”

One can qualify for H-1B status based on experience that is equivalent to a baccalaureate degree by proving “progressively responsible positions related to the specialty”.

The spouse and unmarried minor children (under age 21) of an H-1B worker are granted H-4 immigration status. Applications for H-4 classification should be included in the petition for the H-1B worker if the dependents are in the U.S. Filing instructions are on the back of the H-1B Request Form. Dependents in H-4 status are not eligible for employment.

There are a limited number of H-1B visas granted in the Government fiscal year, (October 1 through September 30). The cap is 65,000, but new regulations make available 20,000 new visas, only for foreign workers with a minimum master's level degree from a U.S. academic institution, in addition to the Congressionally mandated annual cap of 65,000 visas.

Applications for H-1B visas are accepted after April 1. H-1B visas are not granted until after October 1. In 2005, the 2006 H-1B cap was reached on August 10.

Begin the H1B process at least six months prior to the requested H1B employment date. After determining that the person qualifies for H1B status, the employer must obtain the Labor Conditions Application (LCA). Once the certified LCA is received, the H1B petition will be filed.

Once received by USCIS, the petition can take many months to be processed, and unexpected delays can occur. For this reason, please allow six months for USCIS processing before the official start date of employment. USCIS has instituted a Premium Processing Service in which they will adjudicate a complete petition within 15 calendar days of receipt; the processing fee is \$1,000.

Nonimmigrants in most status categories may change their status to H-1B. The most common exception encountered is nonimmigrants in J-1 status that are subject to the two-year foreign residency requirement.

The H-1B may be granted initially for 3 years, and may be extended for up to a total of six years. After six years in status, the individual must depart the U.S. for at least one year before qualifying again for status.

H-1B holders may be allowed one-year increments of status beyond the statutory 6-year limit where either a labor certification I-140 or I-485 application has been filed.

If the employer dismisses the alien prior to the expiration of the authorized stay, the employer is liable for the reasonable cost of return transportation for the alien abroad.

It is possible to "transfer" H-1B status to another employer. The new must file a "non-frivolous" petition, provided the nonimmigrant was lawfully admitted to the United States and has not engaged in unauthorized employment since his or her lawful admission. The previous employer does not have to give permission for portability. A petition to change H-1B employers is not subject to the H-1B cap.

If you have been terminated by your first employer there is no "grace period" for you to look for another H-1B employer. You must immediately submit an application to the CIS for a change of non-immigrant status and tell the CIS that you are looking for another H-1B sponsor.

H-1B filing fees are:

- 1) The base filing fee of \$185.00, **plus**
- 2) The applicable American Competitiveness and Workforce Improvement Act of 2000 (AWCIA) fees:
 - a. . \$1,500.00 for employers with 26 or more U.S. full time equivalent employees, including employees at any affiliate or subsidiary of such employer or
 - b. \$750.00 for employers with 25 or less U.S. full time equivalent employees, including employees at any affiliate or subsidiary of such employer .
- 3) And the new \$500.00 Fraud Prevention and Detection Fee as applicable.

Many nonprofit primary and secondary schools that are affiliated with institutions of higher education, and therefore, employees of those schools are exempt from the H-1B cap. Everyone applying for the status for the first time will be subject to the cap, unless they seek status to do cap-exempt work. **The following types of work are cap exempt:**

1. Work for an institution of higher education or a related or affiliated nonprofit entity;
2. Work for a government research organization or a nonprofit research organization; and
3. Work as a physician relevant to a J waiver on the basis of agreeing to serve as a primary care physician in a Health Professional Shortage Area (Conrad State 30 Program).

Note: This is basic information concerning what can be an extremely complex area of immigration law. You should consult an immigration attorney if you think you are eligible for an H-1B visa.

Please [email me](#) or call me toll free at 1-866-US VISAS if you would like to ask me an immigration question or schedule a consultation.

Please visit my [website](#) for additional articles and information on immigration and visas.

Note: Receipt of his information does not create a client-attorney relationship. This information should not be considered legal advice. Unless you have a signed engagement letter with me, you should not consider information contained herein as legal advice and you should check with your own legal counsel before relying on this information.