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# H-1B Frequently Asked Questions

This information covers some commonly asked questions about the H-1B immigration status. Individuals interested in obtaining H-1B status may wish to consult an immigration attorney for detailed information on how U.S. immigration laws apply to their particular situation. See our list of [immigration attorneys \[pdf\]](http://internationaloffice.berkeley.edu/sites/default/files/attorneys.pdf) (<http://internationaloffice.berkeley.edu/sites/default/files/attorneys.pdf>) in the Bay Area.

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## 1. What is an H-1B?

The H-1B is an employer-sponsored nonimmigrant classification which allows persons who are not citizens or permanent residents of the U.S. to work in a specialty occupation for up to six years with very limited exceptions. "Employer-sponsored" means that the employer must apply for the H-1B on behalf of the prospective H-1B employee through the United States Citizenship and Immigration Services ([USCIS](http://www.uscis.gov/portal/site/uscis)) (<http://www.uscis.gov/portal/site/uscis>). "Specialty occupation" means a position that requires specialized knowledge and skills, and at least a bachelor's degree in that specialty. The H-1B also requires that the H-1B employer pay the H-1B employee the same or higher wage than is paid to workers in similar occupations, in the geographical area of the proposed employment. Since the procedures and record keeping required for the H-1B are complex, an attorney or other trained person will be necessary to complete the paperwork.

## 2. What kinds of occupations qualify for H-1B status?

A broad range of professional occupations qualify for H-1B status. Generally, professional-level occupations in engineering, biological, physical, social sciences, mathematics, and business administration will qualify for H-1B. A bachelor's degree is always the minimum requirement for an occupation to qualify for H-1B status, but depending on the position, an advanced degree (Master's or Ph.D.) may be necessary.

## 3. Who is eligible to obtain H-1B status?

H-1B status is available to a person who has been offered a temporary professional position by a U.S. employer. A bachelor's degree or higher in a related area is the minimum educational level required for a position to qualify for H-1B status, and the H-1B employee must have this degree (or higher).

## 4. Am I eligible for H-1B status since I have a bachelor's degree?

Not necessarily. The job itself must require a bachelor's degree or higher in a specialized field. You must then have that degree to qualify for H-1B status.

## 5. Is it difficult to get H-1B status in certain kinds of jobs?

It may be particularly difficult to get H-1B status for certain types of jobs. Positions in sales can be difficult if they do not require special training. Some positions in the computer industry, especially computer programming, can be difficult because the minimum requirements for some computer-related jobs are not always well established. An attorney can advise you as to the applicability of an H-1B for a particular job.

## 6. Is there a minimum salary for a job in H-1B status?

Yes, the employer hiring an H-1B worker, must have documentation to prove, and then must certify to the U.S. Department of Labor (DOL) that it will pay the H-1B employee the prevailing wage or the actual wage, whichever is higher. The prevailing wage is the salary paid to workers in similar occupations in the geographic area of the intended employment. The actual wage is the wage that the employer pays employees in similar occupations at the location of

the intended employment. The employer must also certify that it is not displacing any U.S. workers to hire the H-1B applicant, and that there are no strikes or other work stoppages in the occupation in which the H-1B applicant will be employed. The employer makes these declarations, under penalty of perjury, by submitting to DOL for certification a form called a "Labor Condition Application" (LCA).

## 7. What must the employer do to hire an H-1B worker?

After receiving the certified Labor Condition Application (LCA) from DOL, the employer then submits a petition (application), with supporting documentation to the USCIS. There are USCIS processing fees of \$460 for the H-1B petition, and \$370 per application for the H-4 dependents of the H-1B employee. All employers seeking an H-1B for initial employment, or a change of employer must also pay a \$500 H-1B Fraud Prevention and Detection Fee. Employers that are not institutions of higher education or affiliated non-profit research institutions must also pay a \$1500 fee for the training of U.S. workers (\$750 for small employers). Beginning on August 14, 2010, large employers with more than 50% employees in H-1B or L-1 status must pay an additional fee of \$2000 for certain H-1B petitions.

The employer may not pass the \$2000, \$1500 or the \$500 fee on to the H-1B employee. Under the DOL regulation, the \$460, and any attorney's fees for services related to the preparation and filing of the H-1B petition may not be passed on to the H-1B employee, if doing so would effectively lower the employee's wage below the required wage.

## 8. How long does it take to obtain H-1B status?

The amount of time required to obtain H-1B status varies according to circumstances at the DOL and the USCIS. The total processing time, including prevailing wage determination (if necessary), LCA and USCIS processing can take as long as six to seven months or longer. Processing times at the USCIS service centers can vary, and you can check their processing times at the [USCIS website \(https://egov.uscis.gov/cris/processTimesDisplayInit.do\)](https://egov.uscis.gov/cris/processTimesDisplayInit.do).

## 9. What is the H-1B "cap"?

The cap refers to the limit of H-1B visas allowed per federal fiscal year (FY). A fiscal year begins on October 1st and ends on September 30th of the following year. Current regulations set the cap at 65,000 H-1B visas for the entire country. Applications are accepted at the USCIS on a first-come, first-serve basis. To check the latest cap count please visit the [USCIS website. \(http://www.uscis.gov/h-1b\\_count\)](http://www.uscis.gov/h-1b_count)

## 10. Who is exempt from the H-1B cap?

Universities and related nonprofit entities, nonprofit research organizations and government research organizations are permanently exempt from the cap. These employers are able to submit an H-1B application to the USCIS at any time during the year without concern for the fiscal year limit. However, a person who works for an H-1B cap-exempt employer who changes jobs to an employer that is not exempt will become subject to the H-1B cap. There is also an exemption from the annual cap for the first 20,000 new H-1B beneficiaries who have earned a Master's degree or higher from a U.S. institution of higher education.

## 11. When is the best time to submit the H-1B application to the USCIS?

The earliest an H-1B application can be submitted to the USCIS is six months prior to the selected H-1B start date. For employers who are subject to the cap (and because the cap may be reached early every year), it is best to submit the H-1B application in April for the start of the new fiscal year on October 1 when the new batch of 65,000 H-1B visas become available.

## 12. How should I explain H-1B status to a prospective employer?

It is important for an employer to understand that the H-1B is employer-sponsored, which means that they are responsible for submitting the petition to the USCIS. If an employer is unfamiliar with the H-1B status and/or application procedures, an immigration attorney should be consulted to oversee the process. As a prospective employee, you may want to consult with an immigration attorney about a particular position before your job interview to prepare for any questions the employer may have about your work eligibility.

## 13. I am an international student. Do I have to use Practical Training (F-1) or Academic Training (J-1) before I can get the H-1B?

Not necessarily. However, most F-1 or J-1 students will find it advantageous to obtain Practical Training or Academic Training to begin working as soon as they are offered the job since cap subject employment may not start until October 1st, and since H-1B employment may not be possible due to the cap.

## 14. My immigration status is J-1 Exchange Visitor. Am I eligible for H-1B status?

Certain, but not all, J-1 Exchange Visitors may be subject to a [Two-Year Home Country Physical Presence Requirement \(http://internationaloffice.berkeley.edu/two-year\\_requirement\)](http://internationaloffice.berkeley.edu/two-year_requirement) and are not eligible for the H-1B status until the requirement has been satisfied or waived by the USCIS based on a recommendation from the U.S. Department of State. If this two-year requirement does not apply, you are eligible for H-1B status. If you are uncertain as to whether this requirement applies to you, consult with a BIO Adviser.

## 15. Can I obtain an H-1B while I'm residing outside of the U.S.?

Yes, it is possible for an employer to apply for the H-1B on your behalf while you are residing outside of the U.S. Once approved, you would obtain the H-1B entry visa stamp at an American Consulate and enter the U.S. in that status.

## 16. Can I change jobs after I get my H-1B?

An H-1B approval is employer-specific. It permits an H-1B status holder to work only for the employer that filed the petition. If you decide to change employers, the new employer must apply for the H-1B on your behalf. Consult with an immigration attorney if you are planning to terminate your employment or learn that your employment is being terminated. The H-1B is also position-specific. Therefore, if your H 1B employer wishes to significantly change your job duties or other conditions of employment after securing approval of your H-1B petition, the employer is required to submit an amended petition to the USCIS. In both of these cases, under certain conditions, you MAY be eligible to be paid in the new position after the employer has received the USCIS receipt notice for the H-1B petition (this is called "H-1B portability").

### **17. Is H-1B status the only way that I can qualify to work in the U.S.?**

You may be eligible for other types of nonimmigrant (temporary) status that would allow you to work in the United States such as the treaty/trader investment classifications, the TN status for Canadian or Mexican citizens, the J-1 exchange visitor status, the E-3 status for Australian citizens, or the O-1. An immigration attorney can advise you about the eligibility requirements for these immigration categories.

### **18. What is the role of an attorney in the H-1B petition process?**

An attorney can help you and the employer present the best case for approval of the H-1B status application to the USCIS. However, an attorney cannot guarantee success of an H-1B application nor can an attorney obtain an H-1B for an unqualified person. In many cases, an attorney may be able to determine in advance whether or not your position and credentials would qualify for an H-1B.

### **19. What status would my spouse and children have when I am granted H-1B Status?**

Dependents of H-1B status holders (legal spouse and children under age 21) can apply for H-4 status. H-4 status holders are not eligible to work except in limited situations. For more information please visit the [USCIS website \(https://www.uscis.gov/working-united-states/temporary-workers/employment-authorization-certain-h-4-dependent-spouses\)](https://www.uscis.gov/working-united-states/temporary-workers/employment-authorization-certain-h-4-dependent-spouses).

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