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H-1B Nonimmigrant Status for Professionals: Frequently Asked Questions

International Student & Scholar Services (ISSS) receives many inquiries from graduating students who are interested in having employers obtain H-1B status for them. Since it is the employer, and not the employee, who files the H-1B petition with the U.S. immigration service (USCIS), it is essential that students discuss the H-1B process directly with their prospective employers. Employers have many and varied approaches to the process: some handle it in-house, for example, having the human resources office prepare and file the petition; others hire immigration attorneys to prepare the petition; some allow employees to hire an attorney to prepare the petition to be submitted by the employer. Employers also have a variety of approaches to payment of filing fees and attorney fees: some employers pay all attorney fees and filing fees; others allow or require the employee to pay the fees. Given this wide variety of approaches, ISSS is able to provide only very general information about the process and strongly encourages students to ***communicate early and extensively with prospective employers*** about how the process and payment of fees will be handled.

The information provided here is intended as ***very general information*** for UT-Austin students interested in an introduction to H-1B status and processes***. NOTHING IN THIS GENERAL INFORMATION IS TO BE CONSIDERED ADVICE OR LEGAL ADVICE***. For advice, contact a qualified immigration attorney. Also, please remember that immigration regulations and processing change often, so you must verify any general information provided in this handout before you rely on it.

Q: Who is eligible for H-1B status?

A: H-1B nonimmigrant status is available for people coming into the U.S. temporarily to perform services as a professional in a specialty occupation. Those currently in the U.S. in a valid nonimmigrant status may be eligible to change status to H-1B without leaving the U.S.

Q: Is a J Exchange Visitor subject to the two-year home residence requirement eligible?

A: The two year home residence requirement must be satisfied or waived before one can change to any other status in the U.S. (other than A and G) and before one is eligible to return to the U.S. in H, L or Lawful Permanent resident status. If you are subject to this requirement, you must satisfy it or obtain a waiver of it before you can obtain H-1B status.

Q: Does it matter what kind of job I do?

A: Yes, very much. You must work in a job considered to fall into a "specialty occupation" in order to qualify for H-1B status.

Q: What is a specialty occupation?

A: U.S. Immigration Service (USCIS) regulations define specialty occupation as one that requires a "theoretical and practical application of a body of highly specialized knowledge." The occupation must require—generally, throughout the industry (not just your employer)—a bachelor's or higher degree (or foreign equivalent) for *entry* into the profession. Some occupations are well-recognized by USCIS as specialty occupations, and others are not,. Examples of specialty occupations include, but are certainly not limited to accountant, architect, systems analyst, engineer, librarian, pharmacist, researcher, and teacher.

Q: Is there a limit on how long someone may hold H-1B status?
A: A person may hold H-1B status for a cumulative maximum of six years. The status is granted in periods of up to three years (so you cannot get all 6 years at once). Changing employers does not add eligibility beyond six years. In certain limited situations, the individual can obtain H-1B extensions beyond six years while a permanent resident case is pending. A person who has held H status for six years becomes eligible for another six years after remaining outside of the U.S. for one year.

Q: Is H-1B status available for part-time jobs?
A: Yes. H-1B status is available for part-time employment, and the employer must indicate in the petition that the employment will be part-time.

Q: How is H-1B status obtained?
A: The employer files the petition requesting H-1B status for the employee. The employer is the petitioner and the employee is the beneficiary. The employee cannot petition for H-1B status or obtain it independently. The petition may request a change of status to H-1B for a prospective employee already in the U.S. or may indicate that the prospective employee will apply for a visa at the U.S. consulate (if required to have a visa) and enter the U.S. in order to obtain the status.

Q: How does the H-1B petition process work?
A: The employer first electronically files a Labor Condition Application (LCA) with the U.S. Department of Labor (DOL). Once the LCA is approved (usually instantaneous), the employer may file the H-1B petition (including Form I-129 and supplements, extensive supporting documentation, and a copy of the approved LCA) with USCIS. If the employee is already in the U.S. and the petition requests a change of status, the change of status to H-1B is usually granted upon approval of the petition. If the employee is outside the U.S., she/he may apply for an H-1B visa at a U.S. Consulate once the petition is approved.

Q: What are the filing fees for an H-1B petition?
A: See www.uscis.gov. At present, filing fees include $190.00 for Form I-129, a $500.00 "fraud detection and prevention fee," and a training fee of either $750.00 (for employers with fewer than 25 full-time employees) or $1500.00 (for employers with 25 or more full-time employees). ***Higher education institutions and primary and secondary schools are exempt from the training fee.***

Q: Who pays the filing fees?
A: USCIS has stated that it considers all petition fees and costs to be the employer's expense of doing business, and that it expects employers to pay them. But USCIS has regularly accepted fees from beneficiaries. The agencies involved in the H-1B process seem increasingly interested in ensuring that employers bear the cost of the H-1B petition process, so most employers seek legal advice in arriving at a policy on this issue.

Q: What documentation must be filed with the H-1B petition?
A: The following documentation is required:

-Approved LCA from U. S. Dept. of Labor
-Documentation that the job qualifies as a specialty occupation
-Copy of the employee's U.S. college diploma (bachelor or higher) and/or a foreign diploma with evidence that the degree is equivalent to a U.S. bachelor's degree or higher (a combination of education, specialized training, or experience that is equivalent to a U.S. bachelor's degree may be used to meet this requirement.)
-Copy of any license required to practice occupation in state of intended employment
-Copy of any offer and acceptance of employment or written employment contract
-Other documents may be required, depending on the job, employer, etc.

Q: How can one know if a foreign degree is equivalent to a U.S. degree?
A: An evaluation may be obtained from a credential evaluation agency.

Q: Must the employer pay a certain wage to an H-1B employee?
A: In short, it is not possible to obtain H-1B status unless the employer will pay at least the "prevailing wage," defined generally, as the average wage for the occupation in the geographic area in which the employment will occur (or the wage set by a union contract). The employer is also prohibited from paying

the potential H-1B employee less than the wage paid to its other employees who hold the same position and have similar qualifications.

Q: How does the employer determine the prevailing wage?

A: An employer may request a prevailing wage determination from the State Workforce Agency (SWA) or may rely upon wage data from an independent survey if the survey meets U.S. Department of Labor requirements. The SWA will likely use the wage data from the Online Wage Library at http://www.flcdatacenter.com/

Q: How long does it take USCIS to make a decision about the petition?

A: It usually takes three to four months just for USCIS to process a petition, but this can vary widely and change frequently. If the petition is incomplete or additional evidence is required, it can take longer. USCIS provides optional "premium processing" for an extra fee of $1000.00, which guarantees adjudication of a complete petition within two weeks of filing. It may also take time to gather documents, obtain a prevailing wage determination, etc., before filing the petition, so plan ahead.

Q. When must I decide whether or not to use "premium processing"?

A: There are obvious advantages to deciding—before the petition is filed—whether or not "premium processing" will be used, but it is possible to "convert" a petition to premium processing while it is pending by submitting Form I-907, the $1000.00 "premium processing" fee, a copy of the USCIS receipt notice for the petition, and any other required documents and information.

Q: When should I start talking to my employer about filing an H-1B petition for me?

A: The answer to this question varies by situation and may, in the end, depend on one's negotiating position. Each employee must decide whether it's best to settle all issues related to the H-1B during the hiring process or to start work using optional practical training/academic training and prove his/her value to the employer and then start talking about H-1B. The very quick exhaustion of the annual H-1B quota (the "H-1B "cap") in recent years encourages most students to address the H-1B process with employers early and in detail and come to an agreement about it in the hiring process.

Q: When should the employer start the H-1B petition process?

A: An H-1B petition may be submitted up to six months before the intended start date, and it is usually wise to file as early as possible. Processing often takes three to four months, and has taken even longer at some times (see https://egov.immigration.gov/cris/jsps/index.jsp for estimated USCIS processing times). Some employers and employees are able to quickly gather the documents necessary, and others take a very long time. Plan ahead.

Q: Are there any times of the year when new H-1B visas are unavailable?

A: There is a quota or "cap" on the number of *new* H-1Bs that can be granted each government fiscal year (Oct. 1—Sept. 30). The cap is currently 65,000, but a new law recently added an additional exemption of 20,000 for graduates of U.S. institutions with a graduate degree. Once the cap is reached (or caps are reached), no individual may obtain an H-1B until the following October 1. ***Higher education institutions and certain closely related non-profit and research entities and government research organizations are exempt from the cap.*** The cap does not apply to extensions of H-1B status or to changes of employer or addition of an employer (known as "concurrent H-1B employment"). Since USCIS accepts H-1B petitions up to six months in advance of the intended start date, many cap-subject employers file petitions on April 1 for the H-1Bs that become available October 1.

Q: What happens if my OPT expires before my H-1B status can begin?

A: If your Optional Practical Training (for F-1s) or Academic Training (for J-1s) expires before your H-1B status can begin because the cap has been reached, you must stop working when your authorization expires. Several years ago the immigration service issued a special provision allowing such people caught in the so called "cap gap" to remain in the U.S. while they waited to start their H-1B employment. *USCIS has not issued such a provision in the last few years*, so many people caught in the "cap gap" leave the U.S. after completing OPT (and a 60-day "grace period") and return after the H-1B petition is approved. It is impossible to predict whether USCIS will again issue a "cap gap" provision, but recent experience would suggest that it is best to plan that they will not.

Q: Can one change from another nonimmigrant status to H-1B without leaving the U.S.?

A: Yes, if one meets all of the criteria for H-1B status and is in valid nonimmigrant status an approval of the petition filed on one's behalf will grant a change of status to H-1B. In this case, a visa in the passport

is not necessary to remain in the U.S. and work; however, when one next needs to re-enter the U.S. from abroad a visa will be necessary (visa not necessary for re-entry from Canada or Mexico, unless the home country is considered a "state sponsor of terrorism," (at this writing the list includes Iran, Syria, Libya, Sudan, North Korea, and Cuba--see http://www.state.gov/documents/organization/65476.pdf.).

Q: May someone in H-1B status work for more than one employer?

A: It is possible for someone to hold H-1B status for employment with more than one employer—known as "concurrent employment"—if each employer has properly filed an H-1B petition. It is generally agreed that the "portability" provisions of the law allow each employers after the first H-1B employer to begin the employment after the filing but before approval of the new H-1B petition.

Q: What happens if the employment is terminated early?

A: If the employer terminates the employment for any reason before the approved expiration date, the employer is responsible for notifying USCIS and providing return transportation of the employee to his or her last place of foreign residence. The employee loses H-1B status upon termination and will be required to leave the U.S. unless the employee finds a new employer willing to file a new petition on his or her behalf in a timely fashion or has another means for obtaining a valid status. This is a complex situation and both the employer and employee will require the advice of an immigration attorney.

Q: May an employee in H-1B status travel outside of the U.S. and re-enter the U.S.?

A: Yes, an employee in H-1B status may re-enter the U.S. after a trip abroad if she/he has ***both*** valid H-1B ***status*** and a valid H-1B ***visa*** in the passport. If the employee does not have a valid H-1B visa, then one must be obtained while abroad before re-entering the U.S. It is important to realize that a change of status to H-1B in the U.S. does not provide a visa, which is a travel document in the passport. A valid visa is not usually required for brief trips to Canada or Mexico (unless traveler's home country is considered "state sponsor of terrorism" (at this writing the list includes Iran, Syria, Libya, Sudan, North Korea, and Cuba--see http://www.state.gov/documents/organization/65476.pdf.).).

Q: May one travel abroad while awaiting approval of an H-1B extension petition?

A: If an H-1B petition is filed for someone already in the U.S. seeking a change of status to H-1B, and that person leaves the U.S., the change of status request is considered "abandoned," and it will usually be denied. In most cases, if otherwise approvable, the H-1B petition will be approved and the person will have to obtain H-1B status by obtaining an H-1B visa and entering the U.S. in H-1B status.

Q: May one travel abroad while awaiting approval of a pending extension petition?

A: Yes, an employee in H-1B status with a pending extension may travel outside of the U.S. without causing abandonment of the extension (such travel causes abandonment of change of status applications and petitions). However, *in order to re-enter the U.S., the employee will need a valid, unexpired H-1B approval notice and in most cases a valid and unexpired H-1B visa in the passport*. If the employee's H-1B status has expired while awaiting approval of the petition, or the current H-1B status expires while the employee is abroad, then the employee will not be allowed to return and must remain abroad until the extension is approved and also must obtain a valid visa before returning to the U.S. in most cases.

Q: How may an individual in a valid nonimmigrant status extend the validity of the visa in his or her passport (obtain a new visa)?

A: In order to obtain a nonimmigrant visa, one must usually make a personal appearance before a U.S. consular officer at a U.S. Embassy or Consulate abroad. It is no longer possible to have the visa reissued in the U.S. Travelers must plan carefully to ensure that they have enough time to obtain a visa during the stay abroad. View the web site of the consulate at which you intend to apply for the visa (see http://usembassy.state.gov/) to learn about the application process and find estimated "wait times" at http://travel.state.gov/visa/temp/wait/tempvisitors_wait.php

Q: What happens if an H-1B employee wants to move to a new employer?

A: If an H-1B nonimmigrant wants to move to a new employer, the new employer must file an H-1B petition with USCIS on behalf of the intended employee. The intended employee may begin working for the new employer when the new H-1B petition is *filed* and need not wait for approval. This only applies to employees already granted H-1B status with another employer.

Q: What happens if an H-1B employee changes positions with the same employer?

A: Unless the change in position is an insignificant change, a new H-1B petition must be filed. This only applies to employees already granted H-1B status.

Q: What happens if the employer transfers the H-1B employee to another location?
A: In most cases, a new LCA and H-1B petition will have to be filed. There are some exceptions, for example relocations that are not permanent but just a short-term assignment.

Q: Must an employer under take any specific recruitment for U.S. workers prior to filing an H-1B petition or prove that no U.S. workers are available for the job?
A: No, unless the employer has been found to be a willing violator of the LCA regulations, in which case certain recruitment efforts may be required. There are recruitment requirements for some employment-based permanent residence categories and processes.

Q: What status is available for an H-1B employee's family members?
A: An H-1B's spouse and unmarried children under the age of 21 are entitled to H-4 status. They may not accept employment in that status, but may study in the U.S. If the spouse is eligible for a status other than H-4 (including H-1B), the spouse may choose to have that status rather than H-4. For example, the spouse may find employment and have the employer file an H-1B petition for him or her. Make sure to discuss dependents with the person filing the H-1B petition so that their change of status or extension of status application may be included with the H-1B petition. H-4s usually may not obtain a Social Security Card, but may apply to U.S. Internal Revenue Service (IRS) for a Taxpayer Identification Number (ITIN) in some circumstances.

Q: Must my employer hire an attorney to prepare the H-1B petition to be filed for me?
A: No, not necessarily. Some employers have capable staff, sometimes including attorneys, who can file a proper petition and provide guidance through the process. Some employers have an immigration attorney "on retainer" or regularly associate one for such matters. If an employer does not have substantial experience with H-1B petitions, though, it would be wise to seek counsel of a qualified immigration attorney. Relatively minor missteps can be quite costly for both employer and employee.

Q: May I hire an attorney to prepare the H-1B petition to be filed for me?
A: This must be discussed with the employer. Many employers will allow the employee to hire an attorney to file the H-1B petition. Remember, though, that the petition is filed *by the employer on behalf of* the employee, so it is crucial that you discuss this matter with your employer and come to agreement.

Q: How can my employer and I find a qualified immigration attorney?
A: Ask friends and co-workers for recommendations. Visit the American Immigration Lawyers Association web site (www.aila.org). Make sure the attorney regularly handles H-1B petitions. Ask for a written employment agreement stating the fee and services to be provided. Ask whether the fee includes forms preparation ***and*** advising throughout the process. Legal fees for H-1B petitions vary widely among attorneys (perhaps $1500 - $3000), so discuss the fee and ask to pay in installments if necessary.

Q: What if H-1B status is not available to me but I have a job waiting?
A: An immigration attorney may help you and your employer consider other nonimmigrant statuses that may be available to you. For instance, there is a special H-1B status available for citizens of Chile and Singapore and a status very similar to H-1B—known as E-3---available for citizens of Australia. Citizens of Canada and Mexico may be able to obtain TN status. Athletes and entertainers may be eligible for P status. O status may be available for those with extraordinary ability.

Q: My employer's immigration attorney's advice conflicts with the advice provided by my friends, so what should I do?
A: Immigration attorneys are not infallible and can be wrong. Unless your friends are immigration specialists, though, they will know less about immigration law, regulations, and processing than a qualified attorney who practices in the field. You should feel free to verify any information provided to you by an immigration attorney by consulting with a second immigration attorney. Bear in mind that often a detail which might seem insignificant to your friends, could be recognized as quite important by an immigration attorney. It may be the one fact that distinguishes your situation from your friend's. Be wary of well-intentioned friends who provide immigration advice. Treat their offer of immigration advice as you would treat the offer from a non-physician friend to provide you with medical treatment. Incorrect immigration advice may be less painful in physical terms, but it can be quite damaging to your future.

For additional information:

U. S. Citizenship & Immigration Services http://uscis.gov/

American Immigration Lawyer's Association (AILA)
www.aila.org

AILA's Attorney referral Service
Call 1-800-954-0254 or send e-mail message to ilrs@aila.org

Immigration Law Weekly: www.ILW.com

Texas Bar Association Attorney Referral Service
Call 1-800-252-9690 or 1-877-9TEXBAR (toll free)

International Office handout "An Employer's Guide to Hiring International Students" at
http://www.utexas.edu/international/cs/library.htm