

The H-1B is a temporary United States work visa, valid for an initial period of up to three-years, and may be extended to a maximum of six, with limited exceptions. To qualify, a foreign national must be coming temporarily to the United States to perform services in a specialty occupation for a U.S. employer. A *specialty occupation* is generally defined as "*one that requires the attainment of at least a bachelor's degree (or its equivalent, possibly based on education and/or experience) as a minimum requirement for entry into the occupation*".

***H-1B sponsorship is tied specifically to any sponsoring employer.*** The client employer is called the petitioner or employer (ER), petitioning the US government; and the foreign national employee is the beneficiary of the visa petition, also known as employee (EE).

### Main Factors Affecting Approval

Obtaining a new H-1B is based on several factors, but never assured with the federal government and the current state of affairs at the USCIS. A filing that is not approved *will not* receive a refund of fees from the USCIS nor the law firm. We try to make a fair assessment of our odds of approval in advance.

The main factors affecting approval are:

- ***The position offered.*** Does it require someone to truly hold at least a bachelor's degree? For example, work as a waiter does NOT qualify, even if the employee (EE) has a PhD.
- ***The person.*** Does the H-1B beneficiary (EE) have a degree (or equivalent) which closely matches the company's requirements and specific position offered?
  - This has been an area of contention between the USCIS and immigration lawyers. USCIS has been requiring occupation-specific majors, while the law clearly supports granting of visas to applicants with degrees in multiple disciplines, as long as it reasonably qualifies the applicant to perform the work. For example, occupation specific degrees are required in law or medicine, but for marketing or IT positions, there are usually a number of academic disciplines which are acceptable.
- ***The company.*** Is the company (ER) financially viable and of a sufficient size and complexity to justify hiring the H-1B candidate? Factors considered by the USCIS include the company's stage of development, organizational complexity, ability to pay the required wage, current number of employees, gross income, and funding. Evidence provided to document company operations varies on a case-by-case basis.

### H-1B Employer (ER) Obligations

- ***Protect wages in the region.*** Employers must pay every H-1B worker wages that are 100% of the wages paid to US workers in similar positions in the same geographical region. This wage is referred to as the [prevailing wage](#). *Different wage levels apply to certain non-profits.*



## Bashyam Shah<sup>LLP</sup>

Immigration Law Group

- **Protect wages in the workplace.** Employers must pay every H-1B worker the actual wages paid to other employees in the same position, with normal variability for experience, merit, skills, etc. This wage is referred to as the actual wage.
- **Post the proposed salary.** Employers must post the prospective salary or the salary range for an H-1B position for 10 business days at the worksite in two conspicuous locations. *Advertising required, only if the company is H-1B dependent - see below.*
- **Protect working conditions.** Employers cannot use H-1B workers to break a strike and they must notify their U.S. workforce of the hiring of H-1B professionals.
- **Provide benefits equally.** Employers must provide benefits to H-1B employees in the same manner as provided to similar U.S. workers.
- **File a Labor Condition Application (LCA).** Employers must file a Labor Condition Application attesting to the wages and the no-strike use of H-1B employees with the U.S. Department of Labor (DOL).
- **Pay the employee during benching.** Employers who bench employees during nonproductive status must continue to pay full salary and benefits as attested on the Labor Condition Application.
- **Be subject to penalties for failures.** Failure to comply with DOL regulations could result in civil penalties, a requirement to pay back wages, and even debarment from participating in key immigration programs. *Audits are performed by US immigration authorities randomly.*
- **No discrimination in hiring.** The employer may decline employing any worker who is not legally eligible to work. Written offers should be contingent upon proof of eligibility to work for any employer in the U.S. If a candidate requests sponsorship for H-1B status, the company can decide to sponsor or not.
- **Return transportation.** If an employer terminates an H-1B employee before the end of that employee's period of authorized stay, the employer is liable for the "reasonable costs" of return transportation for the employee to his or her last country of residence. Immigration statutes and regulations suggest that the employer's liability is limited to the reasonable cost of physically returning the H-1B employee, and does not extend to the cost of relocating family members or property.
- **Withdrawal of H-1B after termination.** Regulations require an H-1B employer to notify USCIS "immediately" of "any material changes in the terms and conditions of employment" affecting an H-1B employee. USCIS policy is that a termination is such a "material change." Employers may satisfy this notification obligation by sending a letter explaining the change or termination to USCIS office that approved the petition.

### H-1B Employee (EE) Obligations

- **Inform Lawyer of Travel.** An employee who will be traveling in H-1B status should inform a lawyer in advance to make sure that all paperwork is in order and to ensure that H-1B status is still valid. He/she may need a trip to a US Embassy or Consulate abroad before returning to secure a visa stamp.
- **Quitting a job is allowed.** An employee may quit his/her employment in H-1B status at any time. He/she may be subject to contractual terms made specifically with the employer, outside the scope of the H-1B visa.

- ***Lay-offs and leaving the U.S.*** An employee who is laid off or terminated may no longer be considered to be maintaining H-1B status, unless they qualify for the 60-day grace period. He/she should contact their personal immigration lawyer as soon as possible to determine their immigration options.

### **The Players in the H-1B Process and Their Roles**

A dual representation situation is created in the preparation of an H-1B petition, where our firm has the interests of both the US company petitioner and foreign national employee in mind, in representing both parties together, to obtain the desired visa from the US government.

- ***Employer and employee participation.*** Both the US company petitioner (employer) and foreign national (employee) supply essential information to complete the needed paperwork, submitted to US immigration authorities. Paperwork includes numbered immigration forms, letters, and supporting documentation. Employer signs the immigration forms and a critical support letter, which confirms the temporary offer of employment, and summarizes eligibility for the H-1B. Employer also follows instructions from our firm to ensure compliance with applicable law surrounding hiring H-1B workers, including posting and maintenance of public access files (PAFs). Employer must update the Public Access File with information about benefits, salary changes. Information about recruitment is necessary only if the employer is dependent on H-1B workers (a foreign worker ratio - see below).
- ***Attorney analysis and preparation.*** The attorney obtains the initial paperwork on a particular employee and determines if H-1B status will be viable based on information presented. The attorney informs the client about H-1B obligations and responsibilities. The attorney prepares the forms and files them with USCIS.
- ***Department of Labor.*** Reviews the Labor Condition Application (LCA) and certifies that the prevailing wage is being paid based on the information provided. DOL also may perform random audits to see if employer requirements in addition to the LCA disclosures are being upheld.
- ***US Citizenship & Immigration Services.*** USCIS receives the H-1B filing and determines that the job requirements, the employee's credentials and the employer's viability are all sufficient for approval.
- ***Department of State/visits to US Embassy or Consulate abroad.*** If the employee is abroad after receiving approval of the petition, or is granted consular approval (as opposed to a change or extension of status) the employee must apply for an H-1B visa stamp at a US Embassy or Consulate abroad.

### **Additional H-1B Considerations — In General**

- ***Spouses/Children (Dependents of H-1Bs).*** Spouses and children may accompany the H-1B principal using H-4 status. Spouses of H visa holders may NOT be gainfully employed (unless they qualify for an H-4 EAD) but are allowed to attend school and university classes.

- ***Duration/Six Year Limit with Limited Exceptions.*** H-1B status is good for an initial term of up to three-years, and may be extended for a maximum of six years. After six years, the individual must leave the US for one year, unless he/she qualifies for an extension BEYOND six years based on AC-21.
- ***Extensions of H-1B status beyond six years.*** H-1B status may be extended beyond the 6-year limitation, in one-year increments, if a labor certification application (commonly referred to as PERMs or Labors) has been filed at least 365 days prior to the expiration the 6-year limitation. An H-1B may also be extended beyond the 6-year period, in three-year increments, for any person who is the beneficiary of an approved first, second, or third employment-based 1-140 petition, but due to per country limitations is unable to file for or obtain his or her immigrant visa. Finally, time spent physically outside of the United States beginning with the first date of H-1B status may be re-captured.
- ***Timing of H-1B extensions.*** An extension with the same employer should generally be initiated approximately 6 months before expiration so that the individual is not stuck in the US waiting for approval prior to travel (after expiration of the old 1-94 card). If the case needs to be quickly processed, the petition may be expedited with Premium Processing Service for an additional government filing fee, currently set at \$1410. *Common reasons are filing an extension too close to expiration.*
- ***H-1B portability (or transfer).*** A person who was previously granted a visa or otherwise held H-1B status may commence new employment upon the filing of a new petition by the prospective new employer if: (1) s/he was lawfully admitted; (2) the new petition is not frivolous; (3) the new petition was filed before the date of expiration of the period of stay authorized by the AG of the H-1B beneficiary (current 1-94); and (4) subsequent to such lawful admission the H-1B beneficiary has not been employed without authorization before the filing of such petition.

We hope that this guide provides you with a brief overview of the H-1B visa process, key players, and items to keep in mind. If you have any questions or want to learn more about pursuing an H-1B visa, feel free to reach out!