**H-1B Visa and Lottery Process**

The H-1B visa category was created by Congress to employ high-skilled professionals in the U.S. by companies with a presence in the U.S. An H-1B visa can be applied for on behalf of any applicant with relevant skills and at least a bachelor’s degree in a specialized field to work in the U.S. There is an annual quota of 85,000 set by the U.S. Congress for the issuance of new H-1B Visas (65,000 regular visas and 20,000 visas reserved for this with a U.S. Master’s degree or higher). These new H-1B visas filed are called cap-subject H-1B visas. Because the demand for H-1B visas is very high, USCIS employs a random selection process called the H-1B lottery to select applicants that meet the annual quota cap.

**Who can sponsor an H-1B visa?**

An H-1B can be sponsored by a company which is in the U.S. or a multinational company that has operations and offices in the U.S. The company which acts as the sponsor must also maintain a valid employer-employee relationship with the intended H-1B visa holder, called the beneficiary. This relationship is typically indicated by the fact that the company is the entity which has the authority to hire, fire, supervise, or otherwise control the work of the beneficiary. These requirements are often referred to as the “right to control” the beneficiary’s employment. This requirement precludes the sponsoring company from sub-contracting the beneficiary out to 3rd party companies. The beneficiary may perform services at an end-client/3rd party work site, but the end-client can have no supervisory control over the beneficiary’s work or pay the beneficiary directly for their work.

Technically, any company with an office in America can sponsor an H-1B visa. It can be a company with a few people to hundreds or thousands of people. There are some requirements by USCIS laid out so that the company filing for the visa has the ability to pay the beneficiary as it is the company’s responsibility to make sure the beneficiary is paid in the U.S. as per the U.S. Department of Labor, which is governed by something called LCA (more details below).

**What are the requirements a company and foreign worker must meet to qualify for the H-1B?**

For the company, the primary qualifications are related to the job which they want the foreign employee to perform, often called the proffered position. This position requires:

* Theoretical and practical application of a body of highly specialized knowledge; and
* Attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the U.S.

The position must also meet one of the following criteria to qualify as a specialty occupation:

* Bachelor’s or higher degree or its equivalent is the minimum entry requirement for the particular position.
* The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, the job is so complex or unique that it can be performed only by an individual with a degree.
* The employer requires a degree or its equivalent for the position.
* The nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor’s or higher degree.

For the foreign employee to be qualified to perform services in a specialty occupation, they must meet one of the following criteria:

* Hold a U.S. bachelor’s or higher degree required by the specialty occupation from an accredited college or university.
* Hold a foreign degree that is the equivalent to a U.S. bachelor’s or higher degree required by the specialty occupation from an accredited college or university (for this, an education evaluation from an accredited evaluation firm is required).
* Hold an unrestricted state license, registration, or certification that authorizes the worker to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.
* Have education, specialized training, and/or progressively responsible experience that is equivalent to the completion of a U.S. bachelor’s or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty (an education/experience evaluation from an accredited evaluation company is required to determine this).

**What is an LCA and why is it required?**

LCA stands for Labor Condition Application. It is a mandatory document that the H-1B Sponsor or employer must file with the U.S. Department of Labor (DOL) before filing the H-1B petition with USCIS for any non-immigrant worker as per the Immigration and Nationality Act (INA). Employers (or their legal representatives) file H-1B LCA in U.S. Dept. of Labor FLAG System. It takes about 7 days for processing. It is required to ensure that foreign workers are provided with similar wages and conditions as U.S. Workers.

An H-1B LCA form (ETA Form 9035/9035E) has all the key information regarding the offered job, wage details, location, etc. offered to the foreign worker. It has all the below details :

* The job title of position offered
* Standard Occupation Classification Code, called as SOC Code
* Duration of the job position offered (up to 3 years at a time)
* Whether the position offered is full-time or not.
* Total number of positions the LCA is applied for (can be one or any number)
* Rate of Pay / Salary offered for the position
* Location of the job position called as “Place of Employment”
* Is it new or continuing employment
* Prevailing Wage for the same position in that area
* Employer’s & Attorney contact information.
* Is the employer H-1B Dependent or not
* Public disclosure – where LCA will be posted for viewing by public.

The sponsoring U.S. company must post a notice that an LCA and H-1B petition will be filed on behalf of a foreign worker prior to submitting the LCA to the U.S. DOL for certification. This notice must be posted in one or two ways:

1. Hard copy notice in a public location of the employer’s establishments in the area of employment such as a breakroom, common area, or bulletin board or
2. Electronic notice using the same means the employer normally communicates with its workers about internal matters such as job vacancies, promotion opportunities, etc.

The DOL introduced the H-1B LCA to protect the employee’s fundamental rights at work in terms of wages, working conditions, and policies. In the LCA form, employers declare/attest under penalty of perjury that they will abide by the labor laws and be compliant in the below four areas:

1. Pay Prevailing Wage: That the beneficiary will be paid equally, similar to their other employees in that location or the prevailing wage rate in a particular location, whichever is higher for that position, and the beneficiary needs to be paid during non-productive time. Also, provide the same benefits as regular U.S. workers.
2. Working Conditions, Hours: That the employer will provide same working conditions as U.S. workers and employing the beneficiary will not adversely impact the working conditions at the location, especially hours, vacation time, shifts, etc.
3. Strike or Lockout Info: That there is no strike or lockout or any other work stoppage for the named occupation in the place of employment during filing of LCA.
4. Post LCA Notice, Share to Union, Employees: The employer will provide a copy of the LCA to the employed workers in that location and will also provide a copy to a union, if any. Also, post the LCA in two conspicuous locations where the H-1B worker will be employed or distribute through electronic notification for the employees in that location.
5. Official Regulation H-1B LCA: If you want additional details on the above rules and more info, you can read official regulation on LCA at INA § 212(n)-(p) on US DOL website (<https://www.dol.gov/agencies/whd/laws-and-regulations/laws/ina/h1b>) .

**When can you file the H-1B visa petition and for how long does USCIS accept petitions?**

New H-1B visa applications for someone applying for the first time can only be done once a year during a defined time window (unless the U.S. company is cap-exempt). In general, you can only file for an H-1B visa 6 months before the start date of the beneficiary’s actual work start date. The USCIS fiscal year is from October 1st to September 30th of next year, 6 months before Oct 1st is April 1st. Now, with the H-1B Registration Process, usually, the submission date for H-1B registration process is in the month of March of every year. It varies by year. After the registration process, the selected applicants are informed by the end of March and they can file H1B petition between April 1st, and June 30th. If the applicant is not selected, USCIS will not notify them.

USCIS accepts H-1B visa applications until the quota is complete for that year. In the past, they used to accept applications for a minimum of 5 days and for up to a few months, depending on the demand to meet the quota cap of 85,000. However, this changed with the introduction of the H-1B registration process, but it is very common for USCIS to select more registrations during the lottery than there are visas available on the assumption that not all the registrations selected will actually qualify. This means that getting the H-1B petition filed as soon as possible after being selected provides the best chances for petition approval.

**What happens after H-1B selection and petition approval?**

If the employee is selected for the H-1B registration, they are now free to file the H-1B petition with USCIS. The petition must contain the required forms and documentation to demonstrate that the company, the proffered position and the beneficiary all meet the H-1B requirements. With H-1B cap-subject visas, the start date is always October 1st of that year (due to the USCIS fiscal year). This is the date the beneficiary will be granted H-1B status and legal work authorization based on this status.

Assuming the petition is approved by USCIS and the beneficiary is outside the U.S., the beneficiary will then use the I-797 Approval Notice from USCIS to complete the DS-160 online and make an appointment at a U.S. embassy or consulate abroad for the H-1B visa stamp in their passport. This interview should take place no more than 6 months prior to the October 1st start date (July 1st). The timing of the interview and the processing of the visa stamp will depend on the U.S. embassy/consulate being used.

Assuming the petition is approved by USCIS and the beneficiary is already in the U.S. in another immigration status, the beneficiary will officially change their status to H-1B on October 1st. Nothing is required by the beneficiary at that time – the status change is automatic. However, if the beneficiary leaves the U.S., they will need to use the I-797 Approval Notice to complete the DS-160 and schedule an interview at a U.S. embassy or consulate to obtain a visa stamp in their passport. Without that visa stamp, they will not be allowed back into the U.S. in H-1B status and therefore will not be legally allowed to work.

**Summary of H-1B Registration Process**

Usually, USCIS announces the exact dates for the next H-1B Registration/Lottery Process during January of that year, so the dates in the below chart are an approximate timeline.

See the USCIS website for more information:

<https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process>

**Termination of an H-1B Worker**

The H-1B visa category has a number of employer obligations built into the terms of the visa and the regulations, and this holds true even if an employer wants to terminate the H-1B worker/visa beneficiary before the end of the visa.

**There are 4 key steps the employer needs to take when terminating an H-1B worker:**

1. Confirm the termination in writing to the beneficiary and inform them of their last day.
2. Send a letter to USCIS confirming that the employer/sponsor would like to withdraw the H-1B petition once the employment officially ends, but not before it ends.
* This is because employers are required to pay wages to the beneficiary as long as the petition is in effect.
1. Withdraw the Labor Condition Application (LCA) with the U.S. Dept. of Labor (DOL) via the iCERT Portal System. This can also be done via email or written notice if the employer does not have access to the electronic LCA through the Portal.
* This is a legal obligation and not withdrawing the LCA can result in a penalty for back wages under the LCA agreement.
1. Offer to pay the beneficiary the reasonable cost of return transport to their home country (and this offer should be documented).
* This obligation only arises if the beneficiary departs the US. If the beneficiary transfers to a different employer, there is no obligation to pay the cost of return transportation.
* This offer can also be built into the beneficiary’s employment contract if the employer chooses, but it should be revisited upon the termination of the beneficiary.

Failure to take these steps can result in a continuing obligation to pay the beneficiary’s wages and gives the beneficiary the ability to submit a complaint to the U.S. DOL.

It’s important to note that even after the above steps have been followed and the termination has occurred, the employer still needs to maintain the Public Access File (PAF) for one year beyond the date of LCA withdrawal or employment (whichever is longer).