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H1 visa requirements

Specialty Occupation

The employer seeking the services of an H-1B visa holder and filing the necessary papers to obtain such services must be a "U.S. employer." The employer must demonstrate that the position is one requiring a professional in a specialty occupation and that the intended employee has the required qualifications.

Definition of a specialty occupation is an occupation that requires a theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or higher degree in the specific specialty or its equivalent as a minimum for entry into the occupation. If a license to practice your particular occupation is required by the American State in which you will be working, you must have such a license.

Although this may seem like a great deal of jargon for most people, it is essentially a safe bet to look at the position and see if the normal minimum requirement for entry into the particular position is a bachelor's degree (or its equivalent). A position that would normally not require a bachelor's degree for entry into the field may qualify as specialty occupation if the position is so complex or unique that only a person with a degree can perform the requisite duties.

Positions that are traditionally considered professional positions would most likely qualify as a specialty occupation. They include positions such as architects, engineers, lawyers, physicians, teachers in elementary or secondary schools, colleges or seminaries. USCIS has indicated through decisions over the years that accountants, computer professionals, social workers, medical technologists, dietitians, economists, mechanical engineers, and librarians may also qualify as specialty occupations.

Education

After establishing that a particular position qualifies as a specialty occupation, the employer must show that the foreign worker sought meets the requirements needed to engage in a specialty occupation.

The person must hold a U.S. bachelor's or higher degree from an accredited college or university and the degree must be required to qualify in the specialty occupation.

If the person holds a foreign degree, then that degree must be determined to be the educational equivalent of a U.S. bachelor's degree. In some cases, a person may obtain an educational equivalence through a combination of education, specialized training or progressively responsible work experience. Three years of specialized experience is generally considered equivalent to one year of college education.

Education Evaluation Services[1]

DOL and USCIS requirements

The effect of a foreigner's admission on the jobs of U.S. workers is a major issue in U.S. Immigration policy and law. Therefore, an employer who petitions for a nonimmigrant worker must comply with a number of conditions and regulations. To obtain an H-1B visa, there must be a job offer and an employer who is willing to sponsor a person by filing a petition with the United States Citizenship & Immigration Service (USCIS).

An employer seeking the services of an H-1B alien and filing the necessary papers to obtain such services must be a "U.S. employer." A U.S. employer is a person, firm, corporation, contractor or other association or organization in the United States with an IRS tax identification number. There must be an employer-employee relationship, as indicated by the fact that the employer may hire, fire, pay, supervise or otherwise control the work of the employee.

In addition to showing that both the job requirements and the applicant's credentials or experience are "professional," the employer must also meet the Department of Labor ("DOL") requirements and file **Form I-129[2]** ("H-1B petition") with the USCIS for permission to employ the foreign national. Each petition may only include one worker.

Prior to filing the H-1B petition with the USCIS, an employer must file a labor condition application ("LCA") with the Department of Labor. Employers affirm in the labor condition application that the wage offered to the applicant is at least as high as that paid by the employer for the same type of job, and the number equals or exceeds the prevailing wage for the job in the same geographical area; that working conditions will not adversely affect those workers similarly employed; that there is no strike or lockout at the employer's premises; and that the notice of the LCA has been given to current employees. Among other things, the LCA must be filed where the work will actually be performed. Therefore, if the alien is to be hired by a company located in one place but will actually be doing the work in another facility or company, the LCA should be filed in the second jurisdiction. If the alien works in more than one location, both locations should be listed. If the employee is employed sequentially in various employment locations, the LCA should be submitted to the DOL office having jurisdiction over the initial place of employment. While filing LCA, the employer should give company background, number of employees, income, job description and duties of the applicant as also terms of employment.

Computer Professionals typically work at client sites through an agreement between the petitioner (employer) and its customer. An employer who seeks the services of an H-1B worker at more than one location must provide an itinerary. In certain circumstances, the USCIS (United States Citizenship and Immigration Service) requires presentation of "third party contracts" between the petitioner and the petitioner's customer (at whose site the H-1B employee will work), allegedly to determine whether employment is "speculative."

For specific procedures on filing, please visit the **Department of Labor's Employment and Training Administration[3]**.

Prevailing Wage Information[4]

The employer will be required to pay 100% of the prevailing wage. There was a 95% rule previously to allow for some flexibility in cases where an employer was allowed to pay 95% of the government-determined prevailing wage. However, the governmental survey will have at least four levels rather than the current two levels. Alternatively, there will be a formula to calculate the additional two levels if the government has only provided a two-level survey.

An H-1B certification is valid for the period of employment indicated on the Labor Condition Application (LCA), specifically the **Form ETA 9035[5]**, for up to three years. (H1B visas under the Chile / Singapore programs are generally granted only in 1 year increments.) The employer should not allow the nonimmigrant worker to begin work until USCIS grants the worker authorization to work in the U.S. for that employer or, in the case of a nonimmigrant who is already in H-1B status and is changing employment, to another H-1B employer until the new employer files a petition supported by a certified LCA. The employer should maintain documentation to meet its burden of proof with respect to the validity of the statements made in its LCA and the accuracy of information provided, in the event that such statement or information is challenged. The employer should also maintain such documentation at its principal place of business in the U.S. and should make such documentation available to DOL for inspection and copying upon request.

USCIS will review the petition and send an approval notice if it is satisfied that all conditions for an H-1B worker are met. An individual may have a petition filed for him from more than one employer if he or she seeks employment in two jobs. Also, if an individual is in H-1B status and seeks to change jobs, then he or she must have a petition filed for him by his or her new employer.

Instead of an Approval Notice, inexperienced attorneys commonly receive an USCIS Notice of Action in response to filing an H-1B petition for computer professionals. The Notice of Action normally uses boilerplate language and states, "[t]his Service accepts that you are the employer, not an agent, and that you retain control over the beneficiary's employment. A copy of the agreement(s) are needed to establish that the employment of the beneficiary is not speculative in nature, and that the beneficiary will be employed in fact. Service regulations specify that aliens admitted to the United States as nonimmigrant workers must have services to perform...."

DOL may initiate an investigation of any employer where DOL has reasonable cause to believe that the employer has violated the terms of the H-1B visa. This is an expansion of DOL's investigative authority, which previously required either a complaint to be filed, or that the employer have been previously sanctioned in order for DOL to initiate an investigation. The law also provides DOL with the authority to excuse certain technical violations by employers if a good faith effort is made to comply with the regulations. DOL can give employers 10 days to correct technical violations. Good faith does not apply if there is a pattern or practice of willful violations of the regulations.

DOL investigative authorities

1. DOL can initiate an investigation of an employer if there is reasonable cause that the employer is not in compliance with this subsection. The Secretary of Labor (or acting Secretary) must personally certify that reasonable cause exists and must approve the investigation. The investigation may be initiated for reasons other than completeness and obvious inaccuracies by the employer.
2. DOL can conduct an investigation if it receives credible information from a known source likely to have knowledge of an employer's practices or conditions. The information must provide reasonable cause that the employer has committed a willful failure to meet a condition, or has committed a substantial failure to meet a condition that affects multiple employers.
3. DOL is in the process of creating procedures for providing information that may be used as the basis of an investigation.
4. An investigation under subsection 2 must be from information that originates from a source other than DOL or was lawfully obtained by DOL during another DOL investigation.
5. Information provided to the DOL by the employer for purposes of securing an H-1B employee shall not be considered a receipt of information under this subsection.
6. No investigation or related hearing may be conducted unless the information is received within 12 months after the date of the alleged failure.
7. DOL would provide notice to an employer prior to the commencement of an investigation with limited exception.
8. An investigation by DOL may last for 60 days, and if there is evidence of a violation, DOL shall provide the employer with notice of the determination and an opportunity for a hearing. The hearing must take place within 120 days of the determination and a finding must be made within 120 days of the hearing.

Good Faith Compliance- An employer is deemed to have complied with the section, notwithstanding a technical or procedural failure to meet such requirements, if there was a good faith to comply with the requirements. This good faith clause shall not apply if DOL has explained the basis of the failure or if the employer has been given time to correct the failure and has failed to do so. An employer will not be assessed fines or penalties for failure to pay the prevailing wage if he can establish that the manner in which the prevailing wage was calculated was consistent with recognized industry standards and practices.

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