



McCandlish Holton
A PROFESSIONAL CORPORATION

H-1B Visas

Using an H-1B visa, U.S. employers are permitted to hire foreign professional employees (for example, professors, researchers or technical personnel) who have *at least a four (4) year college degree*, if they will work in a position requiring a college degree.

H-1B visas are available to persons with (1) a 4 year Baccalaureate Degree *or the foreign equivalent*; or (2) persons who can show by expert affidavits *that their combination of education and qualifying experience* is the equivalent of at least a U.S. four year B.A. or B.S. degree in the field.

Duration: An H-1B visa is valid initially for up to three (3) years and can be extended an additional three (3) years for a total of six years, regardless of the number of employers during that time. Extensions beyond six years are available in limited circumstances.

Limitations: There are many technical requirements, including *payment of a prevailing wage* and the *filing of a Labor Condition Application*, for successful processing of an H-1B. Failure to comply with all of the H-1B regulations can result in the employer being disqualified for one year from hiring any additional H-1B specialty occupation workers, as well as other fines and penalties.

Special Issues for H-1B:

- § **Credentials Evaluation:** Foreign degrees must be evaluated to determine if they are the equivalent of the U.S. degree. There are credentials evaluation services throughout the United States who can provide these evaluations. In addition, under CIS regulations, three years of work experience can substitute for one year of bachelor's degree level college education. If the employer relies on a combination of education and work experience to show bachelor's degree equivalency, expert affidavits may be required to support the petition.

- § **Prevailing Wage:** The employer must pay the higher of the “prevailing wage” for the position as determined by United States Department of Labor (“DOL”), or the actual wage—that is, the wage paid to similarly employed U.S. workers. The DOL now has special rules for universities, recognizing the differing salary scales for universities versus private companies. A prevailing wage determination can be obtained from the State Employment Security Agency or from authoritative surveys.
- § **Labor Condition Application (“LCA”):** This document attests to the DOL that the employer will pay the prevailing wage and that hiring the H-1B worker will not adversely affect the wages and working conditions of U.S. workers. The LCA must be certified by the DOL, and included in the H-1B package. The LCA process is now streamlined with the use of electronic filings. LCAs can be obtained in a matter of seconds. **NOTE:** The LCA is not the same as Labor Certification for green card purposes. For an LCA in connection with an H-1B, there is no need to advertise the job or to test the labor market for U.S. workers.
- § **Posting:** A notice must be posted for ten days in two different places at the location of employment announcing that you are hiring an H-1B worker.
- § **Public Access File:** A Public Access File must be maintained for each H-1B employee, containing several documents, including the posting notice, proof of posting, the prevailing wage determination, the certified LCA, a receipt from the employee showing that s/he received a copy of the LCA, a statement of the actual wage rate, a short memorandum describing how the employer determined the salary and a summary of available benefits.
- § **Filing Fees:** CIS’ normal filing fee for private employers is \$ 185, plus a \$1,500 “training fee”, plus a “fraud prevention” fee of \$ 500. (NOTE: University employers, certain non-profit research entities, and primary/secondary schools do not pay the “training fee”. Employers with 25 or fewer employees pay only at \$750 “training fee”). Premium processing (15 day processing) carries an additional \$1,000 filing fee to CIS.
- § **Transferring Employees to Other Locations:** If an H-1B employee is transferred for more than a very limited duration, the employer must have an LCA from DOL for the new location. If the employer transfers the employee before getting the LCA, the employer may need to file an amended H-1B petition with CIS.
- § **Change in Job Duties:** A material change in job duties may require a new H-1B filing. Any change in job duties should be reviewed by an attorney or immigration advisor.
- § **Family:** The spouse and children of H-1B employees receive H-4 visas and cannot work under that category.
- § **Dual Intent:** An H-1B visa holder may lawfully have the intent to remain permanently in the United States. This will be helpful for maintaining status while pursuing a permanent resident application.
- § **H-1B Quota:** CIS issues 65,000 new H-1B approvals each year (CIS year – October 1 through September 30). Exceptions to the cap: University jobs; H-1B extension with same employer; H-1B transfer to new employer. Graduates with U.S. advanced degrees have special allocation of 20,000 H-1Bs above the 65,000.