

– FOR OFFICIAL USE ONLY –

B. Evidence 111

Chapter 12. Adjudications 112

 A. Adjudicative Issues 112

 B. Approvals 114

 C. Split Decisions 115

 D. Requests for Evidence (RFE) 115

 E. Revocations and Notices of Intent to Revoke (NOIR) 115

 F. Denials (Notices of Intent to Deny and Final Denial Notices) 116

 G. Categories of Specialty Occupations 117

Chapter 13. Admissions, Change of Status, Extension of Stay, and Advance Parole 117

 A. Admissions 117

 B. Change of Status (COS) 119

 C. Extension of Stay (EOS) 120

 D. Advance Parole 120

 1. General 120

 2. Adjudicating Petition for Beneficiary on Advance Parole 121

(b)(5)

Comment [JVT1]: OPS(JVT): Agree that TOC will need to be updated. This can wait until the end when the content has been finalized.

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PART H – Specialty Occupation Workers (H-1B, E-3)

Chapter 1. Purpose and Background

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A. Purpose



U.S. employers may petition to hire H-1B employees to work in occupations that require both:

- 
- A bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

These occupations may include scientists, engineers, college professors, or other specialty occupations if the U.S. employer (petitioner) and the nonimmigrant employee (beneficiary) meet specific requirements.

B. Background

The following is an overview of the historical evolution of the H-1B visa classification. The requirements of the visa have evolved over time. While this history provides a useful backdrop in understanding the current H-1B program, not all the requirements of past versions of the statute apply today.

Snapshot of Legislation Related to Specialty Occupation Visas

The Immigration and Nationality Act of 1952¹

¹ See [Pub. L. 82-414 \(June 27, 1952\)](#).

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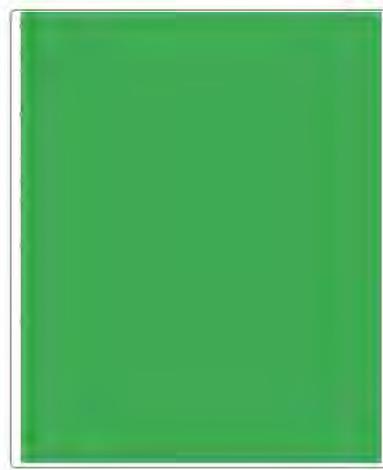
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- 
- Creation of a numerically-limited visa preference category for foreign nationals with special skills, which was the basis of the current employment-based immigrant categories.
- Created an employment category for nonimmigrants.
- Created INA 101(a)(15)(H), which contained the precursor to today's nonimmigrant classification.³
- Introduced the term distinguished merit and ability.⁴

1970 Amendments

- Congress eliminated the requirement that a foreign national of distinguished merit and ability must be coming to the U.S. to fill a temporary employment position.⁵
- A nonimmigrant in the H distinguished merit category could be coming temporarily to fill a permanent need. However, both the petitioner and the beneficiary were required to intend that the employment itself be temporary.⁶



³ A foreign national having a residence in a foreign country who has no intention of abandoning, is of distinguished merit and ability, and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability.

⁴ The term "distinguished merit and ability" was never defined by statute, but was instead defined in an administrative decision of the former Immigration and Naturalization Service (INS). "Distinguished merit and ability" meant "a degree of skill and recognition substantially above that ordinarily encountered, to the extent that a person so described is preeminent in his field of endeavor." See *Matter of Shaw*, 11 I&N Dec. 277 (D.D. 1965).

⁵ See Pub. L. 91-225 (April 7, 1970).

⁶ See H.R. Rep. No. 851, 92nd Cong., 2nd Sess., reprinted in 1970 U.S.C.C.A.N. 2750, 2752-53.

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- Former Immigration and Naturalization Service (INS) decision (1972) held that a person who is qualified as a member of the professions qualified as a person of distinguished merit and ability.⁷

1974-1989 Amendments

- Prior to March 30, 1987, no maximum time limit on the total period of stay or number of extensions which could be approved for an H-1 nonimmigrant, although in practice an H-1 requesting an extension of stay beyond five years was generally denied as an intending immigrant.⁸
- No limit on the number of H-1 beneficiaries who could be admitted to the United States on an annual basis.
- Before 1989, H-1 category included all persons of distinguished merit and ability which was broadly interpreted to include all persons engaged in occupations which required a bachelor's degree or equivalent. Also included were occupations for which a bachelor's degree was not required, such as registered nurses, athletes, artists, and entertainers.⁹
- In 1989, the H-1 category was broken into components to allow for the creation of the former H-1A category for nurses. This resulted in the current H-1B designation.¹⁰

The Immigration Act of 1990 (IMMACT 90)¹¹



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⁷ For a member of the professions, the distinguished merit and ability requirement could therefore be met simply by performing professional services without the need to further demonstrate that the person was preeminent or renown in that profession. See *Matter of Essex Cryogenics Industries, Inc.*, 14 I&N Dec. 196 (D.A.C. 1972) and *Matter of General Atomic Company*, 17 I&N Dec. 532 (Comm. 1980).

⁸ See 52 FR 5738, 5750 (Feb. 26, 1987).

⁹ In 1988, INS published a precedent H-1 decision that further defined the term profession, laying the foundation for what would subsequently become the definition of a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558, 560 (Comm. 1988). The INS then promulgated final regulations in 1990 that codified the interpretations of its prior H-1 precedent decisions and further clarified the specific criteria the Service used to determine whether a proffered position qualified as a profession. See 55 FR 2606 (Jan. 26, 1990).

¹⁰ See Immigration Nursing Act of 1989, Pub. L. 101-238 (December 18, 1989).

¹¹ See Immigration Act of 1990, Pub. L. 101-649 (November 29, 1990).



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occupation.

- Imposed the labor condition application (LCA) requirement, and created the H-1B cap of 65,000 new H-1B visas per fiscal year.
- Established dual intent for H-1B nonimmigrants.
- Separated athletes and entertainers, as well as prominent persons in business, science and education from the former H-1 category and placed them in the newly created O and P nonimmigrant categories.
- Imposed a maximum statutory time limit of six years on the period of H-1B admission.

The American Competitiveness in the Twenty-First Century Act (AC21)¹⁵

- Enacted on October 17, 2000.
- Made significant changes to the H-1B program.
- Raised the yearly cap to 195,000 for fiscal years 2001-2003. The limit returned to 65,000 in fiscal year 2004.
- Allowed for immediate continuing H-1B employment or portability for certain H-1B nonimmigrants who change H-1B employers;
- Exempted certain H-1B nonimmigrants from the yearly cap;
- Provided for extensions of stay in one-year increments beyond the normal six-year maximum for H-1B nonimmigrants who are the beneficiaries of a qualifying employment-based immigrant petitions;
- Provided for petition extensions (up to three years) filed on behalf of H-1B nonimmigrants who are eligible beneficiaries of approved qualifying employment-based immigrant petitions, but for whom immigrant visa numbers are unavailable;
- Modified the method of counting H-1B nonimmigrants; and
- [REDACTED] certain H-1B petitions that are revoked because of fraud or willful

¹⁵ See Pub. L. 106-313 (October 17, 2000).

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misrepresentation shall be restored to the numerical count for the year in which the petition was revoked.

The Visa Waiver Permanent Program Act¹⁶

- 

Fee Increase for the Employers of H-1B Nonimmigrant Workers Act of 2000¹⁷

- 

21st Century Department of Justice Appropriations Authorization Act (DOJ21)¹⁸

- 

H-1B Visa Reform Act of 2004²⁰

- Reinstated the ACWIA fee which had previously sunset on October 1, 2003.
- Increased the ACWIA fee to \$1,500 for certain H-1B petitions filed by petitioners with more than 25 employees in the United States, with some exceptions.
- Set the ACWIA fee at \$750 for certain H-1B petitions filed by petitioners with 25 or fewer employees in the United States, with some exceptions.
- 

¹⁶ See Pub. L. 106-396 (October 30, 2000).

¹⁷ See Pub. L. 106-311 (October 17, 2000).

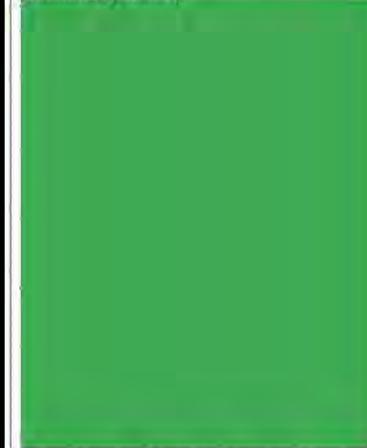
¹⁸ See the 21st Century Department Of Justice Appropriations Authorization Act, Pub. L. 107-273 (November 2, 2002).

¹⁹ In 2002, the Department of Justice (DOJ) amended Sections 106(a) and (b) of AC21.

²⁰ See Pub. L. 108-447 (December 8, 2004).



Comment [KMA12]:



Comment [JVT13]: SCOPS suggested edits.

Comment [RHC14]: These edits are



Comment [KMA15]: OCC's edit:



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March 8, 2005.

- Created a 20,000 person exemption from the regular H-1B cap for beneficiaries who possess a Master’s degree or higher from a U.S. institution of higher education.

Employ American Workers Act (EAWA)²¹

- EAWA passed in 2009 as part of the stimulus bill.²²
- Took effect on February 17, 2009, and expired on February 17, 2011.
- Prevented a company from displacing U.S. workers when hiring H-1B specialty occupation workers, if the company received funds through the Troubled Asset Relief Program (TARP)²³ or under Section 13 of the Federal Reserve Act (collectively referred to as covered funding).²⁴

Emergency Supplemental Appropriations for Border Security for the Fiscal Year Ending September 30, 2010²⁵

- [REDACTED]
- This law was originally slated to remain in effect until September 30, 2014.

James Zadroga 9-11 Health and Compensation Act of 2010²⁷

[REDACTED]

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Comment [KMA17]: From RHC/OCC: If OP&S

Comment [RHC18]: If OP&S has not already

Comment [CMS19]: AAO: Please note the

Comment [JVT20]: SCOPS suggests adding in

²¹ See Section 1611 of Pub. L. 111-5, 123 Stat. 115, 305 (February 17, 2009).

²² On February 17, 2009, the American Recovery and Reinvestment Act (commonly known as the “stimulus bill”) was enacted. The stimulus bill contained the Employ American Workers Act (“EAWA”).

²³ See Title I of Pub. L. 110-343, 122 Stat. 3767 (October 3, 2008).

²⁴ Under EAWA, any company that received covered funding and sought to hire H-1B workers was considered to be an “H-1B dependent employer.” Employers who received covered funds were thereby required to make additional attestations to DOL when filing the LCA. The Form I-129, Petition for a Nonimmigrant Worker, was revised on March 11, 2009, to inquire whether the petitioner had received TARP funding. If the petitioner indicated it had received TARP funding, the petitioner must have also indicated it was an H-1B dependent employer on the LCA. The additional requirements in EAWA applied to all H-1B petitions filed on or after February 17, 2009, seeking an employment start date before February 17, 2011.

²⁵ See Pub. L. 111-230 (August 13, 2010).

²⁶

²⁷

See Pub. L. 111-347, 124 Stat. 3623 (January 2, 2011).

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Consolidated Appropriations Act, 2016²⁸

- [Redacted]
- [Redacted]
- [Redacted]
- [Redacted]

Comment [JVT21]: SCOPS suggests adding in [Redacted]

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1. Visas for Chile and Singapore³⁰ [Redacted]

In 2003, the H-1B³¹ classification was added to the INA upon the signing into law the Free Trade Agreements (FTAs) with Chile and Singapore.³² The agreements took effect on January 1, [Redacted] numerical limitations for the FTAs are counted against the overall H-1B Program cap of 65,000.

There is no requirement to file a petition with USCIS for an H-1B1 visa. Persons seeking classification as an H-1B1 nonimmigrant may apply directly to the Department of State (DOS) for a visa. However, nonimmigrants already present in the United States may apply to USCIS for a change of nonimmigrant status to H-1B1 or for an extension of their current H-1B1 status. The H-1B1 nonimmigrant category requires the filing of an LCA certified by the U.S. Department of Labor (DOL), and the position must be a specialty occupation. The requirements for H-1B1 nonimmigrant classification are essentially the same as those for an H-1B nonimmigrant.³³

Comment [JVT24]: SCOPS recommends putting [Redacted]

2. Visas for Australian Citizens (E-3) [Redacted]

The E-3 nonimmigrant classification³⁴ was created as part of the Real ID Act of 2005.³⁵ The E-3 [Redacted]

³⁰ See United States-Chile Free Trade Agreement Implementation Act, Pub. L. 108-77, 117 Stat. 909 (September 3, 2003). See United States-Singapore Free Trade Agreement Implementation Act, Pub. L. 108-78, 117 Stat. 948 (September 3, 2003).

³¹ See INA 101(a)(15)(H)(i)(b)(1).

³² For more information on the U.S.-Chile FTA, see the [Office of the U.S. Trade Representative website](#). For more information on the U.S.-Singapore FTA, see the [Office of the U.S. Trade Representative website](#).

³⁵ See Division B of Pub. L. 109-13, 119 Stat. 231, 302 (May 11, 2005).

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[Redacted]

The statute defining a specialty occupation for an H-1B includes the E-3 in its definition of specialty occupation.³⁸ The same criteria and standards are used to determine whether the position is a specialty occupation and whether the beneficiary is qualified to work in the specialty occupation. There are several mostly procedural differences which are discussed further in this volume.³⁹

[Redacted]

C. Authority

1. Role of the U.S. Department of Labor (DOL)

[Redacted]

DOL enforces the attestations made on the LCA as well as certain administrative, record-keeping, and posting requirements associated with the LCA through its Wage and Hour Division (WHD). The petitioner makes attestations on the LCA regarding wages, benefits, and working conditions of both foreign and U.S. workers.⁴¹ DOL generally certifies an LCA unless it is incomplete or contains obvious inaccuracies.⁴²

[Redacted]

³⁸ See INA 214(i)(1).

³⁹ A more comprehensive discussion of the E-3 classification can be found in Chapter 6, H-1B and E-3 Categories, Section F, Specialty Occupation (E-3) [2 USCIS-PM H.6(F)].

⁴⁰ See INA 212(n). The requirements of an LCA are discussed in Chapter 5, H-1B Portability [2 USCIS-PM H.5].

⁴¹ The LCA is filed on ETA Labor Certification Form 9035 or 9035E.

⁴² See INA 212(n)(1)(C)(ii). See 20 CFR 655.730(b).

Comment [JVT25]: SCOPS recommendation -

[Redacted]

Comment [KMA26]: Edit from OCC/RHC:

[Redacted]

[Redacted]

Comment [JVT28]: SCOPS recommendation to

[Redacted]

Comment [RHC29]: I tweaked these edits.

[Redacted]

Comment [JVT30]: SCOPS recommendation to add in this section:

[Redacted]

Comment [SCOPS-MDV31]: Should we

[Redacted]

Comment [JVT32]: SCOPS edit.

DPS/KMA: Accept edits.

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U.S. worker, the LCA attestation system is designed to discourage U.S. employers from favoring H-1B employees over U.S. workers by providing for a post-certification enforcement system by DOL leading to possible fines, debarment, or both in the event of violations by an H-1B employer.⁴⁵



Comment [RHC33]: Edited the above paragraph and moved this sentence here.

DPS/KMA: Accept edits.

2. Role of the Department of Homeland Security (DHS)

As part of DHS, U.S. Citizenship and Immigration Services (USCIS) is responsible for overseeing the H-1B program.⁴⁶ This includes the creation of regulations and policy governing H-1B standards, as well as operational oversight. This also includes the adjudication of H-1B petitions, monitoring the H-1B cap, developing training and quality assurance programs, and fraud prevention and identification.



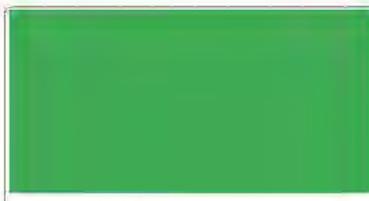
While DOL is the agency that certifies LCAs before they are submitted to USCIS, DOL regulations note that DHS (USCIS) is the department responsible for determining whether the content of an LCA filed for a particular H-1B petition corresponds to that petition.⁴⁷



⁴⁵ See INA 212(n)(2)(C).

⁴⁶ See INA 103.

⁴⁷ See 20 CFR 655.705(b). USCIS accepts the employer's petition (Form I-129, Petition for a Nonimmigrant Worker) with the DOL certified LCA attached. USCIS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the LCA is a specialty occupation.



DPS/KMA: Accept edits.

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The Administrative Site Visit and Verification Program (ASVVP) was established on July 22, 2009 and is administered by the Fraud Detection and National Security (FDNS) Directorate within

As one of the tools used to oversee the H-1B program, the ASVVP program is designed to verify

site inspections are not performed in cases where fraud is suspected, and are generally performed without notice. Examples of information verified through ASVVP include the bona fides of the organization (or its existence), job offer, salary, and employment of the beneficiary. ASVVP site inspectors do not make decisions on immigration benefit petitions or applications.

Comment [JVT37]: From FDNS

OP5(I/VT): accept edit

D. Legal Authorities

- [INA 101\(a\)\(15\)\(H\)\(i\)\(b\)](#) - H-1B definition
- [INA 101\(a\)\(15\)\(E\)\(iii\)](#) - E-3 definition
- [REDACTED]
- [REDACTED]
- [INA 214\(g\)](#) - Temporary workers and trainees; limitation on numbers
- [INA 214\(i\)\(1\)](#) - H-1B and E-3 specialty occupation defined
- [INA 214\(i\)\(2\)](#) - Qualifications for a specialty occupation
- [INA 214\(i\)\(3\)](#); [INA 214\(l\)](#) - H-1B1 specialty occupation defined
- [8 CFR 214.2\(h\)](#) - Temporary employees
- [8 CFR 212.7\(c\)](#) - Foreign residence requirement and waiver of certain grounds of inadmissibility

Chapter 2. General Filing Requirements

A. Eligibility

• [REDACTED]

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- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Comment [RHC38]: This is technically incorrect.

B. Initial Evidence

An employer must file a Petition for a Nonimmigrant Worker ([Form I-129](#)) requesting an H-1B nonimmigrant worker at the proper filing location, with correct fee(s), signature, and accompanied by the following:

- A certified Labor Condition Application (LCA);
- Evidence that the petitioner is eligible to request H-1B classification;
- Evidence that the job qualifies for H-1B classification; and
- Evidence that the beneficiary qualifies to perform the duties of the specialty occupation.⁴⁹

[REDACTED]

[REDACTED]

[REDACTED]

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Validity of Labor Condition Application (LCA)

In general,

[Redacted]

the period of requested employment on the petition and must correspond to the occupation, wage, and employment location(s) specified in the H-1B petition.

C. Who May File

[Redacted]

Comment [JVT40]: SCOPS recommends

[Redacted]

Comment [RHC41]: Note that on page 29 we

[Redacted]

Comment [JVT42]: SCOPS edit

Identification of Beneficiary and Signatures

[Redacted]

Comment [JVT43]: SCOPS recommends:

[Redacted]

See edits

[Redacted]

Comment [JVT44]: SCOPS recommends:

[Redacted]

Comment [RHC45]: This is not relevant to "who

[Redacted]

OPS/KMA: accept deletion.

D. Time of Filing

The petitioner may not file earlier than six months before the date of actual need for the beneficiary's services.⁵⁴ In addition, USCIS may not approve the petition earlier than six months before the date of actual need for the beneficiary's services.⁵⁵ For example, if the cap has been filled for the present fiscal year, beneficiaries subject to the cap are unable to start employment until October 1st since that is the first day of the new fiscal year when new H-1B numbers are again available. However, petitions requesting an October 1st employment start date may be filed no earlier than April 1st.

Eligibility at Time of Filing

In general, a petitioner must establish eligibility for the benefit sought at the time of filing.⁵⁶

⁵² See INA 214(c) and 8 CFR 214.2(h)(2)(i)(F)(1). For H-1B petition filing requirements for U.S. employers and agents, see Chapter 4, Specific Beneficiary Requirements [2 USCIS-PM H.4].

⁵⁴ See 8 CFR 214.2(h)(9)(i)(B).

⁵⁵ See 8 CFR 214.2(h)(9)(i)(B).

⁵⁶ See 8 CFR 103.2(b)(1).

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However, the regulations provide an exception to one of the specific beneficiary requirements (H-1B licensing requirement) that permits petitioners to establish a beneficiary's licensing eligibility prior to approval of a petition as opposed to the time of filing.⁵⁷

E. Filing Location

1. H-1B Filing Location

The petitioner must file with the USCIS location with jurisdiction over H-1B petitions in the geographic area of intended employment.⁵⁸ Requests for premium processing are filed at the same location as requests for regular processing.⁵⁹

The most recent instructions to the Form I-129, Petition for Nonimmigrant Worker (H-1B petition) specify the filing locations for each state.⁶⁰

2. Filing Jurisdiction for Multiple Work Locations

[REDACTED] takes place in different locations within the same state or in different states, the state where the petitioning company or organization's primary office is located determines the appropriate location to send the petition, regardless of where in the United States the various worksites are located. For example:

- If the beneficiary will work in Arizona and Texas, and the petitioning company's primary office is in New York, then USCIS treats New York as the workplace for filing location purposes.
- If the beneficiary will work at multiple locations in Florida, and the petitioning company's primary office is in California, then USCIS treats California as the workplace for filing purposes.

If the beneficiary works at a home office, USCIS considers the home office a separate and distinct work site location.

⁵⁷ See 8 CFR 214.2(h)(4)(v)(4). For more information on licensing requirements, see Chapter 5, H-1B Portability [2 USCIS-PM H.5].

⁵⁸ Currently, H-1B petitions are filed either at the Vermont or California Service Center, depending on the state of intended employment. Petitions that are exempt from the cap must be filed with the California Service Center, regardless of the geographic area of intended employment.

⁵⁹ For specific Service Center locations and addresses, see the form instructions.

⁶⁰ Since June 5, 2009, USCIS provides information regarding the proper filing locations in the instructions to the respective petitions and application forms on the USCIS website. See 74 FR 26933, 26933-26941 (June 5, 2009) (interim rule).

Comment [HJC46]: AAO: We note that the following language was not included:



Comment [HJC47]: AAO: We note that the following language was not included:

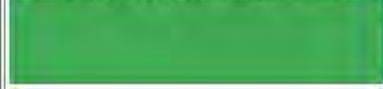


Comment [HJC48]: AAO: OP&S - this section is



Kate 12/8/16-Thank you, and noted.

Comment [HJC49]: AAO: OP&S - this section is



Comment [STN50]: Does that mean that the primary office is still used as the workplace?

OPS/KMA: Not necessarily-the primary office is one of the work locations, but not necessarily the place where the beneficiary is working.

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3. Work in More than One Location

[REDACTED] Where there will be more than one workplace, a detailed itinerary must accompany the petition.⁶¹

The LCA must cover each workplace. For example, if there are two work locations, a petitioner may either:

- File one LCA covering both places of intended employment; or
- File two separate LCAs covering each location.

4. H-1B Extensions

Petitioners must file H-1B petitions seeking an extension of stay with the USCIS office with that has jurisdiction over H-1B petitions in the geographic area of intended employment.

5. E-3 and H-1B1 Specialty Occupation Petitions

E-3 and H-1B1 petitions seeking a change of nonimmigrant status or an extension of stay are filed at the Vermont Service Center regardless of the place of intended work.



F. Fees

Petitioners must file the H-1B petition with the appropriate filing fees. In addition to the base filing fee, there are additional fees. Spouses and children of H-1B beneficiaries are not subject to these additional fees. H-1B fees include:

⁶¹ See 8 CFR 214.2(h)(2)(i)(B).

Comment [RHC51]: This is confusing/inaccurate in light of the above discussion. Suggest deleting

OPS/KMA: Deletion accepted.

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Comment [RHC52]: This chart is somewhat random. This section is discussing filing location, so not sure why we need a chart on H-1B forms here.

OPS/KMA: For WG discussion-should we move this to B, Initial Evidence, but change the title of that to "Initial Evidence and Forms"?

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- A base fee; and
- An American Competitiveness and Workforce Improvement Act of [REDACTED] and [REDACTED]
- Fraud Prevention and Detection Fee; and;
- Public Law 114-113 fee of \$4,000 for petitioners who employ 50 or more employees in the United States and more than 50% of those employees are in H-1B or L-1 nonimmigrant status; and must be submitted with a request for initial H-1B status or a request for a beneficiary already in H-1B status to change employers.

1. Base Fee

The petition base filing fee, as indicated in the form, is required for all H-1B petitions.⁶²

2. American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) Fee

The ACWIA fee applies to any non-exempt petitions filed with USCIS,⁶³ and the petitioner or its representative must pay the fee. The H-1B beneficiary may not pay the fee directly or indirectly.⁶⁴ If the beneficiary paid the fee, USCIS may deny the petition and the employer may be subject to civil monetary fines.

ACWIA requires an H-1B petitioner to pay an additional filing fee for:

- An initial filing [REDACTED] of H-1B status;
- A first [REDACTED] extension of stay; or
- Authorization to change employers.⁶⁵

If one of the above three conditions applies, the petition is subject to the ACWIA fee, unless one of the exemptions discussed below applies.

⁶² Current fees are available on www.uscis.gov/forms.

⁶³ This fee is effective as of December 8, 2004.

⁶⁴ See 20 CFR 655.731(c)(10)(ii).

⁶⁵ See 8 CFR 214.2(h)(19).

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Comment [HJC53]: AAO: We recommend keeping the reference to ACWIA consistent throughout the document.

OPS(JVT): agree

OPS/KMA 12.8-Agree/this appears 10 times in the document, and it is now consistent throughout.

Comment [HJC54]: AAO: We recommend keeping the reference to ACWIA consistent throughout the document.

OPS(JVT): agree

Comment [RHC55]: Will need to add in reference to the new PL 114-113 fee.

OPS/KMA- added.

Comment [JVT56]: SCOPS edits.

OPS(JVT): accept.

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The ACWIA fee depends on the number of full-time equivalent positions the petitioner employs in the United States. The following table provides a list of the required fee amounts under ACWIA.

American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) Fee Requirements	
Number of Full time Employees	Fee
More than 25	\$1,500
25 or Less	\$750

Full-Time Equivalence

The fee determination turns on the number of full-time equivalent employees (FTEs)⁶⁶ and not the absolute number of employees.

For example, if the petitioner employs 26 people, but can demonstrate that ~~two~~ of those persons work part-time for no more than 20 hours a week, then the petitioner employs 25 FTEs, and the lower ACWIA fee is appropriate. The burden is on the petitioner to demonstrate some employees work part-time.

Exemptions from the ACWIA fee

Certain petitioners are always exempt from payment of the fee.⁶⁷ The following organizations are not required to pay the ACWIA fee:

- An institution of higher education as defined in 20 U.S.C. 1001(a),⁶⁸
- A nonprofit entity that is related to or affiliated with an institution of higher education,⁶⁹
- A nonprofit research organization or governmental research organization;⁷⁰

⁶⁶ See 20 CFR 655.736(a)(2).

⁶⁷ See 8 CFR 214.2(h)(19)(iii).

⁶⁸ See 8 CFR 214.2(h)(8)(ii)(F)(1).

⁶⁹ See 8 CFR 214.2(h)(8)(ii)(F)(2) and 8 CFR 214.2(h)(19)(iii)(B).

⁷⁰ See 8 CFR 214.2(h)(19)(iii)(C). The definition of the terms “nonprofit research organization” and “governmental research organization” for the purposes of the ACWIA fee-exemption has been adopted for purposes of the AC21 H-1B cap exemption at 8 CFR 214.2(h)(8)(ii)(F)(3).

Comment [JVT57]: From SCOPS: The ACWIA fee also counts the number of employees at affiliated and related entities.

Comment [RHC58]: This is somewhat inaccurate as the table only provides a breakdown of the ACWIA fee... Was this intended to state “The following table provides a list of the required fee amounts under ACWIA”?

OPS/KMA: That appears to be the case. Edited.

Comment [JVT59]: SCOPS edit

OPS(JVT): accept

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- A primary or secondary educational institution;⁷¹ or
- A non-profit entity engaged in an established curriculum-related clinical training of students registered at any such institution.⁷²

The ACWIA fee is also not required in the following circumstances:⁷³

- A petitioner is filing its second or subsequent request for an extension of stay for an H-1B beneficiary;
- The filing is an amended petition that does not contain any requests to extend the validity of the petition it seeks to amend; or
- A petition is filed to correct a USCIS error. The ACWIA fee exempt petition, however, may not contain any requests to extend the validity of the petition it seeks to correct, unless the USCIS error involved the validity dates.

3. Fraud Prevention and Detection Fee

The petitioner must also pay a Fraud Prevention and Detection Fee of \$500 to:

- Initially obtain H-1B nonimmigrant classification (including H-1B2 and H-1B3), or
- Obtain authorization for an H-1B nonimmigrant to change employers.⁷⁴ of

Exemptions for the Fraud Prevention and Detection Fee

The Fraud Prevention and Detection Fee is not required for petitions for:

- H-1B1 (Chile or Singapore)⁷⁵

⁷¹ See 8 CFR 214.2(h)(19)(ii)(D).

⁷² See 8 CFR 214.2(h)(19)(iii)(E).

⁷³ See 8 CFR 214.2(h)(19)(v).

⁷⁴ See INA 214(c)(12)(A).

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Comment [JVT60]: SCOPS edit

OPS(JVT): accept

OPS/KMA 12.9.16 Deleted language that is not in the regulation.

Comment [JVT61]: SCOPS edit

OPS(JVT): accept

Formatted: Underline

Comment [JVT62]: OPS(JVT): Agree with most of these edits, but not the cross reference.

Comment [STN63]: Since we explain below that this is a subset of an initial H-1B classification it seems unnecessary to list it as a separate bullet here and imply that it is a separate situation for applying the fee.

OPS/KMA Deleted final bullet for the reason stated.

Comment [JVT64]: OPS(JVT): Agree with most of these edits, but not the cross reference.

Comment [JVT65]: SCOPS recommended

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- E-3 (Australia).

L-1 Change of Status Fee

If the beneficiary is changing status from L-1 (Intracompany Transferee) to H-1B with the same employer, the \$500 fraud fee is required because the change is an initial approval of H-1B classification.

[REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

Public Law 114-113 fee

A \$4,000 applies to petitioners who employ 50 or more employees in the United States and more than 50% of those employees are in H-1B or L-1 nonimmigrant status. This fee must be submitted with a request for initial H-1B status or a request for a beneficiary already in H-1B status to change employers.⁷⁹ [REDACTED]

⁷⁶ See 70 FR 23775, 23776 (May 5, 2005).

[REDACTED]

⁷⁹ Between August 14, 2010 and September 30, 2015, the Emergency Supplemental Appropriation for Border Security Act, Pub.L. 111-230 (August 13, 2010), as amended by Pub.L. 111-347 (January 2, 2011) required an additional \$2,000 fee on H-1B petitions if the petition requested an initial approval of H-1B status or authorization to change employers or if the petitioner employed 50 or more employees in the United States, and more than 50% of those employees are in H-1B or L-1 status. As originally enacted Pub.L. 111-230 would have sunset on September 30, 2014. However, on January 2, 2011 President Obama signed Public Law 111-347. Title III, section 302 of that law extended applicability of the fee through September 30, 2015.

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Comment [RHC66]: May want to keep this in a footnote for historical reference. Will need to add discussion regarding new PL 114-113 fee.

OPS/KMA: See PL 114-113 fee addition below. And new footnote for historical reference.

Comment [JVT67]: OBE: PL 111-230 sunset on Sept 30, 2015.

RHC (OCC): should replace the deleted language with similar language regarding the new PL 114-113 fee.

OPS/KMA, see below.

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[Redacted]

G. Prior and Additional Petitions

1. Effect of a Prior Petition Approval

Evidence of prior approvals submitted with a subsequent new petition does not serve as the basis for future eligibility. The petitioner must provide sufficient documentation to establish current eligibility.⁸⁰ USCIS is not required to approve a petition based on a prior approval. Instead, officers must fully review the new petition to determine eligibility.

Officers may review the prior approval of an H petition when considering eligibility for the benefit sought. For example, in a petition accompanied by a request for an extension, an officer may take into consideration the prior approval absent indications of fraud or error. However, the petitioner must still demonstrate eligibility for the extension.

2. Multiple Petitions Using the Same LCA

A petitioner may file an LCA for multiple H-1B beneficiaries. The petitioner may also file multiple petitions at different times as the names of beneficiaries become known, and use copies of the same LCA until all of the openings covered by the LCA have been filled. Each subsequent petition must reference the petition number(s) of all previously filed petitions using that LCA. Once the petitioner has used all position numbers, ~~the the LCA may no longer be used to support additional petitions~~ petitioner may not further use the LCA.⁸¹

3. Multiple Petitions by an Employer

An employer generally may not file more than one H-1B petition on behalf of the same beneficiary, in the same fiscal year (October 1 – September 30), [Redacted] if the foreign national is subject to the H-1B cap or seeks one of the 20,000 master's or higher degree exemptions.⁸² When cap numbers are in high demand and USCIS conducts a random selection to allocate H-1B visas, this rule prevents petitioners from attempting to obtain an unfair advantage in favor of their beneficiaries.

If USCIS denies an H-1B petition, on a basis other than fraud or misrepresentation, the employer may file a second H-1B petition on behalf of the same beneficiary subject to cap availability.

⁸⁰ See *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).
⁸¹ See 8 CFR 214.2(h)(4)(i)(B)(3).
⁸² See 8 CFR 214.2(h)(2)(i)(G).

Comment [RHC68]: Will need to be revised so that this point applies to the new PL 114-113 fee.
OPS/KMA Added.

Comment [RHC69]: Is this sentence referring to [Redacted]
OPS/KMA: Defer to SCOPS as to the adjudication/operation. Because the determination [Redacted]

Comment [STN70]: This language makes it [Redacted]

Comment [JVT71]: SCOPS edit.
Comment [JVT72]: SCOPS recommended edit:
An employer may not file more than one H-1B petition on behalf of the same beneficiary in the same fiscal year (October 1 – September 30) if that beneficiary is subject to the H-1B cap or seeks one of the 20,000 master's or higher degree exemptions
DPS(JVT): accept edit.

Comment [JVT73]: SCOPS recommended edit:
An employer may not file more than one H-1B petition on behalf of the same beneficiary in the same fiscal year (October 1 – September 30) if that beneficiary is subject to the H-1B cap or seeks one of the 20,000 master's or higher degree exemptions
DPS/KMA: OK with edit.

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A petitioner may file more than one petition for the same beneficiary if the petitioner is able to demonstrate a legitimate business need to file more than one petition on behalf of the same beneficiary.⁸³

4. Concurrent Employment - Multiple Employers

Multiple petitioners may employ an H-1B beneficiary at any given time. However, there must be separate H-1B petitions filed and approved for each H-1B employer. Multiple U.S. employers may file a single petition through an agent filing on behalf of the petitioners as their representative.

H. Amended Petitions

An amended petition is required whenever there is a material change in the terms and conditions of employment or the beneficiary's eligibility as outlined in the original approved petition.⁸⁴ When the petitioner continues to employ the beneficiary, the petitioner must immediately file an e-amended petition with the USCIS. [REDACTED]

The amended petition must include the appropriate fee and all required supporting documentation including, but not limited to, a new LCA corresponding with the amended petition. An amended petition is not required for minor, immaterial changes in the terms and conditions of employment. The petitioner should notify USCIS of minor, immaterial changes when filing any extension of stay petition on the beneficiary's behalf.

1. Material Changes

Changes in the following areas may constitute a material change in the terms and conditions of employment that affect eligibility for H-1B classification: [REDACTED]

- [REDACTED] The H-1B nonimmigrant's employment location;⁸⁶ and
- [REDACTED] The H-1B nonimmigrant's duties from one specialty occupation to another.

⁸³ See 8 CFR 214.2(h)(2)(i)(G).

⁸⁴ See 8 CFR 214.2(h)(2)(i)(E). See INA 214(C)(10) and 8 CFR 214.2(h)(11)(i)(A).

⁸⁵ See 8 CFR 214.2(h)(2)(i)(E) and 8 CFR 214.2(h)(11)(i)(A).

[REDACTED] See *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015).

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Comment [JVT74]: From SCOPS;

This is not applicable to amended petition due to a change in work location, and the new location falls under a different jurisdiction from the original approving office.

DPS/KMA OK with edit.

Comment [CMS75]: AAO: As "non-worksites" is

[REDACTED]

Comment [CMS76]: AAO: As "non-worksites" is

[REDACTED]

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- Specialty occupation, LCA, or employer requirements

- Beneficiary qualifications

- 
- 

*Specialty Occupation Requirements*⁸⁷

An H-1B beneficiary must perform services in a specialty occupation, or as a fashion model of distinguished merit and ability, or related to a Department of Defense (DOD) cooperative research and development project or coproduction project.⁸⁸ A petitioner must file an amended petition when there is a material change in the beneficiary's duties from those described in the petition and any associated documents, upon which USCIS based the approval of the petition. This would encompass any significant changes in job duties including, but not limited to, promotions or demotions that would also materially alter any term or condition of the beneficiary's employment from those described in the approved petition.

*Beneficiary Qualifications*⁸⁹

The beneficiary of an H-1B petition must meet the requirements⁹⁰ for the occupation.⁹¹ Petitioners must provide evidence concerning the duties to be performed by the prospective beneficiary, as well as the identity, physical location, and credentials of the individual(s) who will supervise the foreign worker. In addition, petitioners must also submit evidence of compliance with applicable state requirements.

DHS may grant an individual H-1B nonimmigrant status despite his or her inability to obtain a required license in the United States. This temporary exception to the licensure requirement is for individuals who are substantively qualified for licensure but who cannot not obtain such licensure due to requirements for a Social Security number, employment authorization, or due to another "similar technical requirement."⁹² Petitioners filing H-1B petitions on behalf of such beneficiaries must submit evidence from the relevant licensing authority indicating that the

⁸⁷ See INA 214(i)(1).

⁸⁸ See INA 101(a)(15)(H)(i)(b).

⁸⁹ See INA 214(i)(2).

⁹⁰ See INA 101(a)(15)(H)(i)(b).

⁹¹ See INA 214(i)(2).

⁹² See 8 CFR 214.2(h)(4)(v)(C)(2)(i).

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Comment [RHC77]: I am not sure if it is clear

OPS/KMA See edits.

Comment [JVT78]: SCOPS recommended edit

Comment [STN79]: Is it proper to say "also" here to emphasize that a promotion or demotion does not necessary materially change employment, but that it is a separate inquiry?

OPS/KMA Added "also"

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(b)(5)

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only obstacle to the beneficiary’s licensure is the lack of a Social Security number, the lack of employment authorization, or the inability to meet a similar technical requirement.⁹³

Petitions for such unlicensed H-1B beneficiaries may be approved for up to 1 year.⁹⁴

Thereafter, an H-1B petition filed on such a beneficiary’s behalf may not be approved unless the required license has been obtained, the beneficiary is employed in a different position that requires another type of license, or the beneficiary is employed in the same occupation but in a different location that does not require a license.⁹⁵ See final 8 CFR 214.2(h)(4)(v)(C)(3).

If a beneficiary will perform work in an occupation that typically requires a license, a beneficiary may work without a license only if it is otherwise consistent with applicable state licensure requirements and exceptions to such requirements. In such cases, DHS may grant H-1B classification if the evidence demonstrates that the unlicensed H-1B nonimmigrant may fully perform the duties of the occupation under the supervision of licensed senior or supervisory personnel.

If an occupation requires a state or local license for the beneficiary to perform fully the duties of the occupation, the beneficiary must have that license prior to approval of the petition.⁹⁶

For example, if an H-1B beneficiary works in an occupation that requires licensing and the beneficiary is required by law to obtain a new or additional license, (not including a renewal of an existing license) this would constitute a material change in the beneficiary’s eligibility.

*LCA Requirements*⁹⁷

An employer must file an LCA with DOL prior to the employer submitting a petition for an H-1B worker to USCIS.⁹⁸ By completing and signing the LCA, the employer attests to several obligations, including the wages and benefits, and working conditions provided to U.S. workers and the nonimmigrant workers.

USCIS reviews the information submitted on the H-1B petition and the certified LCA along with supporting evidence submitted by the petitioner to determine whether the job meets the requirements of a specialty occupation, whether the qualifications of the prospective H-1B worker meet the statutory and regulatory requirements, and whether the content of the certified LCA corresponds with the petition under review.

⁹³ See 8 CFR 214.2(h)(4)(v)(C)(2)(ii).

⁹⁴ See 8 CFR 214.2(h)(4)(v)(C)(2).

⁹⁵ See 8 CFR 214.2(h)(4)(v)(C)(3).

⁹⁶ See 8 CFR 214.2(h)(4)(v)(A).

⁹⁷ See INA 212(n)(1) and INA 212(t)(1).

⁹⁸ See INA 212(n)(1).

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Comment [STN80]: Are we talking about

Comment [HJC81]: AAO: We recommend

Comment [HJC82]: AAO: We recommend

DPS/KMA OK with edits.

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A petitioner must file an amended or new H-1B petition if the H-1B employee is changing his or her place of employment to a geographical area requiring a corresponding LCA to be certified to USCIS, even if a new LCA is already certified by the U.S. Department of Labor and posted at the new work location.

A petitioner must file an amended or new H-1B petition before placing an H-1B employee at a new place of employment not covered by an existing, approved H-1B petition and corresponding LCA. Once a petitioner properly files the amended or new H-1B petition, the H-1B employee can immediately begin to work at the new place of employment, provided the requirements of INA 214(n) are otherwise satisfied. The petitioner does not have to wait for a final decision on the amended or new petition for the H-1B employee to start work at the new place of employment. USCIS will exercise its discretion to accommodate petitioners who need to come into compliance with *Simeio* as follows:

- Safe harbor period: If a petitioner wishes, notwithstanding the above statement of discretion, to file an amended or new petition to request a change in the place of employment that occurred on or before the *Simeio* decision, the petitioner may file an amended or new petition by January 15, 2016. USCIS will consider filings during this safe harbor period to be timely for purposes of the regulation and meeting the definition of “nonimmigrant alien” at INA section 214(n)(2). Note: See the additional guidance in the table below for situations where a petitioner must file an amended or new petition.
- Post-*Simeio* changes in the place of employment requiring certification of a new LCA:
 - If a petitioner did not file an amended or new petition for an H-1B employee who moved to a new place of employment (not covered by an existing, approved H-1B petition) by January 15, 2016 (deadline for filing) after the date of publication of *Matter of Simeio Solutions, LLC* (April 9, 2015), the petitioner is out of compliance with DHS regulations and the USCIS interpretation of the law, and thus subject to adverse action. Similarly, the petitioner’s H-1B employee will not be maintaining nonimmigrant status and will also be subject to adverse action.
 - If the change in the place of employment (not covered by an existing, approved H-1B petition) occurred on or after August 19, 2015, then the petitioner must file an amended or new petition before the employee begins working at the new location.

*Employer Requirements*¹⁰⁰

⁹⁹ See *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015).

¹⁰⁰ See INA 101(a)(15)(H)(i)(b), 214(c)(1), 212(n)(1), and 212(n)(2)(C)(vii). See 8 CFR 214.2(h)(4)(ii).

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Comment [HJC83]: AAO: The *Simeio* PM guidance states: “[A] petitioner must file an amended or new H-1B petition if the H-1B employee is changing his or her place of employment to a geographical area requiring a corresponding LCA to be certified to USCIS, even if a new LCA is already certified by the U.S. Department of Labor and posted at the new work location.”

Comment [HJC84]: AAO: The *Simeio* PM guidance states: “[A] petitioner must file an amended or new H-1B petition if the H-1B employee is changing his or her place of employment to a geographical area requiring a corresponding LCA to be certified to USCIS, even if a new LCA is already certified by the U.S. Department of Labor and posted at the new work location.”

Comment [RHC85]: I think we need to add in some discussion pertaining to the policy implementing *Matter of Simeio* and the grace period for folks to come into compliance as provided under that policy. It seems like that will impact cases for some time to come (e.g. when looking back to determine if the H-1B maintained status) so we probably need to include that here for reference purposes.

DPS/KMA Added compliance discussion

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USCIS approves each petition for the specific employer-employee relationship¹⁰¹ stated in the original petition. Any material change in the terms and conditions of employment from the employer-employee relationship stated in the original approved petition would require an amended petition.

2. Non-Material Changes

The following do not affect eligibility and do not require an amended petition:

- Short-term, intermittent placement at another worksite, provided there are no changes in the terms and conditions of the H-1B worker's employment that may affect eligibility for H-1B classification,¹⁰²
- A change in the petitioner's name with no other changes;
- [REDACTED]
- A move within an "area of intended employment." If a petitioner's H-1B employee is simply moving to a new job location within the same area of intended employment, a new LCA is not generally required.¹⁰⁴ Therefore, provided there are no changes in the terms and conditions of employment that may affect eligibility for H-1B classification, the petitioner does not need to file an amended or new H-1B petition. However, the petitioner must still post the original LCA in the new work location within the same area of intended employment. For example, an H-1B employee presently authorized to work at a location within the New York City metropolitan statistical area (NYC) may not trigger the need for a new LCA if merely transferred to a new worksite in NYC, but the petitioner would still need to post the previously obtained LCA at the new work location.¹⁰⁵ This is required regardless of whether an entire office moved from one location [REDACTED] another within NYC, or just the one H-1B employee; or
- A transfer from one branch of a firm to another branch of a firm with no change in worksite location, where the duties remain the same, but the petitioning firm remains the employer. A location is considered to be a "non-worksite" if:

¹⁰¹ For detailed discussion of the requirements of "employer-employee relationship," see Chapter 3, Specific Petitioner Requirements [2 USCIS-PM H.3].

¹⁰² See 20 CFR 655.735(c).

¹⁰⁴ See INA 212(n)(4) and 20 CFR 655.734.

¹⁰⁵ See 20 CFR 655.734.

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Comment [JVT86]: OPS(JVT): I think AAO's edits here are fine.. Steven and Kate, do you agree?

Kate: Agree.

Comment [JVT87]: OPS(JVT): I think AAO's edits here are fine.. Steven and Kate, do you agree?

Comment [RHC88]: Deleted this here and [REDACTED]

OPS/KMA Deletion accepted.

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Comment [JVT89]: SCOPS recommends deleting this or and replacing the next bullet with:

•A transfer from one branch of a firm to another branch of a firm with no change in worksite location, where the duties remain the same, but the petitioning firm remains the employer;

•Under certain circumstances, a petitioner may place an H-1B employee at a new worksite for up to 30 days, and in some cases 60 days (where the employee is still based at the "home" worksite); or

•A non-worksite location. A location is considered to be a "non-worksite" if:

[REDACTED]
the next two bullets in the PM. I added the bullet about short term worksite placements.

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(b)(5)

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- The H-1B employees are going to a location to participate in employee developmental activity, such as management conferences and staff seminars;
 - The H-1B employees spend little time at any one location; or
 - The job is “peripatetic in nature,” such as situations where their job is primarily at one location but they occasionally travel for short periods to other locations “on a casual, short-term basis, which can be recurring but not excessive (i.e., not exceeding 5 consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations).”¹⁰⁶
- Under certain circumstances, a petitioner may place an H-1B employee at a new worksite for up to 30 days, and in some cases 60 days (where the employee is still based at the “home” worksite); or
- A change in ownership structure that of the petitioner [REDACTED] where:
 - The new corporate entity succeeds to the interests and obligations of the original petitioning employer;
 - The new corporate entity assumes all of the immigration-related assets and liabilities of the previous entity with regard to that beneficiary, including its LCA obligations, and
 - The terms and conditions of employment remain the same but for the identity of the petitioner.¹⁰⁷

Chapter 3. Specific Specific Eligibility [REDACTED] Requirements

In general, to qualify for an H-1B visa a petitioner must:

- Establish that the petitioner is a U.S. employer;
- Submit a certified Labor Condition Application (LCA) that corresponds to the petition;

¹⁰⁶ See 20 CFR 655.715.

¹⁰⁷ See INA 214(c)(10) and 20 CFR 655.730(e)(1)(iv).

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Comment [RHC90]: May be more accurate to [REDACTED]

OPS/KMA Edits accepted.

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- Establish that the offered position is a specialty occupation; ~~and~~
- Establish a valid employer-employee relationship; and
- Establish that the beneficiary is qualified to perform the duties of the proffered specialty occupation.

A. U.S. Employer Requirement

1. U.S. Employer

~~_____~~ An H-1B petition may be filed by a U.S. employer. A U.S. employer is defined as a person, firm, corporation, or other association, or organization in the United States which meets all of the following criteria:

- Engages a person to work within the United States;
- Has an employer-employee relationship with the H-1B beneficiary, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- Has an Internal Revenue Service Tax Identification Number.¹⁰⁸

When meeting the second criterion, above, a U.S. employer must establish that a valid employer-employee relationship will exist between the U.S. employer and the beneficiary throughout the requested H-1B validity period.

The U.S. employer must _____ establish that the requisite employer-employee relationship exists or will exist in situations where the beneficiary is placed at a worksite that is not operated by the petitioner (third-party placement).

2. U.S. Agents and the Employer Requirement

_____ A U.S. agent may file the petition even if ~~the agent~~ _____ is not be the actual employer of the H-1B beneficiary.

Agents may file H-1B petitions where:

- The workers are traditionally self-employed;

¹⁰⁸ See 8 CFR 214.2(h)(4)(iii).

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Comment [STN91]: Does it make more sense if _____

Comment [CMS92]: AAO: This is new text. _____

Kate: Agree. _____

Comment [CMS93]: AAO: This is new text. _____

Comment [RHC94]: What about _____

OPS/KMA See edits.

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- The workers traditionally use agents to arrange short term employment on their behalf with numerous employers; or
- A foreign employer is responsible for complying with all of the employer sanctions provisions under DHS regulations and the INA.¹⁰⁹

- [REDACTED]

A petition filed by an agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement and include an itinerary of definite employment.

A petition filed by an agent [REDACTED] representing multiple employers and the beneficiary [REDACTED] must include:

- A complete itinerary that specifies the dates of each service or engagement;
- The names and addresses of the actual employers; and
- The names and addresses of the locations where the beneficiary will be working.

B. Labor Condition Application

A Labor Condition Application (LCA) must be submitted with nearly all H-1B petitions. The LCA is a statement filed with the U.S. Department of Labor (DOL) by a prospective H-1B employer certifying that:¹¹²

- The beneficiary hired in a specialty occupation (or as a fashion model of distinguished merit and ability) will be paid at least the same wage paid by the employer to all other individuals [REDACTED] with similar experience and qualifications for the specific employment in question or the prevailing wage for the occupation in the area of employment, whichever is greater;
- The petitioner will provide the beneficiary with working conditions that have no adverse effect on other similarly employed persons;

¹⁰⁹ See 8 CFR 214.2(h)(2)(i)(F)(3).

¹¹⁰ See 8 CFR 214.2(h)(2)(i)(F)(1).

¹¹¹ See 8 CFR 214.2(h)(4)(iii).

¹¹² See INA 212(n)(1).

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Comment [RHC95]: If they must qualify as a US

[REDACTED]

OPS/KMA See edits

Comment [RHC96]: Revised this section since

[REDACTED]

DPS/KMA:Ok with edits.

Comment [LPP97]: AAO: Why was "(or as a fashion model)" deleted? LCAs apply to both and, therefore, it should be included here. See 20 C.F.R. § 655.732.

OPS(JVT): fine with inclusion of fashion model, thanks!

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- No strike or lockout is in progress in the named occupation at the place of employment;
- The employer has provided notice of the filing of the LCA to the bargaining representative of the employer's employees, or, if there is no such representative, has posted notice of the LCA's filing in conspicuous locations in the employer's establishment(s) in the manner required by DOL- [REDACTED] and
- If the employer is a dependent employer,¹¹⁴ no U.S. worker has been or will be displaced as a result of the H-1B beneficiary's employment.

Certain employers, including willful violators and dependent employers, must make additional attestations relating to the non-displacement of U.S. workers.¹¹⁵ A willful violator is an entity that DOL finds to have intentionally not complied with LCA attestations or other DOL requirements. An H-1B dependent employer is an employer:

- With 7 or more H-1B employees who has 25 or fewer full-time equivalent employees (FTE);
- With more than 12 H-1B employees who has 26-50 FTEs; or
- With 15 percent of the workforce as H-1B employees who has 51 or more FTEs.¹¹⁶

An LCA is not required for H-1B employees who will be working in a Department of Defense project.

1. Validity

An LCA may be valid for a period up to three years.¹¹⁷

The LCA, which may be a photocopy of the original, must be valid for the period of time requested for the petition. The dates of intended employment for initial petitions cannot extend outside the dates on the LCA.¹¹⁸ This generally applies to extension of stay petitions from the same employer as well.¹¹⁹

¹¹⁴ See INA 212(n)(3)(A).

¹¹⁵ See 20 CFR 655.736-739.

¹¹⁶ See 20 CFR 655.736.

¹¹⁷ See 20 CFR 655.750(a).

¹¹⁸ See 8 CFR 214.2(h)(9)(iii)(A)(1).

¹¹⁹ 8 CFR 214.1(c)(4) allows USCIS the discretion to excuse a late extension of stay filing. This regulatory provision would be rendered meaningless if USCIS did not interpret 8 CFR 214.2(h)(9)(iii)(A)(i) to permit acceptance of a late-

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Comment [JVT98]: OPS(JVT): AAO's edits look fine. Steven and Kate – any concerns?

Kate: Agree.

Comment [JVT99]: OPS(JVT): AAO's edits look fine. Steven and Kate – any concerns?

OPS/KMA: No concerns.

Comment [RHC100]: note that on page 15 we

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2. Multiple Beneficiaries

Multiple unnamed beneficiaries may be included on the LCA, however, the petitioner must reference, by file number, all previously approved petitions that used the same LCA. Once a position on the LCA has been used for a specific beneficiary, the position cannot be used for another beneficiary. This is true even if the original beneficiary leaves the job permanently before the LCA expired.

3. Inability to Obtain LCA

In general, there is no exception from the requirement that a petitioner submit a certified LCA with the H-1B petition. USCIS rejects or denies petitions that do not have certified LCAs.

Under certain extraordinary circumstances as coordinated with DOL, former INS temporarily allowed the LCA filing to occur after the initial petition filing. These circumstances included the Federal government shutdown in 1996 in which DOL was unable to issue LCAs and a DOL technical system failure which only allowed for screen prints.¹²⁰ USCIS maintains the discretion in certain extraordinary circumstances, like a Federal government shutdown, to temporarily allow for the late filing of an LCA.¹²¹

C. Position Must Be a Specialty Occupation

Certification of an LCA by DOL does not mean that the position is a specialty occupation. Only USCIS can determine whether the position meets the criteria for a specialty occupation.

A specialty occupation is an occupation that requires both:

- 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 requirement for entry into the occupation in the United States.¹²²

filed LCA as well. Example: USCIS decides, in its discretion, to accept a late-filed EOS where the lateness of filing was due to ineffective assistance of counsel. USCIS has the discretion to accept a late-filed LCA as well.

¹²⁰ The adjudications function of the former INS was not shutdown during that period, and former INS continued to accept H-1B petitions.

¹²¹ In 2013, USCIS issued an alert notifying the public that USCIS considered the government shutdown an extraordinary circumstance. In this situation, USCIS excused the late filing of H-1B extension of stay or change of status requests due to the extraordinary circumstances, if the petitioner met all other applicable requirements. See the USCIS website for more information.

¹²² See INA 214(i)(1). See 8 CFR 214.2(h)(4)(ii).

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Comment [JVT101]: OPS(JVT): edits look good

Comment [JVT102]: OPS(JVT): looks good

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A specialty occupation is further defined in the regulations as an occupation which requires requires the theoretical and practical application of a body of highly specialized knowledge in such fields of human endeavor including, but not limited to:

Comment [JVT103]: SCOPS edit

- Architecture;
- Engineering;
- Mathematics;
- Physical sciences;
- Social sciences;
- Medicine and health;
- Education;
- Business specialties;
- Accounting;
- Law;
- Theology; and
- The arts.

- The occupations must also require the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.¹²³ USCIS should not make determinations solely based on a job title but rather look at the detailed description of the duties.

Comment [JVT104]: SCOPS Edit.

1. Determining if the Proposed Employment Is a Specialty Occupation

Comment [JVT105]: OPS(JVT): looks good

USCIS considers all of the facts surrounding the petition in determining whether the employment is a specialty occupation, including:

¹²³ See 8 CFR 214.2(h)(4)(ii).

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- The nature of the petitioner’s business or industry practice; and
- A detailed description of the duties the employee is to perform.

USCIS recognizes DOL’s Occupational Outlook Handbook (DOH) as one authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. However, the OOH is not determinative. USCIS also considers other sources provided by the petitioner. In reviewing this information, officers should know that:

- Some occupations evolve and job titles themselves may change and
- A single factor, such as the job title or salary, does not by itself determine whether the position qualifies as a specialty occupation.

2. Specialty Occupation Criteria

To qualify as a specialty occupation, the position must meet at least one of the following criteria:¹²⁴

- A bachelor or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by a person with a degree;
- The employer normally requires a degree or its equivalent for the position; or
- The nature of the 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.

The degree must be in the specific specialty directly related to the H-1B position, unless the petitioner demonstrates that an alternative, closely related specialty degree applies to the position.

¹²⁴ See 8 CFR 214.2(h)(4)(iii)(A).

Comment [HJC106]: AAO: For clarity, we suggest revising this sentence to state “The decision

Comment [HJC107]: AAO: For clarity, we suggest revising this sentence to state “The decision

Comment [LPP108]: AAO: We are okay with

Kate: No objection.

Comment [LPP109]: AAO: We are okay with

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Officers must not solely rely upon the position title. In order to determine if the position sought is a specialty occupation, the officer must evaluate the duties of the employee. The understanding of the duties and how the position fits into the petitioner’s organization is relevant to determining whether the position is a specialty occupation. Officers must evaluate the duties of the position against the four criteria listed above, with the understanding that the required “degree” is a bachelor’s or higher degree in a specific specialty or its equivalent.

Bachelor’s Degree Normally Required

In order to meet the first prong, the position offered must normally require a person with at least a bachelor’s degree in a specific specialty, or its equivalent, to perform the duties of the particular position. Officers may reference the OOH to ascertain the educational and/or experience requirements of positions and should try to match the proffered duties, not just the title of the occupation.

A position qualifies as a specialty occupation when the petitioner establishes by a preponderance of the evidence that the particular position normally requires a bachelor’s degree in a specific specialty, even if the occupation does not always require a bachelor’s degree. When adjudicating whether a specialty occupation exists, the evaluation focuses on whether the knowledge gained through the course of study allows the beneficiary to perform the job duties, rather than focusing on the title of the degree or major.

The statutory and regulatory language does not require that the body of highly specialized knowledge to be practically applied in performing the duties of the proffered position be limited to the attainment of a single, sole specialty in a discrete academic major.

Degree Requirement

- Industry Standard: Common to the Industry

In order to meet this second regulatory criterion, the petitioner must show that the statutory specialty degree requirement is an industry standard. The petitioner must present evidence to show that the position offered or a parallel position is widely known in the petitioner’s industry among similar organizations to require a person with at least a bachelor’s degree in a specific specialty or its equivalent to perform the duties. This involves referring to companies of similar size and scope to the petitioner within the specific industry.

Some factors considered when determining this criterion include evidence that the industry’s professional association has made a degree a minimum entry requirement, letters or affidavits from firms or persons in the industry attesting that such firms or people routinely employ and

Comment [LPP110]: AAO: This previously

Kate – any objections?

OPS/Kate: I agree.

Comment [LPP111]: AAO: This previously

Kate – any objections?

Comment [HJC112]: AAO: We recommend

Kate: Agree.

Comment [HJC113]: AAO: We recommend adding “parallel position” and “among similar organizations” to this discussion in order for it to be consistent with the regulatory language at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

OPS(JVT): No objection to AAO’s edit. Steven and Kate, any concerns?

DPS/KMA: No concern.

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recruits only people with degrees,¹²⁵ and any other evidence that may establish the degree requirement as an industry standard.

In certain professions, it will be very clear that this criterion has been satisfied [redacted]. A letter is not usually sufficient, however, if the letter does not specify that the degree must be in a specific specialty and the petitioner does not submit additional substantiating documentary evidence.

- Complex or Unique

In the alternative, a petitioner can show that a bachelor’s degree is required by showing that the particular position is so complex or unique that only a person with at least a bachelor’s degree in a specific specialty or its equivalent [redacted] can perform the position’s duties.

Petitioner Normally Requires a Degree

In order to show that a degree is required through this method, the petitioner must demonstrate that historically the person(s) who have performed the duties of the position for the petitioner have possessed at least a bachelor’s degree in a specific field of study, or its equivalent. A petitioner may submit evidence that current or previous employees in the position or occupation have at least a bachelor’s degree in the specific specialty, or its equivalent.

The critical element is not the title of the position [redacted] but whether the position or the duties [redacted] normally require the 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 the minimum for entry into the particular position [redacted].¹²⁶ Evidence may include, but is not limited to:

- Resumes;
- Copies of degrees or transcripts; or
- Previous postings for this particular position.

As long as the petitioner can establish that it has normally required a bachelor’s or higher degree in the specific fields of study [redacted] directly [redacted] related to the particular

¹²⁵ See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

¹²⁶ See 8 CFR 214.2(h)(4)(iii)(A).

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Comment [HJC114]: AAO: This is incorrect.

OPS/JVT: accept edit.

Comment [HJC115]: AAO: For clarity, we recommend revising this sentence as indicated.

OPS/JVT: Accept edit.

Comment [RHC116]: But this is about whether the employer normally requires a degree, and typically an employer’s requirement in this regard is self-imposed since it is their requirement.

OPS/KMA OK with deletion.

Comment [STN117]: Is this a separate element

OPS/KMA-If I understand you correctly, yes; this is

Comment [JVT118]: SCOPS: Please clarify the

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position, then that position may qualify [REDACTED] as a specialty occupation,¹²⁷ even if some people are employed or have been employed by the employer in that position [REDACTED] with an unrelated or lesser degree. Moreover, an H-1B beneficiary with an unrelated or lesser degree may qualify for the position if the evidence establishes that the beneficiary possesses the necessary equivalent experience required to perform the duties of the specialty occupation.

Nature of Duties

A petitioner may demonstrate that a degree in a specific specialty is required for the position by showing that the specific duties of the position are so specialized and complex that it usually requires knowledge acquired from [REDACTED] minimum of a bachelor's degree in a specific specialty, or its equivalent. [REDACTED] A petitioner's statement alone is not sufficient to meet the criterion under this requirement. The petitioner must provide independent documentation to corroborate the claim.¹²⁸

D. Employer-Employee Relationship

1. Demonstrating the Employer-Employee Relationship

Many factors affect whether a valid employer-employee relationship exists or will exist between the U.S. employer and the beneficiary throughout the requested H-1B validity period. Engaging a person to work in the United States is more than the act of paying the wage or placing that person on the payroll. In considering whether or not there is a valid employer-employee relationship for H-1B purposes, USCIS must determine if the employer has a sufficient level of control over the employee.

The regulations state that the existence of an employer-employee relationship is indicated "by the fact that it may hire, fire, pay, supervise, or otherwise control the work of [the] employee."¹²⁹

The employer must be able to establish that it has the right to control over when, where, and how the beneficiary performs the job. The right to control the beneficiary is different from actual control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the right to control the beneficiary.

Although no single factor is decisive, the following factors are relevant to determine the employer-employee relationship:

¹²⁷ See 8 CFR 214.2(h)(4)(iii)(A)(1).

¹²⁸ See *Matter of Saffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

¹²⁹ See 8 CFR 214.2(h)(4)(iii).

Comment [JVT120]: SCOPS: What would be

Comment [JVT121]: SCOPS: What would be

Comment [RHC122]: This appears to be inconsistent with the regulatory prong which refers

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- Location of the beneficiary's work.
- Petitioner's supervision of the beneficiary.
 - On-site supervision.
 - Off-site supervision.
 - Method of supervision: weekly calls, routine reports to main office, site visits by supervisor
- Petitioner's discretion over when and how long a beneficiary must work on a day-to-day basis;
- Tools or instrumentalities needed for the beneficiary to perform the duties of employment provided by Petitioner;
- Petitioner's ability to hire, pay, and fire the beneficiary;
- Petitioner's evaluation of the work-product of the beneficiary, for example-use of progress or performance reviews;
- Petitioner claims the beneficiary for tax purposes;
- Any type of employee benefits;
- Beneficiary uses petitioner's proprietary information to perform the duties of employment;
- Beneficiary produces an end-product that is directly linked to the petitioner's line of business;
- Petitioner's right to control the manner and means in which the work product of the beneficiary is accomplished; and
- Petitioner's right to assign additional projects to the beneficiary.

The common law is flexible about how to weigh these factors. The petitioner meets the relationship test, if, in the totality of the circumstances, the petitioner presents evidence to establish its right to control the beneficiary's employment.

Degree of Control

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In assessing the requisite degree of control, the officer should review the nature of the petitioner's business and the type of work the beneficiary will perform. The petitioner must also establish that its control of the beneficiary's employment will continue to exist throughout the duration of the beneficiary's employment term with the petitioner.

[Redacted]

The following table provides examples of types of employment scenarios that may qualify as valid employer-employee relationships when the employer exercises control. Officers will see a variety of situations and factors when reviewing an H-1B petition and must analyze each case on its own merits.

[Redacted Table]

An invalid employee-employer relationship generally involves situations where the employer has no right to or actual control over the beneficiary's work, salary, benefits, or evaluations. A contract may indicate the petitioning employer's lack of responsibility and control over the beneficiary and beneficiary's work duties. The following table provides examples of types of employment with invalid employer-employee relationships where the employer has no control.

[Redacted Table]

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Comment [PPL123]: AAO: As discussed and agreed to previously, we request that this first

[Redacted]

OPS/Kate Agree with deletion.

Comment [PPL124]: AAO: As discussed and agreed to previously, we request that this first

[Redacted]

Comment [CMS125]: AAO: This additional language was taken verbatim from the previous

[Redacted]

Comment [CMS130]: AAO: We did not like the examples from the prior version, primarily because

[Redacted]

Comment [RHC126]: Suggest deleting this entire chart. They provide little to no value and

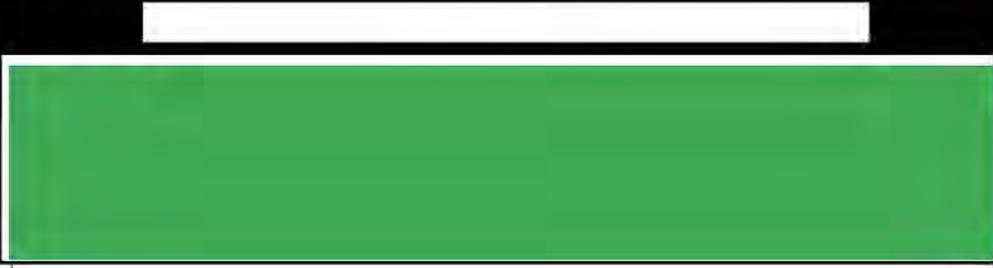
[Redacted]

DPS/KMA: OK with deletion.

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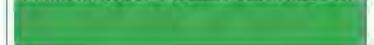
2. Documentation to Establish the Employer-Employee Relationship

Initial Petition

The petition must establish that the above elements will more likely than not continue to exist throughout the duration of the requested H-1B validity period. The petitioner may be able to demonstrate an employer-employee relationship by providing a combination of the following or similar types of evidence:

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested;
- Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;
- Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized) that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees [redacted];
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and the beneficiary's duties, and any other related evidence;

Comment [RHC127]: This is misleading. Some



OPS/KMA: I suggest deleting the chart.

Comment [RHC128]: This is misleading. Some



OPS/KMA: I suggest deleting the chart.

Comment [CMS129]: AAO: We did not like the examples from the prior version, primarily because



OPS(JVT): if this section/chart is going to cause a lot of confusion, I think it should be removed. However, defer to Steven and Kate.

OPS/Kate Agree with removing chart.

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- Copy of position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and the beneficiary, whether the petitioner has the right to assign additional duties, the extent of the petitioner’s discretion over when and how long the beneficiary will work, the method of payment, the petitioner’s role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;
- A description of the performance review process; or
- Copy of the petitioner’s organizational chart, demonstrating the beneficiary’s supervisory chain.

*Extension Petitions*¹³⁰

An H-1B petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists and will continue to exist. The petitioner must provide evidence that the U.S. employer continues to have the right to control the work of the beneficiary. The petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

- Copies of the beneficiary’s pay records (for example, leave and earnings statements, and pay stubs) for the period of the previously approved H-1B status;
- Copies of the beneficiary’s payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of time sheets during the period of previously approved H-1B status;
- Copy of prior years’ work schedules;
- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period (for example copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, website text, news copy, photographs of prototypes, and

¹³⁰ In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

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Comment [PPL131]: AAO: The prior version said “and/or” here. We request that it be reverted.

OPS(JVT): no strong objection to having and/or. Just need to double check PM style manual.

OPS/KMA-No objection because it seems to be warranted here, to describe “either or both” payroll summaries and W-2s. I checked the PM style manual, and there is nothing prohibiting its use.

Comment [PPL132]: AAO: The prior version said “and/or” here. We request that it be reverted.

OPS(JVT): no strong objection to having and/or. Just need to double check PM style manual.

OPS/KMA PM style manual does not prohibit and/or.

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any other related documents). The documentation must clearly authenticate the author and date created;

- Copy of dated performance review(s); and
- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes. For example, promotions, demotions, transfers, layoffs, and pay changes with effective dates.

If the determination is made that the petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, USCIS may deny the petition and request for extension.

E. Itinerary Requirement

In all cases, if the petitioner requires services to be performed [REDACTED] at more than one work location [REDACTED], then the petitioner must submit an itinerary with the dates and locations of the services.¹³¹ If a U.S. agent files the petition as an agent performing the function of an employer, the agent petitioner must include an itinerary of definite employment. If an agent files the petition on behalf of multiple employers, the petitioner must [REDACTED] submit a complete itinerary of services or engagements that specifies:

- The dates of each service or engagement,
- The names and addresses of the actual U.S. employers, and
- The names and addresses of the establishment, venues, or
- Locations where the services will be performed for the period of time requested.¹³²

The itinerary is material evidence in that it assists USCIS in determining that:

- The petitioner has concrete, non-speculative plans in place for a particular beneficiary;
- The beneficiary is or will be performing duties in a specialty occupation; and
- The beneficiary is not being and will not be *benched* (nonproductive time¹³³ caused by conditions related to employment, such as lack of assigned work, lack of a permit, or studying for a licensing exam) without pay between assignments.

¹³¹ See 8 CFR 214.2(h)(2)(i)(B).

¹³² See 8 CFR 214.2(h)(2)(i)(F).

Comment [RHC133]: Revised to be more consistent with the plain language of the regulation.

DPS/KMA Thanks for the edits. Accepted.

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F. Additional Requirements

1. Petitioner's Need for the Services

In general, officers may accept evidence of a petitioner's business plans and the staff it needs to grow its business, especially where the requested position aligns with a business plan. A petitioner that may on the surface appear not to have a need for a particular position because of its small size or relative newness might in fact have a critical need for that position in order to grow.

However, the petitioner must meet ~~its~~ the burden of showing that the position is consistent with both its current operations and its business plan for the future by a preponderance of the evidence. The position cannot be speculative in nature. The petitioner must have an immediate need for the position, and must establish eligibility for the benefit request at the time of filing and must continue to be eligible through adjudication. The petitioner cannot base the need on facts not provided or based on future growth, which is impossible to substantiate. [REDACTED] USCIS may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts.¹³⁴

Officers may encounter [REDACTED] cases involving petitions filed by small businesses for beneficiaries with professional skills not normally associated with persons employed in such a business. For example, a petition for an [REDACTED] Certified Public Accountant (CPA) position filed by an small auto repair business or restaurant may not qualify, unless the petitioner demonstrates there is a specialty occupation position to be filled. The officer must assess whether the offered position would in fact be a CPA position or whether it is instead a [REDACTED] bookkeeping, accounting, or auditing clerk position.

If a family member or friend filed the petition USCIS may investigate ~~them~~ further in order to ensure that the petition was not filed merely as an accommodation to the beneficiary. The burden of proof falls on the petitioner to demonstrate the need for such an employee.

After giving proper deference to the petitioner's business plan and legitimate operating needs, unless if the officer does not believe the petitioner has established by a preponderance of the evidence [REDACTED] that a legitimate need exists, the officer may deny the petition because the petitioner has failed to demonstrate that [REDACTED] the beneficiary will be employed in-is a qualifying specialty occupation.

Comment [STN134]: Should we say "The

OPS/KMA: Added language closely tracking 103.2(b)(1).

Comment [RHC135]: This is potentially confusing, especially since we are often times

OPS/KMA OK with deletion.

OPS/KMA: Unclear. See edits.

Comment [STN137]: Are there instances where

OPS/KMA: Good point. See edits.

Comment [JVT138]: SCOPS edit

OPS(JVT): Accept, thanks!

¹³³ See DOL Fact Sheet 621.

¹³⁴ See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

2. Payment of Wage

It is not necessary that an H-1B or E-3a petitioner demonstrate an "ability to pay" the required wage because it is not part of the H-1B or E-3 regulations as required for employment-based immigrant visa petitions.¹³⁵ ¹³⁶ That means that a petitioner need not demonstrate that it has a certain minimum amount of income or assets to pay the wage stated on the LCA, unlike what is generally required for employment-based immigrant visas. However, an officer may request evidence of financial ability if the financial condition of the petitioner calls into question whether the petitioner intends to offer viable employment to [REDACTED] the beneficiary. The financial standing of the petitioner, when taken in consideration with other factors, may indicate that the petition does not include a valid job offer. Other factors that an officer may examine include, but are not limited to:

- The nature of the petitioner's business;
- The relationship between the beneficiary and the owners or officers of the petitioner; and
- The petitioner's immigration filing history.

3. Payment of Return Transportation Costs

If the H-1B employer terminates the employment of the H-1B employee before the validity of the petition approval expires, the employer is liable for the reasonable costs of return transportation to the H-1B employee's home country.¹³⁷ A terminated H-1B employee who does not receive return transportation home has a cause of action against the former employer and may file suit for that amount.



¹³⁵ See 8 CFR 204.5(g)(2).
¹³⁶ See 8 CFR 204.5(g)(2).
¹³⁷ See INA 214(c)(5)(A).

Comment [JVT139]: OPS(JVT): Ok with having quotes here.

Comment [STN140]: What if we add a clarifying sentence after this saying, "That means that a petitioner need not demonstrate that it has a certain minimum amount of income or assets to pay the wage stated on the LCA, unlike what is generally required for employment-based immigrant visas."

OPS/KMA Added.

Comment [JVT141]: SCOPS:



Comment [JVT142]: SCOPS:



Comment [JVT143]: SCOPS:
Need clarification. It means the petitioner's filing history?

OPS(JVT): This is a good question. Filing history seems fine.

Comment [JVT144]: SCOPS:
Need clarification. It means the petitioner's filing history?

OPS(JVT): This is a good question. Filing history seems fine.



Comment [JVT145]: SCOPS: This does not



Chapter 4. Specific Beneficiary Requirements

The H-1B beneficiary must be qualified to engage in the specialty occupation. The petitioner must submit one of the following to show that the beneficiary possesses the minimum requirements for entry into the field:

- A U.S. bachelor’s or higher degree required by the specialty occupation from an accredited college or university;
- A foreign degree determined to be equivalent to a U.S. bachelor’s or higher degree required by the specialty occupation from an accredited college or university;
- An unrestricted state license, registration, or certification, which authorizes the beneficiary to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.

The petitioner may also submit a combination of:

- Education, specialized training, or progressively responsible experience that is equivalent to completion of a U.S. bachelor’s or higher degree in the specialty occupation demonstrating that the beneficiary is qualified to perform the duties of the specialty occupation, and
- Recognition of expertise in the specialty occupation through progressively responsible positions directly related to the specialty.¹⁴¹

A. Initial Documents

The petitioner is required to provide documentary evidence to establish that the beneficiary is qualified to perform the services in the pertinent specialty occupation.¹⁴²

¹⁴¹ See 8 CFR 214.2(h)(4)(iii)(C).

¹⁴² See 8 CFR 214.2(h)(4)(iv)(A).

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School records, diplomas, degrees, affidavits, declarations, contracts, and similar documentation submitted must:

- Reflect periods of attendance, courses of study, and similar pertinent data, and
- Be executed by the person in charge of the records of the educational or other institution, firm, or establishment where the beneficiary acquired the education or training.¹⁴³

Affidavits or declarations made under penalty of perjury submitted by present or former employers or recognized authorities certifying as to the recognition and expertise of the beneficiary must:

- Specifically describe the beneficiary's recognition and ability in factual terms; and
- ~~Set forth~~ Indicate the expertise of the affiant and the manner in which the affiant acquired such information.¹⁴⁴

A petitioner may submit copies of the academic transcripts that are associated with any academic diploma, and likewise, copies of whatever documentation and records correspond to training that the petitioner claims USCIS should credit towards the beneficiary's qualification for the proffered position. The petitioner may submit similar documentary evidence for claims that the work experience should be credited towards establishing the beneficiary's qualifications.



Comment [UU146]: AAO: The prior version used "Set forth" to match the regulation. It may have been changed for plain language purposes, but we think it is important to retain "Set forth" instead of "Indicate."
 OPS(JVT): set forth is fine. Thanks.

B. U.S. Bachelor's or Higher Degree

If the documentary evidence is sufficient to establish that the beneficiary was awarded a bachelor's or higher degree in a specific specialty by an accredited U.S. college or university, it may meet the degree requirement. The fact that the beneficiary earned the U.S. degree in less than four years (or more than four years) is not necessarily relevant. However, the degree must

Comment [RHC147]: Why do we say this here?


¹⁴³ See 8 CFR 214.2(h)(4)(iv)(A)(1).

¹⁴⁴ See 8 CFR 214.2(h)(4)(iv)(A)(2).



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be in the specific specialty required to enter the occupation, or a specialty directly related to the occupation.¹⁴⁷

If the relation of the bachelor's degree to the H-1B specialty occupation is not immediately apparent, transcripts may be requested to demonstrate how the body of highly specialized knowledge leading to a degree in the specific specialty meets the requirements for the proffered position.

C. Equivalent Foreign Degree¹⁴⁸

Officers must review a foreign degree to determine if it is equivalent to a U.S. bachelor's degree or higher degree from an accredited college or university. A petitioner should submit an evaluation of the foreign degree with an evaluation from a reliable credentials evaluation service which specializes in evaluating foreign educational credentials.

1. Education Evaluation from a Reliable and Specialized Evaluation Service¹⁴⁹

The regulations recognize for consideration only an evaluation of education (not training or experience) from educational evaluations services. Any portion of an evaluation by a credential evaluations service that claims to evaluate training or work experience may be considered when reviewing the education evaluation.

2. Degree Evaluation

Officers may favorably consider a credentials evaluation performed by an independent credentials evaluator who provides a credible analysis for such an equivalency determination that is based solely on the beneficiary's foreign degree(s). Officers consider the opinions rendered by an educational credentials evaluator in conjunction with a review of the beneficiary's relevant educational credentials.

Officers may also consider other available credible resource material regarding the equivalency of the educational credentials to college degrees obtained in the United States. Opinions rendered that do not provide a credible basis for the evaluator's opinions are not persuasive.

Singular Degree

The degree equivalency must indicate that a single degree of the beneficiary's is equivalent to a bachelor's or higher degree in the specific specialty from an accredited U.S. institution.¹⁵⁰

[Redacted]

¹⁴⁸ See 8 CFR 214.2(h)(4)(iii)(C)(2).

¹⁴⁹ See 8 CFR 214.2(h)(4)(iii)(D)(3).

¹⁵⁰ See 8 CFR 214.2(h)(4)(iii)(C)(2).

Comment [RHC148]: Seems odd that we include a citation that just cites them back to the same chapter that they are reading...

DPS/KMA: Agree Deleted footnote

Comment [JVT149]: SCOPS:

[Redacted]

Comment [JVT150]: SCOPS:

[Redacted]

Comment [JVT151]: SCOPS:

I do not believe it is a requirement for a petitioner

[Redacted]

Comment [RHC152]: The regs do not preclude

[Redacted]

Comment [RHC153]: Logical seems like an odd point to include, and I deleted it since it would not be credible if it is not logical.

DPS/KMA OK with deletion.

Comment [RHC154]: What do we mean by

[Redacted]

(b)(5)

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For example, a two two-year associate's degrees cannot be combined to demonstrate that the beneficiary has a foreign degree equivalent to a bachelor's or higher degree in the specific specialty from an accredited college or university in the United States.¹⁵¹ Instead, officers should evaluate the two two-year associate degrees as possession of progressively responsible experience, education, or training that equates to the completion of a U.S. bachelor's or higher degree in the specific specialty.¹⁵² Officers should carefully analyze both the evaluation and the beneficiary's credentials to determine whether they are factually consistent, including the field in which the beneficiary received a degree.

Educational Evaluation Used as an Advisory Opinion

An officer may, with discretion, use as an advisory opinion an educational credentials evaluation that is submitted as expert testimony.¹⁵³ When an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that opinion.¹⁵⁴ Some factors that may call into question the reliability or credibility of an educational evaluation include:

- Reliance on certificates or diplomas from non-accredited schools or non-degree-granting institutions such as commercial technical schools or professional associations;
-  inconsistencies between the analyses or the conclusions reached by the different evaluators, when the petitioner submits two or more evaluations. The petitioner must resolve any material inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact lies, will not suffice.¹⁵⁵ or
- Factual inconsistencies between the evaluation and the beneficiary's educational documents.

Record of Proceeding

¹⁵¹ See 8 CFR 214.2(h)(4)(iii)(C)(2).

¹⁵² See 8 CFR 214.2(h)(4)(iii)(C)(4).

¹⁵³ See *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). See *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

¹⁵⁴ See *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). See *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

¹⁵⁵ See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Comment [STN155]: Edited because this bullet forms part of a sentence so the first sentence should not be a full sentence on its own.

OPS/KMA OK with edits.

Comment [HJC156]: AAO: The prior version provided the following:

This appears to be the result of plain language edits. Therefore, please see suggested changes to this section to make the sentences complete.

OPS(JVT): accept edits.

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50

The record of proceeding must contain all of the beneficiary's credentials which the evaluator considered [REDACTED] in the evaluation and, if in a foreign language, a certified English translation.¹⁵⁶ Also, officers should carefully analyze both the evaluation and the beneficiary's credentials to determine whether they are factually consistent, including the field in which the beneficiary received a degree. USCIS officers may also consider other available credible resource material regarding the equivalency of the educational credentials to college degrees obtained in the United States. Opinions rendered that do not provide a credible basis for the evaluator's opinions are not persuasive.¹⁵⁷ If the officer considers any documentation not provided by the petitioner, the officer must supplement the record with copies of any such documents and, if USCIS issues an adverse determination [REDACTED] to allow the petitioner an opportunity to respond to that documentation.

3. Uses of Foreign Education Credentials Evaluations

There are a number of outside organizations which evaluate educational credentials to determine degree equivalency. [REDACTED] Although USCIS does not specifically recognize or accredit any sources of evaluations, foreign educational degree evaluations may assist officers if the evaluation is:

- Complete and detailed;
- Well documented; and
- Specific in reaching an equivalency determination.

Consultation of Education Evaluation Resources

Officers may, with discretion,¹⁵⁸ consult education evaluation resources, regarding the equivalency of the beneficiary's foreign degree absent the provision of a foreign education credential evaluation by the petitioner, for assistance to:

- Resolve discrepancies; or
- Provide clarification.

Consultation of an education evaluation resource may sometimes produce results that are inconsistent with an evaluation in the record. To the extent that the education evaluation

¹⁵⁶ [REDACTED]
¹⁵⁷ [REDACTED]

¹⁵⁸ Officers are never required to consult an education evaluation resource, although the officer may decide to do so in certain circumstances. Management approval is required before an officer can request a consultation.

Comment [HJC157]: AAO: The reference to the

[REDACTED]

DPS(JVT): agree. Accept edit.

Comment [KMA158]: I would prefer to strike this statement because I think that it might create more external confusion than assist with providing clarity to our audience, without agreed upon guidelines for the credibility.

Comment [UU159]: AAO: Why was the following deleted?

[REDACTED]

Comment [UU160]: AAO: Why was the following deleted?

[REDACTED]

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[REDACTED] suggest to say that instead.

DPS/KMA See edits.

Comment [STN162]: This sentence seems a bit

[REDACTED]

OPS/KMA OK with deletion.

Comment [JVT163]: SCOPS: May want to

[REDACTED]

(b)(5)

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resource consulted by an officer casts doubt regarding the [REDACTED] beneficiary's foreign education and that derogatory information will form the basis of a decision adverse to the petitioner, the officer must first provide a summary of the education evaluation resource information to the petitioner and provide it with an opportunity to rebut that information before denying the petition.¹⁵⁹

In such situations, officers should print a copy of the information contained in the education evaluation resource and incorporate that information into the record of proceeding. Officers must:

- Add a copy to the Record of Proceeding;
- Advise the petitioner of the information in the education evaluation resource;
- Provide a copy to the petitioner, or if not permitted by a licensing agreement, a summary of that information; and
- Afford the petitioner an opportunity to rebut the information in the education evaluation resource.

The petitioner's response must resolve any material inconsistencies in the record by independent objective evidence.¹⁶⁰ Any rebuttal of the information from an education evaluation resource should also come from an equally credible source.

4. Non-Probative Evidence

There are varying forms of evidence petitioners submit to support the claims of the beneficiary's foreign degree equivalency to a U.S. degree. Each piece of evidence carries a certain amount of evidentiary weight in immigration proceedings. The standard of proof in H-1B nonimmigrant cases is the preponderance of the evidence standard. The table below provides a list of evidence that is not useful to determine a foreign degree's equivalency to a U.S. degree.

Non-Probative Evidence for Beneficiary Educational Qualifications	
Type of Evidence	Summary
United Nations Educational Scientific	<ul style="list-style-type: none"> • Educational evaluations may reference as exhibits excerpts from the 1993 UNESCO document regarding recognition of

¹⁵⁹ See 8 CFR 103.2(b)(16).

¹⁶⁰ See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Comment [HJC165]: AAO: The original stated

DPS(JVT): agree with edit.

Comment [UU166]: AAO: We need to add

DPS(JVT): No objection, but would like SCOPS to confirm this language is ok.

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Non-Probative Evidence for Beneficiary Educational Qualifications

Type of Evidence	Summary
and Cultural Organization (UNESCO)	<p>foreign educational qualifications.</p> <ul style="list-style-type: none"> Relates to admission to graduate school and training programs and eligibility to practice in a profession. Does not define “comparable qualifications” that should be recognized. Is not useful in determining whether the beneficiary’s degree is the foreign equivalent of a U.S. bachelor’s degree required by the specialty occupation.
Contact Hours	<ul style="list-style-type: none"> Educational evaluations may argue that the foreign educational system works on contact hours and that the amount of completed contact hours is equivalent to the number of credit hours required for completion of a U.S. bachelor’s degree. Hours spent in the classroom with an instructor. May vary by country and are not equivalent to credit hours.
Credit Hours	<ul style="list-style-type: none"> Amount of credits received for taking a course and include work performed outside the classroom.¹⁶¹ Some evaluators will argue that a student completing a three-year degree will have more [REDACTED] hours.”
Carnegie Units	<ul style="list-style-type: none"> Defined and accepted in 1909 as a theoretical measure to gauge education, and is used to measure the amount of time a student has studied a subject.
Bologna Bachelor’s Degree	<ul style="list-style-type: none"> Does not apply to higher education and, therefore, is not a useful means for evaluating post-secondary education. Issued in several European countries, is (in most cases) a three-year freestanding degree designed to prepare students for further study or employment. May be cited and argued that it and other three-year bachelor’s degrees are equivalent to a four-year U.S. degree. Comparisons to Bologna degrees are not useful in evaluating the equivalency of a foreign degree.¹⁶²



¹⁶¹ Typically, in the United States, a three-semester credit hour course meets three 50-minute sessions per week for fifteen weeks for a total of 45 sessions. U.S. students typically complete 120 credit hours for a bachelor’s degree.

¹⁶² An assessment of the Bologna Process concluded: “Even though the Bologna Process has resulted in shorter degree programs that are defined in terms of required credits and introduced a two-tiered (undergraduate and

(b)(5)

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D. Education, Specialized Training, or Progressively Responsible Experience¹⁶³

A petitioner may seek [REDACTED] to establish that the beneficiary has achieved a level of knowledge, competence, and practice in the specialty occupation that is equivalent to completion of a U.S. bachelor's or higher degree in the specialty through a combination of education, specialized training, and/or progressively responsible experience. If seeking to qualify under this provision, the petitioner must demonstrate that the beneficiary has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty. The petitioner must also demonstrate that the beneficiary's achievement of a level of knowledge, competence, and practice in the specialty occupation has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty as determined by one or more of the following:

1. Evaluation of Training or Experience

A beneficiary may satisfy the required educational requirements through training and/or experience. The training or experience must be evaluated [REDACTED] by an authorized official. The authorized official must:

- Be substantively endorsed by an appropriate representative of the educational institution, such as a dean or provost, that can speak authoritatively on the issue;¹⁶⁴
- ~~Have the authority to~~ grant college-level credit for training and/or experience in the specialty;
- ~~Grant the credit~~ at an accredited college or university; and
- The accredited college or university must have a program for granting such credit.¹⁶⁵

The need to show that the beneficiary is qualified for the specialty occupation through training and/or experience can arise in a variety of situations.¹⁶⁶ The petitioner must demonstrate that

graduate) system, the new European bachelor's is still quite distinct from its U.S. counterpart. See World Education News & Reviews ("WES"), "Evaluating the Bologna Degree in the U.S.," March-April 2004.

¹⁶³ See 8 CFR 214.2(h)(4)(iii)(C)(4) and 8 CFR 214.2(h)(4)(iii)(D).

¹⁶⁴ See 8 CFR 214.2(h)(4)(iii)(D)(1).

¹⁶⁵ See 8 CFR 214.2(h)(4)(iii)(D)(1).

¹⁶⁶ For example, the beneficiary might possess a U.S. bachelor's degree in a field that is not related to the specialty occupation. In addition, a beneficiary may [REDACTED] not possess a U.S. bachelor's degree or a foreign degree equivalent to that degree.

Comment [CMS168]: AAO: Given the removal

OPS(JVT): no objection to including this language. Steven and Kate – do you agree?

Comment [HJC169]: AAO: we recommend keeping "and/or" to be consistent with 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

OPS(JVT): seems fine, just need to check PM style guide.

OPS/Kate – PM Style Guide does not prohibit "and/or".

Comment [HJC170]: AAO: we recommend keeping "and/or" to be consistent with 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

OPS(JVT): seems fine, just need to check PM style guide.

Comment [UU171]: AAO: The word [REDACTED] appears to be new. We suggest sticking to the regulation's use of "evaluation" and using "evaluated" instead.

OPS(JVT): agree.

Comment [STN172]: Have the authority to?

OPS/KMA added.

Comment [HJC173]: AAO: We recommend keeping "and/or" to be consistent with 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

OPS(JVT): seems fine, just need to check PM style guide.

Comment [HJC174]: AAO: We recommend keeping "and/or" to be consistent with 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

Comment [STN175]: Have the authority to? Or is this even necessary as a separate bullet? Can we collapse this with the one above?

Comment [HJC176]: AAO: We recommend keeping "and/or" to be consistent with 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

Comment [HJC177]: AAO: We recommend keeping "and/or" to be consistent with 8 C.F.R. 214.2(h)(4)(iii)(D)(1).

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(b)(5)

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the courses and other work the beneficiary has engaged in equate to athe U.S. bachelor's degree that would be required to engage in the specialty occupation.

For an officer to consider an evaluation of training and/or experience in establishing U.S. degree-equivalency, the evaluation and any supporting evidence must establish all of the following elements at the time the evaluation was conducted:

- The evaluation was produced by a person who was an official of an accredited U.S. college or university;
- The official had authority from that U.S. college or university had a program for granting to grant college-level credit for training and/or experience in the specialty in question credit based on a person's training and/or work experience; and

- [REDACTED]

USCIS does not require the beneficiary to be enrolled in a program for college credit at the university in order to accept the evaluation of such an expert. However, the official must be formally involved with the college or university's official program for granting credit based on training and/or experience to have the required authority and expertise to make such evaluations.

The evaluation may be done in the official's name as a person, or as an authorized representative of the college or university. An officer should consider an acceptable evaluation of training and/or experience in determining eligibility.¹⁶⁷ An evaluation is an advisory opinion only and an officer may discount or give less weight to the evaluation when [REDACTED] the evaluation is questionable.¹⁶⁸

2. College-Level Equivalency Examinations or Special Credit Programs¹⁶⁹

Results of recognized college-level equivalency examinations or special credit programs, include:

- The College Level Examination Program (CLEP), or
- Program on Noncollegiate Sponsored Instruction (PONS).

¹⁶⁷ [REDACTED]

¹⁶⁸ See *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm. 1988).

¹⁶⁹ See 8 CFR 214.2(h)(4)(iii)(D)(2).

Comment [HJC178]: AAO: We recommend keeping "and/or" to be consistent with 8 C.F.R. 214.2(h)(4)(iii)(D)(2).

OPS(JVT): seems fine, just need to check PM style guide.

OPS/KMA PM style guide does not prohibit "and/or" usage.

Comment [HJC179]: AAO: We recommend keeping "and/or" to be consistent with 8 C.F.R. 214.2(h)(4)(iii)(D)(2).

OPS/KMA PM style guide does not prohibit "and/or" usage.

Comment [STN180]: This seems substantially identical to the language above.

OPS/KMA Combined.

Comment [HJC181]: AAO: We recommend keeping "and/or" to be consistent with 8 C.F.R. 214.2(h)(4)(iii)(D)(2).

OPS/KMA No objection.

Comment [STN182]: Not sure how this cite is related to this sentence.

OPS/KMA-Simon is correct. Deleted cite.

Comment [HJC183]: AAO: We recommend revising this sentence to reflect that an evaluation has to meet the requirements under 8 C.F.R. 214.2(h)(4)(iii)(D)(2). Perhaps add the word "acceptable"? That may be sufficient to tie this to the regulatory requirements.

OPS/Kate: Accept edit.

Comment [HJC184]: AAO: For clarity, we recommend keeping the word "only" from the prior version to state "an evaluation is an advisory opinion only..."

OPS(JVT): no objection. Steven and Kate, any objections?

OPS/Kate No objection.

Comment [STN185]: I don't think the case [REDACTED]

OPS/KMA: Accept edit.

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(b)(5)

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An authorized official should translate the examination or special credit program into college credits. These officials include:

- An authoritative source in the particular program; or
- An authorized official (for example a registrar) from an accredited college or university.

3. Education Evaluation

A beneficiary may satisfy the required educational requirements through an evaluation of his or her education. To satisfy this criterion, the petitioner must provide an evaluation of the beneficiary's education from a reliable credentials evaluation service which specializes in evaluating foreign educational credentials.¹⁷⁰ Such an educational evaluation, however, must be of education only, not training and/or experience. As noted above, an evaluation is an advisory opinion only and an officer may discount or give less weight to the evaluation when there are obvious inaccuracies or the evaluation is questionable.¹⁷¹

In addition, a beneficiary may qualify to perform specialty occupation duties if the beneficiary possesses the equivalence to completion of a college degree through education, specialized training, and/or progressively responsible experience, and has recognition in the expertise in the specialty.¹⁷²

3-4. Membership in a Professional Association

The petitioner may provide evidence of the occupational specialty in which the beneficiary has achieved a certain level of competence, in the form of a certification or registration from:

- A nationally-recognized professional association; or
- Society for the specialty that is known to grant certification or registration.¹⁷³

However, membership in a professional association alone is insufficient evidence of equivalency. An association which grants certification or registration in the profession should have an accrediting body which:

- Has standards for the profession; and

¹⁷⁰ See 8 C.F.R.-R. 214.2(h)(4)(iii)(D)(3).

¹⁷¹ See *Matter of Seg, Inc.*, 19 I&N Dec. 817, 820 (Comm. 1988).

¹⁷² See 8 CFR 214.2(h)(4)(iii)(C)(4).

¹⁷³ See 8 CFR 214.2(h)(4)(iii)(D)(4).

Comment [STN186]: Should we clarify that this does not need to be a single degree like above?

RHC: Agree. That would be useful to distinguish this evaluation of education from the one under 214.2(h)(4)(iii)(C)(2).

OPS/KMA See edits.

Comment [KMA187]: Added "educational, so that this single source educational evaluation is distinguished from the second paragraph.

Comment [CMS188]: AAO: The third criterion appears to have been omitted completely. Please insert this or similar language to address it.

OPS(JVT): This language should be included. (Added)

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(b)(5)

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- Issues an official document to applicants verifying that the association has professional credentials.

23

[REDACTED] A petitioner must provide sufficient evidence of the standards of the organization to permit officers to determine that a U.S. bachelor's degree or higher in the specific specialty, or its equivalent, is required for such membership, certification, or registration.

4-5. Service Evaluations [REDACTED] 174

In general, the beneficiary must establish three years of specialized training and/or work experience for each year of college-level education.¹⁷⁵ The evaluation by USCIS must establish the equivalency. For equivalence to a master's degree, the beneficiary must have a bachelor's degree followed by at least five years of experience in the specialty. There is no education and experience equivalency for a Doctorate degree or its foreign equivalent.

Training and Work Experience Equivalence

College Education	Experience Equivalency
One Year of College	3 years of specialized training and/or work experience
Master's Degree	Bachelor's Degree followed by at least [REDACTED] 5 years of [REDACTED] experience in the specialty
Doctorate Degree	No equivalency

¹⁷⁴ See 8 CFR 214.2(h)(4)(iii)(D)(5).

¹⁷⁵ See 8 CFR 214.2(h)(4)(iii)(D)(5). When attempting to show a beneficiary's qualifications to perform services in a specialty occupation through experience rather than through possession of a bachelor's degree, a USCIS evaluation may equate three years of specialized training and/or experience for [REDACTED] each [REDACTED] year of college-level training the beneficiary lacks. [REDACTED]

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(b)(5)

Comment [RHC189]: What is the source of [REDACTED]

OPS/KMA: Agree that this language does not appear to be based in the regulatory language. See edits. AAO, is there case law where this may have come from?

Comment [HJC190]: AAO: This subheading does not capture the full scope of 8 CFR § 214.2(h)(4)(iii)(D)(5). Please see suggested edit.

OPS(IVT): Think original subheading was ok, but don't have a strong position on this. Steven and Kate, do you have objections?

OPS/Kate: Appreciate the suggestion. Accept edit.

Comment [HJC191]: AAO: This subheading does not capture the full scope of 8 CFR § 214.2(h)(4)(iii)(D)(5). Please see suggested edit.

Comment [HJC192]: AAO: This section has been substantially changed from the prior, informally cleared version. There was a lot of discussion regarding this section - mainly about the 3 to 1 rule and how it only exists within the service...

Comment [HJC193]: AAO: 8 CFR § 214.2(h)(4)(iii)(D)(5) states "and/or." OPS/KMA: Accept edit.

Comment [HJC194]: AAO: 8 CFR § 214.2(h)(4)(iii)(D)(5) states "and/or..." OPS/KMA: Accept edit.

Comment [RHC195]: Note that the "d" in this citation should be capitalized.

OPS/KMA Thanks, good catch.

Comment [HJC196]: AAO: We recommend deleting the explanation as it does not capture the full scope of 8 CFR § 214.2(h)(4)(iii)(D)(5).

OPS/KMA: No objection.

Comment [RHC197]: Not sure what value this sentence adds. Suggest deleting.

OPS/KMA Accept deletion.

Comment [HJC198]: AAO: We recommend revising this term/sentence as it is confusing who has the burden to "clearly demonstrate" the requirements. The petitioner bears this burden. In addition, the evaluation is our evaluation, not so...

(b)(5)

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(b)(5)

[REDACTED] For every three years of specialized training and/or work experience, the petitioner must clearly demonstrate that:

- The beneficiary’s training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation;
- The beneficiary’s experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and
- The beneficiary has recognition of expertise in the specialty.

In addition, the beneficiary must have [REDACTED] recognition of expertise in the specialty evidenced by at least one type of documentation including the following:

- Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- Membership in a recognized foreign or United States association or society in the specialty occupation;
- Published material by or about the beneficiary in professional publications, trade journals, books, or major newspapers;
- Licensure or registration to practice the specialty occupation in a foreign country; or
- Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.¹⁷⁷

The regulation makes these same three elements of proof applicable to establishing the five years of training and/or experience in the pertinent specialty that may be combined with a bachelor’s degree to establish the equivalent of a master’s degree in the specialty.¹⁷⁸

Progressive Experience

The beneficiary must have “progressive” experience in the field establishing the beneficiary’s qualifications for the specialty occupation.¹⁷⁹ The petitioner must provide evidence of an

¹⁷⁷ See 8 CFR 214.2(h)(4)(iii)(D)(5).

¹⁷⁸ See 8 CFR 214.2(h)(4)(iii)(D)(5).

¹⁷⁹ See 8 CFR 214.2(h)(4)(iii)(C).

Comment [CMS199]: AAO: Please note, this is the proper standard here under this regulatory provision.

OPS(JVT): accept edit.

Comment [HJC200]: AAO: 8 CFR § 214.2(h)(4)(iii)(D)(5) states “and/or.”

OPS(JVT): right, but need to check PM style guide.

OPS/KMA: Style guide does not prohibit “and/or” I am fine with this change.

Comment [HJC201]: AAO: This appears to be a plain language edit. For clarity, we recommend revising this sentence to state more closely what the regulation states:

“In addition, the beneficiary must have recognition of expertise in the specialty evidenced by at least one type of documentation including:

OPS(JVT): ok with edit.

Comment [CMS202]: AAO: We reinserted this language from the prior version.

OPS(JVT): accept edit, thanks! HOWEVER, FN is not in PM style and will need to be fixed.

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(b)(5)

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(b)(5)

increase in the complexity, visibility, or other evidence of increasing importance of the beneficiary's work. The evidence may include:

- Employer letters;
- Resumes; and
- Other documents relating to past employment.

The progression should show [REDACTED] advancement in:

- Job duties;
- Responsibilities;
- Projects; and
- Other tasks.

Other Forms of Documentation

A beneficiary may provide other forms of documentation that are easier to evaluate than experience including:

- Foreign educational credentials; and
- Licenses.

The petitioner may establish from an authoritative source or from transcripts, certificates, or other such school records that the beneficiary has college-level education. The beneficiary may have acquired college-level training at a college or university or other academic institution which grants a degree, diploma, or certificate, such as a technical college.

E. Unrestricted State License, Registration, or Certification

Generally, a petitioner may also demonstrate that the beneficiary is qualified to perform services in the specialty occupation, if:

- The beneficiary is in possession of an unrestricted State license, registration, or certification authorizing him or her to perform the specialty occupation in the state of intended employment; and
- The license is required to practice in the occupation.

Comment [RHC203]: Do we have a citation to



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(b)(5)

A beneficiary must have a license from a state in which the employment will take place. In addition, the license must be a full and unrestricted license to engage in the specialty occupation.

With certain exceptions, the license must enable the beneficiary to engage immediately (upon approval of the petition) in the specialty occupation.¹⁸⁰

The ability to demonstrate that the beneficiary possesses the minimum requirements for entry into the field by showing an unrestricted state license is separate from the requirement that the beneficiary possess a license where a state requires a license to work in the occupation.

Accordingly, if a license is required to fully perform the duties of an occupation and if a petition is filed without that required license, an officer may exercise his or her discretion under 8 CFR 103.2(b)(8)(ii) to request that license. If a petitioner is able to produce the license, the petition may be approved even if the license was obtained after the date the petition was filed. In no circumstance, however, will the agency approve a petition based on a license submitted after a final administrative decision has been made to deny the petition.

Professional Licensing

If the occupation requires a state or local license for a person to perform fully the duties of that occupation, the beneficiary must have the license prior to approval of the H-1B petition, with certain exceptions as noted below.¹⁸¹

The petitioner must provide a copy of the beneficiary's valid state license, certification, or registration to practice the profession. Officers may review the BRB Publication's Public Record Resource Center to determine whether a state requires a license for a particular occupation.

If a license is required to perform fully the duties of an occupation and the petitioner files the petition without that required license, an officer may exercise discretion¹⁸² to request the license. If a petitioner is able to produce the license, the officer may approve the petition even if the license was obtained after the date the petition was filed.

However, USCIS will not approve a petition based on a license submitted after USCIS has denied the petition. USCIS may not approve a visa petition based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts.¹⁸³

¹⁸⁰ See Chapter 6, H-1B and E-3 Categories [2 USCIS PM H.6].

¹⁸¹ See 8 CFR 214.2(h)(4)(v)(A).

¹⁸² See 8 CFR 103.2(b)(8)(ii).

¹⁸³ See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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(b)(5)

Comment [KMA204]: Inserted this language at AAO's request (see comment on page 17).

Comment [STN205]: I know the regs mention

Comment [STN206]: In a situation where

(b)(5)

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License Pending Approval

An H-1B beneficiary may face obstacles which preclude the individual from acquiring required licensure in the United States. For instance, some states do not issue licenses until the worker presents, as a prerequisite, evidence of an approved H-1B petition on his or her behalf. Similarly, some states require an applicant for a license to present a social security number that is valid for employment but the beneficiary cannot obtain a social security number until USCIS approves the H-1B status.

If the beneficiary is unable to attain the license due to the state requirements, the petitioner must establish that:

- The beneficiary is fully qualified to receive the state or local license;
- All educational, training, experience, and other substantive requirements must be met at the time of filing the petition;
- The beneficiary has in fact filed an application for such state or local license in accordance with the requirements of the state or local jurisdiction in advance of being granted employment authorization in the United States;
- Performance of work by an unlicensed beneficiary would otherwise be in compliance with applicable state requirements.¹⁸⁴

Officers should approve these types of petitions for a one-year validity period. Officers should verify that the sole reason why the beneficiary does not possess such license is that:

- The appropriate licensing authority will not grant it to a beneficiary absent evidence that USCIS granted the beneficiary employment authorization;
- The state requires an applicant for a license to present a social security number that is valid for employment but the beneficiary cannot obtain a social security number until USCIS grants the H-1B status to the beneficiary; or
- The beneficiary is unable to meet a similar technical requirement that precludes issuance of the license to an individual who is not yet in H-1B status.¹⁸⁵

¹⁸⁴ See 8 CFR 214.2(h)(4)(v)(C)(1).

¹⁸⁵ See 8 CFR 214.2(h)(4)(v)(C)(2)(ii).

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Comment [JVT207]: SCOPS: suggests lower case s

DPS(JVT): Agree. catchall rule for capitalization that stipulates we should capitalize proper nouns (names) and leave common nouns in lower case. Therefore, treat Washington State as a proper noun, but "state" in "state of Washington" as a common noun and use lowercase.

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USCIS will examine the nature of the duties and the level at which they are performed, as well as evidence provided by the petitioner as to the identity, physical location, and credentials of the individual(s) who will supervise the beneficiary, and evidence that the petitioner is complying with state requirements. If the facts demonstrate that the beneficiary under supervision will fully perform the duties of the occupation, H classification may be granted.

Any petition that requests an extension of stay (EOS) beyond the one-year validity period on behalf of the beneficiary who has been granted H-1B status under this provisional measure must show that the beneficiary has obtained the required license.

If the beneficiary has not obtained the license at the time the petition for extension is filed, USCIS will deny the petition.

Expiring Licenses

Licenses may include an expiration date. The license must be valid at the time of filing. In many occupations, a beneficiary's unrestricted license, though not a limited license, will not be valid for the entire length of time requested by the petitioner. Licensed professionals must renew their full license every few years. Officers should not limit the validity dates of an approved petition simply because the beneficiary's permanent license will expire prior to the requested ending employment date.

Temporary Licenses – One-Year Limit

Although an H-1B petition is valid for a period of up to three years, USCIS may not approve an H-1B petition for a period of three years when a temporary license does not cover the entire three-year employment period requested in the petition.¹⁸⁶ USCIS may only approve the petition for a period of one year or for the period that the temporary license is valid, whichever is longer.¹⁸⁷ This situation should be distinguished from one in which a full and unrestricted license is subject to routine renewal.

If a temporary license is available in the state of employment, and the beneficiary is allowed to fully perform the duties of the occupation without a permanent license, then USCIS may approve the H-1B classification if all other requirements are met. Please note, however, where licensure is required in an occupation, and the beneficiary has a temporary license, the petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer.

¹⁸⁶ See 8 CFR 214.2(h)(9)(iii)(A)(1).

¹⁸⁷ See 8 CFR 214.2(h)(4)(v)(E).

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Comment [STN208]: So what are we

OPS/KMA: Deleted this sentence because the new content in the immediately preceding paragraph addresses the point.

Comment [JVT209]: SCOPS: 8 CFR 214.2(h)(4)(v)(E) states that after the one year, if the alien has not received the permanent license but continues to maintain a temporary license that is valid for the duration of time requested on the petition, USCIS can grant the extension request.

OPS(JVT): Agree. Added FN with citation to temporary licenses below

Comment [STN210]: Have we always referred

"unrestricted," which was used in the AC21 final rule.

Comment [STN211]: Seems out of place here even if true.

OPS/KMA OK with deletion.

Comment [HJC212]: AAO: the following important caveat was deleted:

"Note: Where licensure is required in an occupation, and the beneficiary has a temporary license, the petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer."

We suggest it be reinserted.

OPS(JVT): ok with including again. Steven and Kate – any objections?

OPS/KMA: no objection

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No License Required if Working Under Supervision of Licensed Professional

If the beneficiary can fully perform the duties of the position without licensure because he or she will work under the supervision of a licensed professional as permitted by state law, then USCIS does not limit the validity period of the petition, despite the lack of a permanent license. The officer shall examine the nature of the duties and the level at which beneficiary performs the duties. The petitioner must demonstrate that the beneficiary is permitted to work without a license by law in the intended state of employment. If the facts demonstrate that the beneficiary under supervision could fully perform the duties of the specialty occupation, USCIS may approve the petition, provided the beneficiary meets all other eligibility criteria.



F. Dual Intent

An H-1B beneficiary may pursue immigrant status while in the United States as a nonimmigrant.



Under the doctrine of dual intent, certain nonimmigrants may take steps towards permanent residence if they continue to abide by the terms and conditions of their nonimmigrant status. The fact that steps may have been taken towards permanent residence (for example, the employer has filed a permanent labor certification application with the U.S. Department of Labor, or the H-1B beneficiary is also the beneficiary of an immigrant petition) does not violate the H-1B beneficiary's nonimmigrant status or call the H-1B beneficiary's nonimmigrant intent into question. In many other nonimmigrant categories, the intent to



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(b)(5)

Comment [JVT213]: OPS(JVT): Steven and Kate, this is an AAO suggestion. I think its fine. Ok?

OPS/Kate OK.

Comment [STN214]: If we say must, should this be "demonstrate"?

OPS/KMA changed to demonstrate

Comment [JVT215]: SCOPS: This does not



Comment [STN216]: Although this makes



OPS/KMA OK with deletion.

Comment [STN217]: I think this is true for any



(b)(5)

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remain permanently is inconsistent with nonimmigrant intent and renders the foreign national ineligible for nonimmigrant classification.¹⁹¹

Dual Intent for H-1B1s and E-3s

An H-1B1 or E-3 beneficiary cannot simultaneously intend both to remain in the United States permanently (by pursuing an immigrant visa) and remain temporarily. H-1B1 nonimmigrants must establish that they have no intention of abandoning a [REDACTED] foreign residence abroad [REDACTED].

However, E-3 nonimmigrants do not have to establish that they have no intention of abandoning a foreign residence abroad [REDACTED]. The failure to maintain a foreign residence, which might otherwise be an indicator that nonimmigrant intent is lacking, is not an issue for the E-3.

G. Dependents

USCIS may admit the spouse and minor children of the beneficiary as dependents under the H-4 classification, if accompanying or following to join the beneficiary. Dependents who are already in a valid nonimmigrant status in the United States may file for a change of nonimmigrant status.

Chapter 5. H-1B Portability

An H-1B nonimmigrant may change employers or seek concurrent employment [REDACTED]. The new or concurrent H-1B employer must file an H-1B petition for the new employee.¹⁹³ For a nonimmigrant who meets the applicable requirements, employment with the new (or concurrent) employer can start immediately upon filing of the H-1B petition by the new employer. (H-1B portability).¹⁹⁴

1. Eligibility

There is no separate portability application or adjudication. Under the statute,¹⁹⁵ a nonimmigrant who was previously issued an H-1B visa or provided H-1B nonimmigrant status

¹⁹¹ See INA 214(b) and INA 214(h). See 8 CFR 214.2(h)(16)(i).

¹⁹³ Prior to 2000, an H-1B nonimmigrant seeking to add or change employers was required to wait for approval of the new petition before starting employment with the new employer. This wait for approval made H-1B nonimmigrants less mobile in the labor force relative to U.S. workers and also made the process of filling H-1B jobs longer for U.S. employers recruiting H-1B workers already in the United States.

¹⁹⁴ See INA 214(n), as amended by Section 105 of AC21, Pub. L. 106-313 (October 17, 2000).

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(b)(5)

Comment [RHC218]: We may also need to

[REDACTED]

OPS/KMA: Accept edits. Thank you for these edits on point.

Comment [JVT219]: SCOPS: They must also be in a valid non-immigrant status, except for those classes stated in 8 CFR section 248.2(a).

OPS(JVT) that's true, with limited exceptions. Accept. Steven and Kate - ok?

OPS/KMA-Agree.

Comment [JVT220]: SCOPS: They must also be in a valid non-immigrant status, except for those classes stated in 8 CFR section 248.2(a).

OPS(JVT) that's true, with limited exceptions. Accept. Steven and Kate - ok?

Comment [RHC221]: revised because H-1Bs

[REDACTED]

OPS/KMA: Accept edits.

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may begin new employment upon the filing of an H-1B petition [REDACTED] on the H-1B nonimmigrant's behalf by the prospective employer, if:

- The H-1B nonimmigrant was lawfully admitted to the United States, or otherwise provided H-1B nonimmigrant status;¹⁹⁶
- A non-frivolous petition for new employment was filed before the end of the H-1B nonimmigrant's period of authorized stay, including a petition for new employment with the same employer;¹⁹⁷ and
- The H-1B nonimmigrant has not been employed without authorization since the lawful admission to the United States mentioned [REDACTED] and through the filing of the portability petition.¹⁹⁸

An H-1B nonimmigrant who does not meet these requirements is ineligible for portability, and employment under these circumstances for a new or concurrent H-1B employer cannot begin until USCIS approves the new petition. If that H-1B nonimmigrant begins working before USCIS approves the new petition in this situation, the nonimmigrant will have engaged in unauthorized employment.

When an H-1B beneficiary moves to a new employer employment and begins working upon the filing of the new petition, the work authorization from the previous H-1B status carries over to the new filing. If USCIS approves the new filing then that becomes the basis for the work authorization. If USCIS denies the new filing, then work authorization for the new employer employment ceases. Denial of the portability petition does not affect the ability of the H-1B to continue (or resume) working in accordance with the terms and conditions of the prior H-1B employment [REDACTED] if that petition otherwise remains valid and the beneficiary has maintained status or been in a period of authorized stay.

Portability does not apply to H-1B1 [REDACTED] or E-3 [REDACTED] petitions.

Authorized Period of Stay

In order to qualify for portability, a the petition and beneficiary must meet all the requirements,¹⁹⁹ including the requirement that the petitioner files the new petition while the

¹⁹⁶ See 8 CFR 214.2(h)(2)(i)(H)(1)(i).

¹⁹⁷ See 8 CFR 214.2(h)(2)(i)(H)(1)(ii).

¹⁹⁸ See 8 CFR 214.2(h)(2)(i)(H)(1)(iii).

¹⁹⁹ See INA 214(n).

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(b)(5)

Comment [RHC222]: Do we need to include

OPS/KMA Accept edits. See added text and cites.

Comment [RHC223]: Made similar edits in this section since we extend portability to new employment with the current employer upon the filing of an amended or new petition. To avoid confusion, seems best to refer to "new employment" (the term used in the statute) rather than "new employer".

OPS/KMA: Thank you for these edits. Accepted.

Comment [HJC224]: AAO: We recommend keeping the references to H-1B1 and E-3 consistent throughout the manual. We further note that both visas were previously identified.

OPS(JVT): Jackie - can you help with this and make sure references are consistent? Thanks!

Jackie: all set!

(b)(5)

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(b)(5)

[REDACTED] H-1B nonimmigrant is in an authorized period of stay. A “period of stay”²⁰⁰ is not necessarily synonymous with the concept of “lawful nonimmigrant status.” While everyone who is in a lawful nonimmigrant status will be within a period of stay, not everyone who is in a period of stay is necessarily in lawful nonimmigrant status.

[REDACTED]

2. [REDACTED] Successive Portability Petitions (“Bridging”)

A petitioner may file a successive H-1B portability petitions for a beneficiary while the previous H-1B petitions remain pending (creating a “bridge” of H-1B petitions). An H-1B nonimmigrant worker who has changed employment based on an H-1B portability petition filed on his or her behalf may again change employment based on the filing of a new H-1B portability petition, even if the former H-1B portability petition remains pending. However, for USCIS to approve, every H-1B portability petition must separately meet the requirements for H-1B classification and for an extension of stay.

Eligibility for employment pursuant to a subsequent H-1B portability petition would effectively depend on the following factors:

- Whether any prior H-1B portability petitions have been approved or remain pending at the time that the subsequent portability petition is filed; and
- Whether the individual’s Arrival-Departure Record (Form I-94), issued upon admission or extended pursuant to an approved H-1B petition on his or her behalf, has expired.

As long as a worker is in H-1B nonimmigrant status, or is in a period of authorized stay as a result of a timely filed H-1B petition, that worker may begin new employment upon the filing by the prospective employer of an H-1B portability petition on the foreign worker’s behalf. There is no requirement that the portability petition be approved at the time the worker begins the new employment.

DHS notes that an H-1B beneficiary who has a valid and unexpired Form I-94 remains in a period of authorized stay. As long as the petitioner can demonstrate that the beneficiary remained in valid H-1B nonimmigrant status when a successive portability petition was filed,

²⁰⁰ “Period of stay” is used in other sections of the INA in discussing unlawful presence and its consequences. See INA 212(a)(9)(B)(i).

Comment [RHC225]: Added to clarify that we are talking about folks who are in an H-1B period of stay, rather than those who may be here in any period of stay.

OPS/KMA Accept edit.

Comment [RHC226]: The COS example is

[REDACTED]

OPS/KMA: WG-do we want to remove this example?

Comment [KMA227]: Edited for consistency with the regulations.

Comment [RHC228]: While I know that this is currently in existing guidance (e.g. the 12/27/05 Aytes memo) I am not sure this is technically accurate as stated. Here, we are talking about

[REDACTED]

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the timely filed petition and associated extension of stay request should not be denied simply because of a denial or withdrawal of the preceding portability petition. DHS does not consider an H-1B portability petition that is filed before the validity period expires to constitute a "bridge petition"; rather, a bridge petition is one filed after expiration of the Form I-94, but during the time in which the individual was in a period of authorized stay based on a preceding timely filed extension petition.

An individual with a pending successive portability petitions from traveling outside the United States. H-1B nonimmigrants may travel and be admitted in H-1B status while H-1B portability petitions on their behalf are pending. However, individuals requesting admission as H-1B nonimmigrants must prove at the port of entry that they are eligible for admission in that status.²⁰¹

Generally, if the individual's original H-1B petition has expired prior to the time that the employee seeks admission to the United States, or is otherwise no longer valid, the beneficiary must present evidence that USCIS has approved the new petition to be admitted to the United States. If the original H-1B petition has not yet expired, however a beneficiary of an H-1B portability petition applying for admission may be admissible if, in addition to presenting a valid passport and visa (unless visa-exempt), he or she provides a copy of the previously issued Form I-94 or Form I-797 approval notice for the original H-1B petition (evidencing the petition's validity dates), and a Form I-797 receipt notice demonstrating that the new H-1B petition was timely filed on the individual's behalf. The inspecting officer at the port of entry will make the ultimate determination of whether the applicant is admissible to the United States as an H-1B nonimmigrant.

3. Expired Status

In the event that the beneficiary's nonimmigrant status has expired while the petitions are pending, the denial of any filing in the string of extension of stay [REDACTED] filings breaks the "bridge." that "carried" any petition filed after the expiration of the beneficiary's status. [REDACTED]

4. Portability and the H-1B Cap

Availability of a cap number, where required, is a prerequisite to proper filing of an H-1B petition. In such cases, as long as a worker is in H-1B nonimmigrant status, or is in a period of authorized stay as a result of a timely filed H-1B petition, that worker may begin new

²⁰¹ See USCIS Memorandum from Michael A. Pearson, "Initial Guidance for Processing H-1B Petitions as Affected by the 'American Competitiveness in the Twenty-First Century Act' (Public Law 106-313) and Related Legislation (Public Law 106-311) and (Public Law 106-396)" (June 19, 2001).

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(b)(5)

Comment [JVT229]: JVT: Need to double check

OPS/KMA: Updates here represent AC21 Final Rule portability changes.

Comment [RHC230]: Added this language from the 12/2005 memo to clarify that it only affects those petitions that were carried by the bridge (i.e. a denial of a petition at the end of the string would not necessarily affect a prior petition that is still pending).

OPS/KMA Accept edits.

Comment [RHC231]: Deleted as unnecessary and possibly confusing (the bridge could be formed by a petition filed before the status expired but remained pending after the status expired).

OPS/KMA Accept deletion.

Comment [JVT232]: SCOPS: Does this mean

OPS/KMA: Added language from the AC21 rule, modified for this section.

(b)(5)

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employment upon the filing by the prospective employer of an H-1B portability petition on the foreign worker’s behalf. An H-1B nonimmigrant worker’s cap-subject employment may not begin prior to October 1 of the fiscal year for which his or her cap-subject petition is approved.²⁰² [REDACTED] –Therefore, in the context of a change from cap-exempt to cap-subject employment, the H-1B nonimmigrant worker would not be eligible to begin working upon the timely filing of a nonfrivolous petition under 8 CFR 214.2(h)(2)(i)(H).

Portability is not available when USCIS rejects the H-1B petition, since the petition was not “filed.”²⁰³

5. Dependents

A dependent’s status links to the status of the porting principal nonimmigrant. When an H-4 nonimmigrant spouse seeks an extension of stay, he or she must file Form I-539 when intending to maintain status for the same period as the primary beneficiary. In such cases, the H-4 nonimmigrant spouse must file Form I-539 in connection with, or concurrently with a Petition for a Nonimmigrant Worker (Form I-129) seeking an extension of stay on behalf of the H-1B nonimmigrant worker.

Chapter 6. H-1B and E-3 Categories

Classes of Applicants and Corresponding Codes of Admission	
Beneficiary	Code of Admission
Specialty Occupation ([REDACTED])	H-1B
• [REDACTED]	H-1B
• [REDACTED]	H-1B
• Department of Defense (DOD) Worker or Project Employee	H-1B2
• Fashion Models	H-1B3
Specialty Occupation ([REDACTED] Chile and Singapore)	H-1B1

²⁰² See INA 214(g)(1).

²⁰³ See 8 CFR 103.2(a)(7)(i).

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Comment [JVT233]: SCOPS: First, the

[REDACTED]

OP5/KMA: Added language from the AC21 rule, modified for this section.

Comment [JVT234]: SCOPS: First, the

[REDACTED]

Comment [RHC235]: Should we note that the dependent should file an I-539 if the H-1B portability is requesting an EOS and the H-4 intends to maintain status for the same period of time?

OP5/KMA: see edits.

Comment [JVT236]: OP5(IVT): if we take professional out of other charts, we should take it out here too.

Comment [JVT237]: SCOPS: First, the

[REDACTED]

OP5(JVT): no strong objection to deletion.

[REDACTED]

Comment [RHC239]: Seems like including this

[REDACTED]

(b)(5)

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Classes of Applicants and Corresponding Codes of Admission	
Beneficiary	Code of Admission
Spouse or Child of H-1B, H-1B1	H-4
Specialty Occupation ([REDACTED] Australia)	E-3
Specialty Occupation (Spouse – Australia)	E-3D

A. Physicians (H-1B)

Prior to 1991, physicians could only obtain H-1B status to teach or conduct research. Changes made to the statute in 1991²⁰⁴ allowed physicians to qualify for H-1B status under limited circumstances. A foreign national physician qualifies for H-1B status if the physician is:²⁰⁵

- Coming through an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency; or
- Coming to practice as a physician if the beneficiary has passed the appropriate licensing examination,²⁰⁶ and
- Competent in the English language or is a graduate of a U.S.-accredited medical school.

A certified Labor Condition Application (LCA) from the U.S. Department of Labor (DOL) is required.

1. Patient Care

A physician coming through invitation from a research or educational institution may not engage in direct patient care unless it is incidental to the physician's teaching and research. If patient care is not involved, the petitioner does not need to submit a license or an authorization from the state.

²⁰⁴ See Miscellaneous Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232 (December 12, 1991).

²⁰⁵ See INA 212(i)(2).

²⁰⁶ Prior to the mid-1990's, the appropriate examination was Parts I and II of Federation Licensing Examination (FLEX) and Steps 1, 2, and 3 of the National Board of Medical Examiners (NBME). These examinations were replaced by Steps 1, 2, and 3 of the U.S. Medical Licensing Examination (USMLE).

Comment [JVT240]: SCOPS: Recommend

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2. Clinical Physician

If the physician will be providing direct patient care, the petition must include the following:

- A license or other authorization required by the state or territory of intended employment to practice medicine;
- A full and unrestricted license to practice medicine in a foreign state or evidence that the beneficiary has graduated from a medical school in the United States or in a foreign state; Evidence that the beneficiary has passed the Federation licensing examination (administered by the Federation of State Medical Boards of the United States) or an equivalent examination as determined by the Secretary of Health and Human Services (HHS);²⁰⁷
- Evidence that the beneficiary has passed the English test given by the Educational Commission for Foreign Medical Graduates (ECFMG) to establish competency in oral and written English language unless the beneficiary has received his or her medical education at an accredited school of medicine in Canada or the United States.

(b)(5)

Licensing Examination

The U.S. Medical Licensing Examination (USMLE) (steps 1, 2, and 3) is the only current licensing examination which will satisfy the requirements of the statute for an H-1B clinical physician.²⁰⁸

If the physician is required to pass the Federation Licensing Examination (FLEX), or the National Board of Medical Examiners (NBME), or the USMLE, the beneficiary must have done one of the following:²⁰⁹

- Passed components 1 and 2 of the FLEX; or
- Passed Parts I, II, and III of the NBME; or
- Passed Steps 1, 2, and 3 of the USMLE.

An H-1B beneficiary coming to practice medicine as a clinical physician who has passed parts of the previous exams cannot combine those parts with parts of the USMLE to obtain licensure for H-1B purposes. For an H-1B beneficiary who passed the earlier examinations but did not obtain

²⁰⁷ Current examination includes Steps 1, 2, and 3 of the USMLE.

²⁰⁸ Current exam requirements are available at the [USMLE website](#).

²⁰⁹ See 57 FR 42755 (September 16, 1992).

– FOR OFFICIAL USE ONLY –

70

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a state license based on that passage, the beneficiary will have to take the complete USMLE in order to obtain state licensure and to be eligible for H-1B status.

To meet H-1B requirements, the clinical physician must have passed all parts of the exams specified. For example, passing Part I of the NBME and Steps 2 and 3 of the USMLE would not make a physician eligible for H-1B status.

A clinical physician must pass the FLEX or an equivalent examination as determined by the HHS Secretary. The FLEX is no longer offered. HHS had previously determined that Parts I, II, and III of the NBME, and Steps 1, 2, and 3 examinations of the USMLE program, are equivalent to the FLEX. However, the NBME is also no longer offered.

Canadian Licensing

The Licentiate of the Medical Council of Canada (LMCC), the Canadian medical licensing procedure, is not equivalent to the FLEX, and therefore not acceptable by USCIS.

Medical Residents

Some medical residents, who are physicians in training, may not require a license in certain states when working under the supervision of a licensed professional. Evidence to support any claimed exemption from a medical license must be in the record. An officer must verify state regulations regarding exemption.

3. Graduates of Foreign Medical Schools

Graduates of foreign medical schools may qualify as an H-1B nonimmigrant if:

- Teaching or conducting research, or both; and
- Not performing patient care except patient care incidental to the beneficiary's research or teaching.

In addition, the graduate may qualify if:

- Performing services as a member of the medical profession (for example, providing patient care);
- Passed steps 1, 2, and 3 of the USMLE;
- Possess a license from the relevant licensing authority; and
- Have competency in oral and written English as evidenced by ECFMG Certification.

Comment [STN241]: Do we need a license requirement bullet here too?

OPS/KMA Added.

Comment [JVT242]: SCOPS recommendation

OPS(JVT): Accept.

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(b)(5)

4. Graduates of U.S. Medical Schools

Graduates of accredited U.S. medical schools do not need to provide evidence of competency in oral and written English. However, graduates of U.S. medical schools must still possess a license in order to practice medicine.²¹⁰

5. English Competency

English proficiency is a requirement for H-1B physicians. A beneficiary may establish proficiency in the English language by passing Step 1 and the Clinical Skills portion of Step 2 of the USMLE.²¹¹ At one time, the ECFMG administered an English language proficiency test and issued certificates accordingly. The ECFMG is no longer administered,²¹² however, USCIS may accept existing certificates.

U.S. and Canadian Medical Schools

Alternatively, English language proficiency is demonstrated by graduation from a medical school accredited by the U.S. Department of Education. The school does not have to be located in the United States. For example, some U.S. institutions have campuses located outside the United States where medical education is provided which the U.S. Department of Education accredits.

The U.S. Department of Education through cooperation with the Liaison Committee on Medical Education (LCME) accredits most Canadian medical schools.²¹² Most Canadian medical school graduates are competent in oral and written English. However, Canadian medical school graduates must still pass steps 1, 2, and 3 of the USMLE unless coming to the United States to teach or conduct research with no patient care except that which is incidental to the research or teaching.

Comment [JVT243]: SCOPS edit

OPS(JVT): accept

6. Educational Commission for Foreign Medical Graduates (ECFMG)

The ECFMG is the only recognized source in the United States for verification of medical transcripts and diplomas. Part of the ECFMG's certification process involves verification of a foreign medical graduate's overseas education. Where there is a question as to whether a foreign degree is equivalent to an M.D., USCIS may accept or request an ECFMG certificate to demonstrate equivalency.

²¹⁰ See 8 CFR 214.2(h)(4)(viii)(B)(2)(i).

²¹¹ Effective as of July 14, 2004.

²¹² See the [LCME website](#).

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Despite the reference to passage of the ECFMG in the regulations discussing English language proficiency,²¹³ there is no longer a separate English language proficiency examination administered by ECFMG. However, USCIS considers a certificate issued by the ECFMG as evidence that a beneficiary is proficient in the English language.

7. Physicians of National or International Renown²¹⁴

Foreign medical school graduates who are of national or international renown are exempt from the requirements relating to other physicians.²¹⁵ The physician of national or international renown is exempt from:

- The licensing examination;
- English language proficiency requirements; and
- The limitation on activities to teaching and research.

The physician of national or international renown is still subject to the beneficiary requirements²¹⁶ dealing with state licensure and either foreign licensure or graduation from a foreign medical school.

Possible evidence that the beneficiary qualifies as a physician of national or international renown may include, but are not limited to:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Comment [HJC244]: AAO: Replacing this list with the new list agreed upon by the Working Group on August 21, 2014.

OPS(LVT): Agree. Steven and Kate, can you send me the list so I can double check to make sure its consistent?

OPS/Kate: Thanks for providing the updated/corrected list, Hae-Jin. The list agreed upon by the WG is [here](#) on the ECN.

²¹³ See 8 CFR 214.2(h)(4)(viii)(B)(2)(i).

²¹⁴ See 8 CFR 214.2(h)(4)(viii)(C).

²¹⁵ See 8 CFR 214.2(h)(4)(viii)(B).

²¹⁶ See 8 CFR 214.2(h)(4)(viii)(A).

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- Documentation of the beneficiary's receipt of nationally or internationally recognized prizes or awards in the field of medicine;
- Evidence of the beneficiary's authorship of scientific or scholarly articles in the field of medicine published in professional journals, major trade publications, or other major media;
- Published material about the beneficiary's work in the medical field that appears in professional journals, major trade publications, or other major media (which includes the title, date, and author of such material);
- Evidence that the beneficiary has been employed in a critical, leading, or essential capacity for organizations or establishments that have distinguished reputations in the field of medicine;
- Evidence of the beneficiary serving as a speaker or panelist at medical conferences;
- Evidence of the beneficiary's participation as a judge of the work of others in the medical field;
- Documentation of the beneficiary's membership in medical associations, which require significant achievements of their members, as judged by recognized experts in the field of medicine;
- Evidence that the beneficiary has received recognition for his/her achievements or contributions from recognized authorities in the field of medicine; and
- Any other evidence demonstrating the beneficiary's achievements, contributions, and/or acclaim in the medical field.

An H-1B physician of national or international renown does not necessarily have to meet the requirements for the nonimmigrant (O-1 visa category) or immigrant (E-11 visa category)

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employment-based Extraordinary Ability categories. The evidence must just establish that the beneficiary is nationally or internationally renowned.²¹⁷

Comment [HJC245]: AAO: Citation to



8. Physicians Working for the Veteran’s Administration (VA)

Physicians coming to the United States to work at a Veteran’s Administration (VA) hospital are required to have a state license to practice medicine. However, the license does not have to be from the state where the VA hospital is located.

B. Nurses and Health Care Workers (H-1B)

USCIS may approve an H-1B petition for a nurse position that meets the requirements for the classification. However, most nurse positions do not meet the requirements of the statute because the position is not a specialty occupation. Most nursing positions do not require a U.S. bachelor’s or higher degree in nursing for entry into the occupation in the United States.

There are some situations, however, where the petitioner may be able to show that the nursing position in question is a specialty occupation because a U.S. bachelor’s or higher degree in a specific specialty is normally the minimum for entry into the particular position. The nurse beneficiary may qualify if the nursing position involves an advanced practice nurse such as:

- Clinical nurse specialists;
- Nurse anesthetists;
- Nurse-midwives; and
- Nurse practitioners.

Licensing and Examination

The nurse must have obtained a license to practice nursing in the state of intended employment prior to approval of the petition.

The Commission on Graduates of Foreign Nursing Schools (CGFNS) Certification

A foreign national who seeks admission to the United States for the primary purpose of performing labor as a health care worker, other than a physician, is inadmissible unless he or she presents a certificate from the Commission on Graduates of Foreign Nursing Schools

²¹⁷ "Renown" is defined as "the state of being widely acclaimed and highly honored." See Merriam-Webster's Collegiate Dictionary, 10th edition. See, e.g., Webster's Third New International Dictionary, (2015), available at <http://unabridged.merriam-webster.com/unabridged/renown> (last visited xxx xx, 2015).

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(CGFNS) or an equivalent credentialing organization.²¹⁸ There is an alternative certification process for nurses.²¹⁹

A certifying organization generally must verify that the foreign national's education, training, licensing, experience and English competency meet all statutory and regulatory requirements for health care workers²²⁰ or for certain nurses.²²¹ This verification is not binding on the DHS. However, DHS is not required to re-verify the elements of certification. The health care worker certificate or certified statement must contain the following elements:

- The name, address, and telephone number of the credentialing organization;
- A point of contact to verify the validity of the certificate or certified statement;
- The date the certificate or certified statement was issued;
- The health care occupation for which the certificate was issued; and
- The beneficiary's name, date, and place of birth.

Physical Therapist Certification

The National Board for Certification in Occupational Therapy (NBCOT) is authorized to issue certificates for occupational therapists only. The Foreign Credentialing Commission on Physical Therapy (FCCPT) is authorized to issue certificates for physical therapists only.

Change of Status

On or after July 26, 2004, if an H-1B beneficiary seeks admission to the United States, a change of status, or an extension of stay, the beneficiary, regardless of where he or she received his or her education or training, must provide evidence of health care worker certification if the primary purpose for coming to or remaining in the United States is employment in one of the affected health care occupations.

C. Department of Defense (DOD) Cooperative Research Project (H-1B2)

The Immigration Act of 1990²²² provided for nonimmigrant status for a foreign national coming to the United States to perform unique services of an exceptional nature requiring exceptional

²¹⁸ See INA 212(a)(5)(C).

²¹⁹ See INA 212(r).

²²⁰ See 212(a)(5)(C).

²²¹ See INA 212(r).

²²² See Section 222 of Pub. L. 101-649, 104 Stat. 4978, 5028 (November 29, 1990).

Comment [JVT246]: SCOPS edit

OPS(JVT): no strong objection. Steven and Kate – ok?

OPS/KMA No objection.

Comment [HJC247]: AAO: We recommend revising this sentence to state “perform services of an exceptional nature requiring exceptional merit and ability” to be consistent with 8 CFR 214.2(h)(1)(ii)(B)(2). “Unique” does not adequately capture that language.

OPS(JVT): agree. Accept edit.

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merit and ability relating to a cooperative research and development project or a coproduction project administered by the Secretary of Defense. Admission under the DOD cooperative research project program (H-1B2) is subject to a ten-year limit.

No more than 100 principal beneficiaries can be in this status at any given time. Officers should contact the Service Center Operations Directorate through their chain of command to determine if a visa number is available. Qualifying services under this program are services that require at least a bachelor's degree, or its equivalent, in a specific specialty to perform the duties.

The H-1B2 program is similar to the H-1B program. However, the DOD program is not part of the H-1B specialty occupation program as it has a separate statutory basis than the H-1B specialty occupation program.²²³ The 100 principal beneficiaries' limitation is also not part of the current H-1B cap of 65,000. The existence of this special program does not preclude the DOD from using the regular H-1B provisions provided the required guidelines are met. Petitioners of the DOD Researchers are not required to submit an LCA.²²⁴

An H-1B2 petition requires the following evidence:

- A verification letter from the DOD project manager for the particular project stating that the beneficiary will be working on a cooperative project under a reciprocal government-to-government agreement administered by DOD. Details about the specific project are not required;
- A general description of the beneficiary's duties [REDACTED] as well as the actual dates of the beneficiary's intended employment on the project;
- A statement indicating the names of beneficiaries currently employed on the project in the United States and their dates of employment. The petitioner must also indicate the names of beneficiaries whose employment on the project ended within the past year,²²⁵ and
- Evidence that the beneficiary has a U.S. bachelor's or higher degree in the occupational field in which the beneficiary will be performing the services, or its equivalent.²²⁶

²²³ The H-1B2 visa category authorizes foreign workers to come temporarily to the United States to perform services of an exceptional nature requiring exceptional merit and ability relating to a cooperative research and development project or a coproduction project provided for under a Government-to-Government agreement administered by the Secretary of Defense. See 8 CFR 214.2(h)(1)(ii)(B)(2).

²²⁴ See 8 CFR 214.2(h)(4)(vi)(A)(2).

²²⁵ See 8 CFR 214.2(h)(4)(vi)(B).

²²⁶ See 8 CFR 214.2(h)(4)(vi)(C).

Comment [JVT248]: SCOPS edit

OPS(JVT): no strong objection. Steven and Kate – ok?

OPS/KMA-agree.

Comment [JVT249]: SCOPS edit

OPS(JVT): no strong objection. Steven and Kate – ok?

OPS/KMA: No objection.

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Limitations of Period of Stay and Extensions

USCIS may approve an H-1B2 DOD petition for a period of up to five years or the length of the project, whichever is shorter. USCIS may approve extensions up to another five years, for a total stay of 10 years.

D. Fashion Models (H-1B3)

Included in the H-1B classification are fashion models of distinguished merit and ability (H-1B3).²²⁷ A foreign national of distinguished merit and ability in the field of fashion modeling is one who is prominent in the field of fashion modeling. The beneficiary must also be coming to the United States to perform services that require a fashion model of prominence.²²⁸

In order to qualify as a fashion model of prominence, the foreign national must have a high level of achievement in the field of fashion modeling. The fashion model must have a degree of skill and recognition substantially above that ordinarily and described as renowned, leading, or well-known in the field of fashion modeling.²²⁹

An H-1B3 petition requires evidence that:

- The services to be performed involve events, productions or activities which have a distinguished reputation, or
- The services are to be performed for an organization or establishment that has a distinguished reputation for, or record of, employing prominent persons.²³⁰

The petitioner must obtain a certification from U.S. Department of Labor (DOL) that it has filed a Labor Condition Application (LCA) in the occupational specialty for each Metropolitan Statistical Area (MSA) where the petitioner will employ the beneficiary.

The beneficiary qualifies as a person of distinguished merit and ability in the field of modeling, if the petitioner submits documentary evidence of two of the following:²³¹

- The beneficiary has achieved national or international recognition and acclaim for outstanding achievements in his or her field evidenced by critical reviews by or about the beneficiary in major newspapers, trade journals, magazines, or other published material.

²²⁷ See INA 101(a)(15)(H)(i)(b).

²²⁸ See 8 CFR 214.2(h)(4)(vii)(A).

²²⁹ See 8 CFR 214.2(h)(4)(ii).

²³⁰ See 8 CFR 214.2(h)(4)(vii)(B).

²³¹ See 8 CFR 214.2(h)(4)(vii)(C).

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- The beneficiary has performed and will perform services as a fashion model for employers that have a distinguished reputation.
- The beneficiary has received recognition for significant achievements from organizations, critics, fashion houses, modeling agencies, or other recognized experts in the field of fashion modeling. The testimonials must be in a form that clearly indicates the author's authority, expertise, and knowledge of the beneficiary's achievements.
- Commands a high salary or other substantial remuneration for services (in relation to others in the field) as evidenced by contracts or other reliable evidence.

[Redacted]

[Redacted]

[Redacted]

- [Redacted]
- [Redacted]

[Redacted]

- [Redacted]

232 [Redacted]
233 [Redacted]
234 [Redacted]
40 [Redacted]
235 [Redacted]

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[Redacted]

Comment [JVT250]: SCOPS: Recommend moving this after Specialty Occupation Chapter.

OPJ(JVT): I think this is a good suggestion - Kate and Steven, ok?

OPJ/KMA: Great suggestion. Moved.

Comment [JVT251]: OPJ(JVT): As announced, H-1B petitions filed on or after Oct. 1, 2015, should not include the additional fee that was previously required by Section 402 of Public Law 111-230, as amended by Public Law 111-347, for certain H-1B and L-1 petitions. The additional fee required by Public Law 111-230, as amended, expired on Sept. 30, 2015. All other H-1B and L-1 fees, including the Base fee, Fraud Prevention and Detection Fee, and American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) Fee when applicable, are still required. Petitioners with incorrect fees may be rejected. Petitioners are reminded that USCIS prefers separate checks for each filing fee.

Public Law 111-230, enacted on Aug. 13, 2010, required an additional fee of \$2,000 for certain H-1B petitions and \$2,250 for certain L-1A and L-1B petitions postmarked on or after Aug. 14, 2010. Public Law 111-347, enacted on Jan. 2, 2011, extended the fees through Sept. 30, 2015. For more information, visit the H-1B Visa or L-1 Visa pages or call the National Customer Service Center at (800) 375-5283.

This information will need to be updated.

OPJ/KMA: Section Moved.

Comment [RHC252]: Will need to [Redacted]

OPJ/KMA: Section Moved.

Comment [STN253]: Is there a reason we [Redacted]

OPJ/KMA: Section Moved.

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[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

E-3 Specialty Occupation (E-3)

Congress created the specialty occupation (E-3) classification for nationals of Australia in 2005.²³⁶ A certified LCA from DOL is required.²³⁷ Officers adjudicate the E-3 in the same way as an H-1B. The same criteria and standards are used to determine whether the position is a specialty occupation and whether the beneficiary is qualified to engage in the occupation. There are several mostly procedural differences including:

- Filing location;
- Visa limitation;
- Time limitations; and
- Dual intent.

1. Filing Location

E-3 applicants outside of the United States must appear at a U.S. Consulate or Embassy abroad to apply. No petition is required when applying at a U.S. Consulate or Embassy. E-3 petitioners

²³⁶ See INA 101(a)(15)(E)(iii). See the Real ID Act, Pub. L. 109-13 (May 11, 2005), codified at 49 U.S.C. 30301.

²³⁷ See Chapter 3, Specific Petitioner Requirements, Section B, Labor Condition Application [2 USCIS-PM H.3(B)].

Comment [CSC254]: SCOPS: Should mention

[Redacted]

OPS/KMA: Section Moved.

Comment [CSC255]: SCOPS: Should mention

[Redacted]

Comment [HJC256]: AAO: As mentioned, it

[Redacted]

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seeking a change of nonimmigrant status to E-3 and/or an extension of stay must file at the Vermont Service Center regardless of the place of intended work.

2. E-3 Visa Limitations

E-3 visas are limited to 10,500 per year. These visas are counted separately from the H-1B visas, therefore this cap is distinct from the H-1B cap. Spouses and children of E-3 beneficiaries do not count against the E-3 cap.

3. E-3 Time Limits

E-3 specialty occupation workers may be admitted initially for a period not to exceed the validity period of the accompanying Labor Condition Application (LCA), but not for more than 2 years.

Extensions of Stay

USCIS may approve extensions of stay indefinitely in increments not to exceed the validity period of the accompanying E-3 LCA. As there is no limit on the total length of stay for an E-3 beneficiary, there is no specified number of extensions for a qualifying E-3, but USCIS must approve the extensions in no more than two-year increments.

4. Dual Intent for E-3 Beneficiaries

An E-3 beneficiary cannot simultaneously intend both to remain in the United States permanently (by pursuing an immigrant visa) and remain temporarily. However, E nonimmigrants do not have a foreign residence requirement. Therefore, USCIS does not deny applications for failure to maintain a foreign residence, which might otherwise be an indicator of lack of nonimmigrant intent.

F. Chile and Singapore Free Trade Agreements (H-1B1)

The Chile and Singapore Free Trade Agreements, made nationals of Chile and Singapore eligible to seek admission to the United States as H-1B1 nonimmigrants.²³⁸ USCIS also refers to this category as HSC. While the H-1B1 classification is in many ways similar to the H-1B classification, it exists under a separate statutory provision and many of the provisions applicable to H-1Bs, such as portability, do not apply to H-1B1s.

Eligibility

²³⁸ See Pub. L. 108-77 and Pub. L. 108-78 (September 3, 2003).

Comment [HJC257]: AAO: We recommend inserting "and/" since there will be cases where they are seeking both.

OPS(JVT): seems ok, just need to check PM style guide.

OPS/Kate: PM does not prohibit "and/or".

Comment [HJC258]: AAO: We recommend inserting "and/" since there will be cases where they are seeking both.

OPS(JVT): seems ok, just need to check PM style guide.

OPS/KMA PM style guide does not prohibit "and/or".

Comment [STN259]: I think this is more accurate right?

OPS/KMA-Yes, you're edit is more accurate. Thank you.

Comment [STN260]: Can they have an immigrant petition filed for them? If so, then maybe change this to "seek adjustment of status"

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In order to qualify for H-1B1, a national of Chile or Singapore must:

- Be coming to work in a specialty occupation requiring theoretical and practical application of a body of specialized knowledge, and
- Have attained a bachelor’s degree or higher in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.²³⁹

Although the H-1B1 and H-1B programs differ, Congress expressed its desire that many of the same standards apply.²⁴⁰ Therefore, a bachelor’s degree in a specific specialty, or its equivalent, is required for the majority of H-1B1 nonimmigrants. There are four exceptions to the requirement of a bachelor’s degree in the specific specialty including:

- For persons from Chile, an agricultural manager;
- For persons from Chile, a physical therapist;
- For persons from Chile or Singapore, a management consultant;
- For persons from Chile or Singapore, a disaster relief claims adjuster.

Petition Not Required

It is not necessary to file a petition with USCIS for an H-1B1 nonimmigrant visa if the beneficiary will apply for a visa abroad. Persons seeking classification as an H-1B1 may submit an LCA to DOL and then apply directly to the State Department for a visa.

Persons in the United States seeking a change of status to H-1B1, or seeking an extension of an existing H-1B1 stay, must have a U.S. employer apply to USCIS by submitting the following:

- A completed petition with the base fee and ACWIA fee (if applicable);
- An LCA (Annotated as “H-1B1-Chile” or “H-1B1-Singapore”) certified by DOL;
- A letter from the U.S. employer stating the activity to be engaged in, the anticipated length of stay, and the arrangements for remuneration; and

²³⁹ See INA 214(i)(3).

²⁴⁰ The legislative history of the provision states that the applicable requirements are “to be interpreted identically to the requirement to qualify as a professional under the H-1B category.” See H.R. Rep. No. 108-224, pt. 2, at 6-11 and H.R. Rep. No. 108-225 pt. 2, at 5-11 (2003).

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- Evidence the beneficiary meets the educational requirement for the occupation, which is a bachelor’s degree or higher degree in the specific specialty (unless one of the exceptions applies).

Fees

- The H-1B Fraud Prevention and Detection Fee is not required.²⁴¹
- Public Law 114-113 fee of \$4,000 for petitioners who employ 50 or more employees in the United States and more than 50% of those employees are in H-1B or L-1 nonimmigrant status; and must be submitted with a request for initial H-1B status or a request for a beneficiary already in H-1B status to change employers.²⁴²

Labor Condition Application (LCA)

Employers must submit a labor condition attestation for foreign workers from Chile or Singapore under the Free Trade Agreement H-1B1 (HSC) program. The law requires DOL to certify to DOS (when seeking consular processing) that the appropriate LCA has been filed with DOL.

If certified and the beneficiary will be consular processing, the employer transmits a copy of the signed, certified LCA to the beneficiary together with a written offer of employment. At the time of visa application at the consulate, the beneficiary will present a certified copy of the LCA, clearly annotated by the employer as “H-1B1 Chile” or “H-1B1 Singapore,” as proof of filing.

Licensure

The H-1B1 category does not require a license as a prerequisite for admission. However, professionals admitted in H-1B1 classification must comply with all applicable state and federal licensure requirements for engaging in their respective profession following their admission to the United States.

Cap

²⁴¹ See Pub. L. 111-230 (August 13, 2010).

²⁴² Between August 14, 2010 and September 30, 2015, the Emergency Supplemental Appropriation for Border Security Act, Pub.L. 111-230 (August 13, 2010), as amended by Pub. L. 111-347 (January 2, 2011) required an additional \$2,000 fee on H-1B petitions if the petition requested an initial approval of H-1B status or authorization to change employers or if the petitioner employed 50 or more employees in the United States, and more than 50% of those employees are in H-1B or L-1 status. As originally enacted Pub.L. 111-230 would have sunset on September 30, 2014. However, on January 2, 2011 President Obama signed Public Law 111-347. Title III, section 302 of that law extended applicability of the fee through September 30, 2015.

Comment [JVT261]: SCOPS: Recommend moving this after Specialty Occupation Chapter.

OPS(JVT): I think this is a good suggestion – Kate and Steven, ok?

OPS/KMA: Great suggestion. From five pages ago.

Comment [JVT262]: OPS(JVT): As announced, H-1B petitions filed on or after Oct. 1, 2015, should not include the additional fee that was previously required by Section 402 of Public Law 111-230, as amended by Public Law 111-347, for certain H-1B and L-1 petitions. The additional fee required by Public Law 111-230, as amended, expired on Sept. 30, 2015. All other H-1B and L-1 fees, including the Base fee, Fraud Prevention and Detection Fee, and American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) Fee when applicable, are still required. Petitions with incorrect fees may be rejected. Petitioners are reminded that USCIS prefers separate checks for each filing fee.

Public Law 111-230, enacted on Aug. 13, 2010, required an additional fee of \$2,000 for certain H-1B petitions and \$2,250 for certain L-1A and L-1B petitions postmarked on or after Aug. 14, 2010. Public Law 111-347, enacted on Jan. 2, 2011, extended the fees through Sept. 30, 2015. For more information, visit the H-1B Visa or L-1 Visa pages or call the National Customer Service Center at (800) 375-5283.

This information will need to be updated.

OPS/KMA See added footnote.

Comment [KMA263]: From OCC/ RHC- Will need to include/revise to reflect the new PL 114-113 fee.

OPS/KMA: See addition.

The Chile-Singapore Free Trade Agreements allow for no more than 1,400 nationals from Chile and 5,400 nationals from Singapore to enter the United States annually. This cap is set aside from the overall H-1B cap. When an H-1B1 nonimmigrant changes status to H-1B, he or she will be subject to the H-1B cap.

Chapter 7. Numerical Visa Limitations

A. Visa Limitations (Caps)

1. The H-1B Cap

The number of new H-1B visas issued each year is limited by statute.²⁴³ This limit, referred to as the "cap," has traditionally been set at 65,000 visas, although Congress has increased the cap in some years. The H-1B cap applies to each fiscal year, which begins on October 1st.

Petitions for the upcoming fiscal year are accepted no earlier than the preceding April 1st (or the first working day after that date) because an H-1B petition may not be filed or approved more than six months before the date of actual need.²⁴⁴

The H-1B cap only applies to the principal H-1B beneficiary and not to the spouse and children of the beneficiary, who as dependents of the principal H-1B would obtain their visas under the H-4 classification.²⁴⁵

In addition to the regular H-1B cap, a separate "cap" exists for one of several exemptions to the regular H-1B cap. Specifically, H-1B beneficiaries who possess a master's degree or higher from a U.S. institution of higher education may obtain an exemption [REDACTED] from the 65,000 regular cap.²⁴⁶ This exemption from the cap is limited to 20,000 per fiscal year.

2. The H-1B1 Cap

In a fiscal year, 1,400 nationals from Chile and 5,400 nationals from Singapore are allowed to enter the United States as H-1B1 beneficiaries. Individuals admitted in H-1B1 classification are admitted in one-year increments which may be renewed indefinitely, provided the individual demonstrates that he or she does not intend to abandon residence abroad to remain or work permanently in the United States.²⁴⁷ The following visa allocations apply to the cap:

²⁴³ See INA 214(g)(1)(A).

²⁴⁴ See 8 CFR 214.2(h)(9)(i)(B).

²⁴⁵ See INA 101(a)(15)(H)(iii) and INA 214(g)(2).

²⁴⁶ See Chapter 9, Limitations on Periods of Stay [2 USCIS-PM H.9].

²⁴⁷ See 9 FAM 402.10-5(F)(b).

Comment [CSC264]: SCOPS: Should mention that although they have been counted as H-1B1, they will be subject to H-1B Cap if they want to change status to H-1B?

DPS(JVT): ok by me – Steven and Kate, ok?

Kate: Agree.

Comment [JVT265]: SCOPS: See comment above about moving this section.

DPS(JVT): I'm fine with moving this section. Steven and Kate – ok?

DPS/KMA OK with moving.

Comment [STN266]: The way it read, it seemed [REDACTED]

DPS/KMA Thank you for this point. Accept edit.

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- The principal H-1B1 visa holder counts against the cap;
- The first admission or conferral of status counts against the cap; and
- All subsequent extensions after the ~~sixth~~ fifth extension (starting at the seventh year as an H-1B1).

The following table summarizes the annual 65,000 visa limitations by visa category.

Visa Limitations by Classification	
Classification	Limitation
Free Trade/HSC – from Chile	1,400
Free Trade/HSC – from Singapore	5,400
H-1B – from all other countries	58,200
Total	65,000

Comment [STN267]: I think we say fifth below, and that seems to be correct since the sixth extension is the 7th year, which means that it would count against the cap.

OPS/KMA Thanks, Simon. Accept edit.

Comment [STN268]: Are H-1B1s only approved for a year at a time? If so, suggest that we clarify in the H-1B1 section above.

OPS/KMA: See edits.

Effect of H-1B cap on H-1B1 cap

The annual H-1B cap is reduced by the H-1B1 cap at the beginning of the fiscal year. Therefore, up to 6,800 visas are set aside from the cap of 65,000 during each fiscal year for the H-1B1 program.²⁴⁸

3. Department of Defense (DOD) H-1B2 Cap

The H-1B2 classification has its own, separate numerical limitation. A maximum of 100 H-1B2 workers can be employed in the United States at any time.²⁴⁹

4. E-3 Cap

E-3 visas are limited to 10,500 per year. These visas have their own separate cap and therefore do not count against the H-1B cap. Spouses and children of E-3s do not count against the cap.

²⁴⁸ See INA 214(g)(8)(A)(iv).

²⁴⁹ See 8 CFR 214.2(h)(8)(i)(B). See the terms of the United States-Chile and United States-Singapore Free Trade Agreements.

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5. Closing of Filing Period for Cap-Subject Petitions

If the numerical limitation for the current fiscal year has not been reached, USCIS will accept and adjudicate cap-subject petitions until USCIS receives a sufficient number of petitions to meet the cap. An update is posted on the USCIS website notifying the public when the filing period is closed.

Cap “Lottery”

If the numerical limitation for the current fiscal year has been reached, USCIS  may use a computer-generated random selection process (commonly known as a “lottery”) to select a sufficient number of petitions needed to meet the caps of 65,000 for the general category and 20,000 under the advanced degree exemption limit. For cap-subject petitions not randomly selected, USCIS will reject and return the petition with filing fees, unless it is a duplicate filing.²⁵⁰ If the numerical limitation is reached within the first five days of a given fiscal year, then USCIS will apply the random selection process to all of the petitions filed in the first five days.

Advanced Degrees

USCIS conducts the selection process for advanced degree exemption petitions first if the advanced degree exemption is reached during the first five business days on which petitions eligible to the exemption under the INA.²⁵¹ All advanced degree petitions not selected become part of the random selection process for the 65,000 limit.

Chapter 8. Exemptions From the Numerical Limitations

1. General Exemptions

Certain types of H-1B petitions are exempt from the cap.²⁵² Creating exemptions rather than changing the total cap number each year ensures that certain H-1B beneficiaries as determined  by Congress are able to obtain H-1B status even in times of high demand. It also allows Congress to further policy goals by ensuring that employers and beneficiaries deemed important by Congress are not prevented from obtaining H-1B status by the fixed cap limits.

Congress provided certain institutions with ~~the~~ an exemption from the  H-1B cap   including work on behalf of:

²⁵⁰ See 8 CFR 214.2(h)(8).

²⁵¹ See 8 CFR 214.2(h)(8)(ii)(B).

²⁵² 

²⁵³ See INA 214(g)(5)(A) and (B).

Comment [RHC269]: This is not entirely



Comment [RHC270]: But this is only if the



have added here?

Comment [RHC271]: ??? isn't this the chapter 8 that this footnote is referring to?

OPS/KMA: Good point. Deleted.

Comment [STN272]: Unless we have a cite for



OPS/KMA: Deletion accepted.

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- Institutions of higher education;²⁵⁴
- ~~Nonprofit entities related to or affiliated with an institution of higher education~~ Higher education-related nonprofit entities;²⁵⁵
- Nonprofit research organizations;²⁵⁶ or
- Governmental research organizations.²⁵⁷

Comment [JVT273]: SCOPS edit.

OPS(JVT): need to look over previous version of PM

DPS/Kate 1.4.17-This language is consistent with the reg.

In effect, these statutory measures ensure that qualifying institutions have access to a continuous supply of H-1B workers without numerical limitation. Congress deemed such employment advantageous to the United States, based on the belief that increasing the number of high-skilled foreign nationals working at U.S. institutions of higher education would increase the number of Americans who will be ready to fill specialty occupation positions upon completion of their education.²⁵⁸ Congress reasoned that “by virtue of what they are doing, people working in universities are necessarily immediately contributing to educating Americans.”²⁵⁹ Congress also recognized that U.S. institutions of higher education are on a different hiring cycle from other U.S. employers, and in years of high H-1B demand, these institutions would be unable to hire cap-subject H-1B nonimmigrant workers.²⁶⁰

2. Additional Exemptions

Further cap exemptions include the following situations:

- **Master’s Degree Or Higher:** The beneficiary possesses a master’s degree or higher from a U.S. institution of higher education²⁶¹ (limited to 20,000 per fiscal year);
- **Working ~~in~~ in Guam or the Commonwealth of the Northern Mariana Islands (CNMI):** The beneficiary will be working exclusively ~~in~~ in Guam or the CNMI;²⁶²

Comment [JVT274]: SCOPS edit to FN

OPS(JVT): need to confirm

DPS/KMA 1.4.17-OCC reviewed this edit and did not correct the FN edit.

²⁵⁴ As defined at 20 U.S.C. 1001(a) and 8 CFR 214.2(h)(8)(ii)(F)(1).

²⁵⁵ See 8 CFR 214.2(h)(19)(iv).

²⁵⁶ See INA 214(g)(5) and 8 CFR 214.2(h)(19)(iii)(B).

²⁵⁷ See 8 CFR 214.2(h)(19)(iii)(C).

²⁵⁸ See S. Rep. No. 260, at 21-22.

²⁵⁹ See S. Rep. No. 260, at 21.

²⁶⁰ See S. Rep. No. 260, at 22.

²⁶¹ See 20 U.S.C. 1001(a).

²⁶² See 48 U.S.C. 1805(a)(2) as amended by section 10 of Pub. L. 113-235; 48 U.S.C. 1806(b). This exemption is in effect until December 31, 2019.

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- “Conrad 30” waiver: The beneficiary was admitted to the United States as a J-1 (Exchange Visitor) nonimmigrant in order to receive graduate medical training and has received a waiver of the two-year foreign residence requirement to practice primary care or specialty care medicine in a medically underserved area or for an interested federal or state agency;²⁶³
- Previous H-1B Status: Petitions [REDACTED] involving an H-1B beneficiary who has [REDACTED] been counted against the cap within the last six years [REDACTED] do not count against the cap unless the H-1B beneficiary would be eligible for a new six-year period of admission at the time the petition is filed.^{264, 265} DHS regulations provide that recapturing the remainder of the initial 6-year period of H-1B admission under INA 214(g)(4) may be done at any time before the beneficiary uses the full period of H-1B admission.²⁶⁶ If the extension request is a change from a cap-exempt employer to a cap-subject employer, however, the petition is counted against the cap;
- Multiple Petitions: When multiple petitions are approved on behalf of an H-1B beneficiary, only one approval is counted against the cap²⁶⁷;
- Concurrent Employment: When an H-1B beneficiary is employed by a cap-exempt organization, any concurrently filed H-1B petition is exempt from the cap as long as the beneficiary remains employed by the cap-exempt organization at the time of filing through the time of adjudication.²⁶⁸ ~~or~~
- Spouses and Children: Qualifying dependent family members do not count against the cap.

A. U.S. Master’s Degree or Higher

The first 20,000 petitions filed on behalf of beneficiaries who possess a master’s degree or higher from a public or other nonprofit, accredited or pre-accredited U.S. institution of higher

²⁶³ See INA 214(i)(2)(A).

²⁶⁴ See Chapter 8, Exemptions from the Numerical Limitations [2 USCIS-PM H.8].

²⁶⁵ See INA 214(g)(7).

²⁶⁶ See 8 CFR 214.2(h)(13)(iii)(C).

²⁶⁷ For example, if an H-1B beneficiary changes employers through the filing of a petition by a new employer, the second petition will not count against the cap unless the H-1B beneficiary would be eligible for a new six-year period. This is also the case when an H-1B beneficiary requests concurrent employment with another H-1B petitioner

²⁶⁸ See 8 CFR 214.2(h)(8)(ii)(F)(6).

Comment [RHC275]: Needs to be revised to be

OPPS/KMA: See edits.

Comment [RHC276]: Not sure why we keep citing to chapter 8 of the PM since this is chapter 8 of the PM, right?

OPPS/KMA: I see your point. Footnote deleted.

Comment [STN277]: Add “at the time of filing through the time of adjudication”?

OPPS/KMA Added.

Comment [JVT278]: SCOPS edit

OPPS(JVT): looks fine to me

OPPS/KMA: Agree with edit.

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education are exempt from the H-1B cap.²⁶⁹ Once the 20,000 master's cap is reached, any employer seeking an H-1B nonimmigrant visa on behalf of an H-1B beneficiary who possesses a U.S. master's or higher degree is subject to the regular H-1B cap unless the beneficiary is eligible for another exemption. Officers should apply all exemptions that do not contain numerical limitations first before applying the "masters or higher" 20,000 exemption.

To qualify for a master's cap exemption, the beneficiary must have a U.S. master's or higher degree from a U.S. institution of higher education.²⁷⁰

The qualifying degree must have a bachelor's degree as a prerequisite to obtain the master's degree or higher. Officers can give the exemption if the master's is at least one level beyond the entry-level post-bachelor degree in the field.

B. Place of Employment²⁷¹

These exemptions, created by The American Competitiveness in the Twenty-First Century Act (AC21),²⁷² apply to an H-1B beneficiary who:

- Is employed (or has received an offer of employment) at an institution of higher education or a related or affiliated nonprofit entity; or
- Is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization.²⁷³

Therefore, qualifying cap-exempt entities include:

- A public or other nonprofit, accredited or pre-accredited institution of higher education;
- A nonprofit entity related to or affiliated with a public or other nonprofit, accredited or pre-accredited institution of higher education;
- A nonprofit research organization; or
- A governmental research organization.

²⁶⁹ See INA 214(g)(5)(C).

²⁷⁰ See 20 U.S.C. 1001(a).

²⁷¹ See INA 214(g)(5)(A) and INA 214(g)(5)(B).

²⁷² See Pub. L. 106-313 (October 17, 2000).

²⁷³ See INA 214(g)(5)(A) and INA 214(g)(5)(B).

Comment [JVT279]: SCOPS: Recommend moving this section under the numerical limitation chapter.

OPS(JVT): No big objection. Steven and Kate, ok with move?

OPS/KMA: Moved from below. Unclear why track changes did not show this as moved.

Comment [STN280]: There is no "A" in this chapter.

OPS/KMA: See added "A" section in this chapter.

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Employed “at”

USCIS recognizes that Congress chose to exempt from the numerical limitations in section 214(g)(1) aliens who are employed “at” a qualifying institution, which is a broader category than aliens employed “by” a qualifying institution. USCIS interprets the statutory language as reflective of Congressional intent that certain aliens who are not employed directly by a qualifying institution may nonetheless be treated as cap exempt when such employment directly and predominately furthers the essential purposes of the qualifying institution.

An H-1B beneficiary who is not directly employed by a cap exempt qualifying institution may qualify for exemption from the cap if the H-1B beneficiary will spend the majority of his or her work time performing job duties at a qualifying institution, organization or entity.²⁷⁴

The employment at a qualifying institution, organization, or entity may qualify for cap exemption if if the H-1B beneficiary will spend the majority of his or her work time performing job duties at a qualifying institution, organization or entity and those job duties directly and predominantly furthers the qualifying entity’s (generally higher education or nonprofit research or governmental research);

- Essential purpose;
- Mission;
- Objectives; or
- Functions.²⁷⁶

²⁷⁴ See 8 CFR 214.2(h)(8)(ii)(F)(4).

²⁷⁵ See S. Rep. No. 106-260 (April 11, 2000), providing that persons should be considered cap-exempt “... by virtue of what they are doing” and not simply by reference to the identity of the petitioning employer.

²⁷⁶ See 8 CFR 214.2(h)(8)(ii)(F)(4).

Comment [JVT281]: Does this mean even if the

Please clarify.

Comment [SCOPS-MDV282]: This is somewhat confusing. I understand the concept but

OPS/JVT: Good suggestion. Steven and Kate, what do you think?

OPS/KMA: OK with deletion.

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Comment [RHC283]: Replaced this with verbatim language from the 6/6/06 memo since that memo discusses the at/by distinction more clearly.

OPS/KMA: Accept edits.

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Comment [RHC284]: Is this referring only to employment “at” rather than employment “by”, or both? This is confusing as currently written.

OPS/KMA-See edits to specify employment “at”.

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If a petitioner is not itself a qualifying institution, then it bears the burden of demonstrating by a preponderance of the evidence that a logical nexus exists between the beneficiary’s duties and the normal, primary, or essential work performed by the qualifying institution at which the beneficiary will be working.

²⁷⁷

[Redacted]

[Redacted]

Comment [JVT285]: SCOPS: Would

OPS(JVT): ok with deleting

Comment [JVT286]: SCOPS: How is this different than the above? Recommend removal of

OPS(JVT) : If this is just confusing, I agree we should take it out. Steven and Kate, ok?

OPS/KMA Agree with deletion.

1. Institution of Higher Education

An ~~institute~~institution of ~~higher education~~learning is an ~~institution as an educational institution~~ in any ~~s~~state that:²⁷⁸

- Admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
- Is legally authorized within such ~~s~~state to provide a program of education beyond secondary education;
- Provides an educational program for which the institution awards a bachelor’s degree or provides not less than a two-year program that is acceptable for full credit toward such a degree;
- Is a public or other nonprofit institution; and
- Is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted pre-accreditation status by such an agency or association that has been recognized by the Secretary for the granting of pre-accreditation status, and the Secretary has determined that there is satisfactory

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²⁷⁷ See 8 CFR 214.2(h)(8)(ii)(F)(4).

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assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.²⁷⁹

2. Related or Affiliated Nonprofit Entity

Nonprofit entities that are related or affiliated with an institution of higher education are also exempt from the H-1B cap. The H-1B regulations define the term “related or affiliated nonprofit entity” for purposes of the H-1B fee and numerical cap exemption.²⁸⁰ Adjudicators should apply the same definition to determine whether an entity qualifies as a related or affiliated nonprofit entity for purposes of [REDACTED] H-1B numerical cap and fee exemption. In order to qualify as a cap-exempt entity on this basis, the petitioner must demonstrate by a preponderance of the evidence that it [REDACTED] is an affiliated or related nonprofit entity (including but not limited to hospitals and medical or research institutions) by showing one of the following:²⁸¹

- The nonprofit entity is connected or associated with an institution of higher education through shared ownership or control by the same board or federation;
- The nonprofit entity is operated by an institution of higher education; or
- The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary; or
- The nonprofit entity has, absent shared ownership or control, entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education.²⁸²

In order to show this last condition, absent a demonstration of shared ownership or control, a petitioner must provide evidence of a formal written affiliation agreement that establishes an active working relationship between the two entities and the purpose of the affiliation. This is important to ensure that the nonprofit entity, or nonprofit research organizations, or governmental research organizations will directly and predominantly further the normal,

²⁷⁹ See 20 U.S.C. 1001(a).

²⁸⁰ See 8 CFR 214.2(h)(19)(iii)(B). See The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Pub. L. 105-277 (October 21, 1998).

²⁸² See 8 CFR 214.2(h)(8)(ii)(F)(2)(iv) and 214.2(h)(19)(iii)(B)(4).

Comment [RHC287]: Seemed like part of the

OPS/KMA See edits.

Comment [JVT288]: SCOPS: May be confusing

OPS(JVT): fine with SCOPS clarification. Steven and Kate – ok?

OPS/KMA Agree with clarification.

Comment [JVT289]: SCOPS: recommends hyphenating non-profit

OPS(JVT): reject.

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primary, or essential purpose, mission, objectives, or functions of the institution of higher.²⁸³ A petitioner may wish to submit, or officers may require the submission of, additional evidence to corroborate the purpose of the affiliation. The record must demonstrate that "a fundamental activity" of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education.

Interim Procedures for Related or Affiliated Nonprofit Entity Cap Exemptions

USCIS gives deference to prior determinations made after June 6, 2006, and that a petitioner is a nonprofit entity related to or affiliated with an institution of higher education and therefore exempt from the H-1B statutory cap, when: Deference under this interim policy will apply unless there have been

- [REDACTED]
- [REDACTED] significant changes in circumstances or clear error in the prior adjudication.

The burden remains on the petitioner to show that the organization previously received approvals of its request for H-1B cap exemption as a non-profit entity that is related to or affiliated with an institution of higher education.

3. Nonprofit Research Organization or a Governmental Research Organization

The nonprofit research organizations²⁸⁴ and U.S. governmental research organizations²⁸⁵ eligible for fee exemptions are primary engaged in or the primary mission is basic and/or applied research.²⁸⁶ A governmental research organization can consist of a federal, state or local entity whose primary mission is the performance or promotion of basic and/or applied research.²⁸⁷ A U.S. government entity may either perform or promote basic research or applied research.

Basic Research

Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial

²⁸³ See Aytes Memo June 2006, at 3 (citing S. Rep. No. 106-260 (April 11, 2000) [re. S. 2045, the bill that was enacted into AC21] providing that individuals should be considered cap-exempt "... by virtue of what they are doing" and not simply by reference to the identity of the petitioning employer.)

²⁸⁴ See 8 CFR 214.2(h)(19)(iii)(B).

²⁸⁵ See 8 CFR 214.2(h)(19)(iii)(C).

²⁸⁶ See 8 CFR 214.2(h)(19)(iii)(C).

²⁸⁷ See 8 CFR 214.2(h)(19)(iii)(C).

Comment [JVT290]: OPS(IVT): Jackie – can you make sure that we are using nonprofit consistently. Should not have hyphens. Thanks!

Jackie – all set!

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Comment [RHC291]: While the deference

[REDACTED]

Comment [KMA292]: For WG discussion: AC21 regs supercede the deference policy. Consider deletion, or rewrite in past tense for historical purposes.

Comment [HJC293]: AAO: We recommend stating "and/or" to be consistent with 8 CFR 214.2(h)(19)(iii)(C)

OPS/KMA: This edit is fine.

Comment [HJC294]: AAO: We recommend stating "and/or" to be consistent with 8 CFR 214.2(h)(19)(iii)(C)

OPS/KMA Fine with addition.

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objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities.

Applied Research

Applied Research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

A nonprofit organization²⁸⁸ is:²⁸⁹

- A tax exempt organization under the Internal Revenue Code of 1986;²⁹⁰ and
- An entity approved as a tax -exempt organization for research or educational purposes by the Internal Revenue Service (IRS).

4. Concurrent Employment of Certain Cap-Exempt H-1B Nonimmigrants

An H-1B nonimmigrant employed at an institution of higher education or a related or affiliated nonprofit entity who has not been counted against the cap may accept concurrent H-1B employment with a cap-subject employer.

The concurrent employer must file its own petition on behalf of the H-1B beneficiary, but the beneficiary does not need to wait for approval of the petition in order to commence employment. If the cap-exempt employment ceases, the H-1B employee then becomes subject to the cap unless the beneficiary obtains new cap-exempt employment.

When ²⁹¹ petitioning for concurrent cap-subject H-1B employment, the petitioner must demonstrate that:

- The H-1B beneficiary is employed in valid H-1B status with a cap-exempt employer;
- The beneficiary's employment with the cap-exempt employer is expected to continue after the new cap-subject petition is approved; and
- The beneficiary can reasonably and concurrently perform the work described in each employer's respective positions.²⁹²

²⁸⁸ See 8 CFR 214.2(h)(19)(iv).

²⁹⁰ See IRS Code 501(c)(3), (c)(4), or (c)(6).

²⁹¹ See INA 214(g)(6).

²⁹² See 8 CFR 214.2(h)(8)(ii)(F)(6).

Comment [JVT295]: OPS(JVT): Jackie, can you make sure we are using tax exempt consistently? No hyphen. Thanks!

Jackie: all set!

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Comment [JVT296]: SCOPS: Suggest deleting this sentence and applying FN to the previous sentence.

OPS(JVT): ok with SCOPS edit. Steven and Kate, any objection?

OPS/KMA No objection.

Comment [JVT297]: SCOPS: Suggest deleting this sentence and applying FN to the previous sentence.

OPS(JVT): ok with SCOPS edit. Steven and Kate, any objection?

OPS/KMA NO objection.

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In addition, the validity of a petition for concurrent cap-subject H-1B cannot extend beyond the period of validity specified for the cap-exempt H-1B employment.²⁹³

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Comment [JVT298]: SCOPS edit.

OPS(JVT): accept

The concurrent employment cap provision does not apply to H-1Bs employed at governmental or nonprofit research organizations.

C. Commonwealth of the Northern Mariana Islands (CNMI) and Guam

H-1B beneficiaries performing labor or services in the CNMI and Guam are exempt from the H-1B numerical limitation.²⁹⁴ As of November 28, 2009, H-1B beneficiaries in Guam and the CNMI are exempt from the statutory numerical limitation for H-1B classification from November 28, 2009 to December 31, 2019.²⁹⁵

This H-1B cap exemption does not apply to any employment to be performed outside of the CNMI or Guam. As such, to qualify for this exemption, the petition must list and include an LCA for work locations in the CNMI or Guam only.

An H-1B worker who received H-1B status under this CNMI and Guam cap exemption and ceases to be employed in H-1B classification solely in the CNMI or Guam is subject to the H-1B cap. A subsequent petition filed for such an H-1B beneficiary, for example, a change of employer petition with a request for an extension of stay, requesting employment located outside of CNMI or Guam is subject to the H-1B cap.

D. Certain International Medical Graduates (Conrad and IGA Physicians)

Certain International Medical Graduates are cap-exempt if the graduate:

- Was admitted to the United States as a J-1 nonimmigrant physician in order to receive graduate medical training, and

Comment [JVT299]: SCOPS edit.

OPS(JVT): accept.

²⁹³ See 8 C.F.R. § 214.2(h)(8)(ii)(F)(6)(i).

²⁹⁴ See the Consolidated Natural Resources Act of 2008 (CNRA), Pub. L. 110-229 (May 8, 2008). See INA 214(g)(1)(A).

²⁹⁵ See Section 6(b) of Pub. L. 94-241 (March 24, 1976), as added by Section 702 of the CNRA, Pub. L. 110-229 (May 8, 2008), codified at 48 U.S.C. 1806(b).

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- Received a waiver of the two-year foreign residence requirement in order to practice primary care or specialty care medicine in a medically underserved area or for an interested federal or state agency (Exchange Visitor (J-1) Conrad waiver).²⁹⁶

Not all J-1 nonimmigrants qualify for this exemption. The beneficiary must be a J-1 who came to the United States or acquired the status in order to receive graduate medical education or training and who has an approved Conrad, state waiver, or Interested Government Agency (IGA) waiver²⁹⁷ [REDACTED] as a physician providing direct patient care, teaching, or conducting research for three years [REDACTED] for the health [REDACTED] facility health care organization named in the approved waiver. Physicians who qualify for this exemption

E- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

F-E Extensions – Previously Counted Toward the H-1B Cap

An H-1B beneficiary seeking an extension is not subject to the H-1B cap if USCIS already counted the beneficiary [REDACTED] towards the cap and:

- Is now seeking an extension of stay or readmission in H-1B status for the remaining portion of the initial six-year period of admission; or
- Is eligible for an extension of stay or readmission in H-1B status beyond the six-year maximum period,³⁰⁰ or

²⁹⁶ See INA 214(i)(2)(A).

²⁹⁷ See INA 212(e).

[REDACTED]

Comment [JVT300]: SCOPS edit

OPS(JVT): ok

Comment [RHC301]: The statute refers to employment at a health facility or health care organization. Also, aren't some IGA's for medical research rather than primary care? It seems like the wording here is more focused on Conrad 30 (where they agree to perform primary care at a health facility).

OPS/KMA See edits

Comment [JVT302]: SCOPS: Recommend moving this section under the numerical limitation chapter.

OPS(JVT): No big objection. Steven and Kate, ok with move?

OPS/KMA Moved above.

Comment [JVT303]: SCOPS: INA 214(g)(7) gives CAP exemption to: "Any alien (1) who has already been counted, within the 6 years prior to the approval of a petition... (2) unless the alien would be eligible for a full 6 years..."

The policy memorandum dated December 5, 2006 by Michael Aytes has released the restriction #2 of the INA and allowed the alien in this situation to select his/her "remainder" option, to be readmitted in H-1B status and not be subject to the numerical limitation. The memo does not by any means bypass the restriction #1 of the INA that requires the alien to be counted toward the numerical limitation within the last six years.

[REDACTED]

OPS/KMA I believe this is correct as drafted.

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is a nonimmigrant eligible for an extension of stay beyond the six-year maximum period permitted.³⁰¹

USCIS will not count toward the limitation any H-1B beneficiary previously counted toward the H-1B cap unless the beneficiary would be eligible for the full six years of admission as an H-1B at the time of filing.³⁰²

When an H-1B beneficiary has reached the maximum period of admission, unless he or she is eligible for an extension beyond the six-year period of admission, USCIS may approve a new petition subject to the numerical limitations only if the beneficiary has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.³⁰³

G-F. H-1B "Remainder" Time

H-1B beneficiaries who have previously been counted toward the H-1B cap may choose to be subject to the H-1B cap in order to seek a new six-year admission period only if USCIS considers the beneficiary eligible for the full six years of authorized admission (H-1B beneficiary has resided and been physically present outside the United States for one year).

To choose to be subject to the H-1B cap in this situation, a petitioner must file the petition on behalf of an H-1B beneficiary who has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year, and request an employment start date in a fiscal year for which an H-1B visa number is still available.



H-1B beneficiaries are eligible for a new six-year period of H-1B validity after having resided and been physically outside the United States for the immediate prior year. However, petitioners of beneficiaries who have not completed their entire six-year H-1B  period of authorized admission may choose to have the beneficiary complete that period under the "remainder " policy.³⁰⁴

³⁰⁰ See Section 104(c) of AC21, Pub. L. 106-313, 114 Stat. 1251, 1253 (October 17, 2000).

³⁰¹ See Section 106(a) and (b) of AC21, Pub. L. 106-313, 114 Stat. 1251, 1253-54 (October 17, 2000).

³⁰² See INA 214(g)(7).

³⁰³ See 8 CFR 214.2(h)(13)(i)(B) and 8 CFR 214.2(h)(13)(iii).

³⁰⁴ See Chapter 11, Recapture of Time Abroad for Period of Stay Purposes [2 USCIS-PM H.11].

Comment [RHC304]: I realize the distinction based on the footnotes, but when reading the text it is unclear what the difference is between "eligible for an extension of stay or readmission in H-1B status beyond the six-year maximum period" and "eligible for an extension of stay beyond the six-year maximum period permitted". Suggest combining these two into one bullet.

OPS/KMA combined.

Formatted: Font color: Black

Comment [STN305]: Not sure if this is relevant to this discussion on cap, unless we say that this person will again be subject to the cap.

OPS/KMA Added text.

Comment [RHC306]: Is this "if" requirement relevant? Why can't they apply for the remainder



OPS/KMA Deleted.

Comment [RHC307]: Recapture or remainder? Seems like this is more specifically "remainder".

OPS/KMA Edited.

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USCIS allows a beneficiary to be re-admitted for the "remainder" of the initial six-year period of authorized admission without being subject to the H-1B cap (if previously counted). Remaining H-1B time may be recaptured at any time before the foreign worker uses the full period of H-1B admission period available to the H-1B beneficiary.³⁰⁵

Comment [RHC308]: Same as above - how is admission, right?
OPS/KMA See edits.

Specifically, the "remainder" period of the initial six-year admission period refers to the full six-year period of admission minus the period of time that the alien previously spent in the United States in valid H-1B status.

The burden is on the petitioner to demonstrate periods of absence from the United States.

Comment [RHC309]: Verbatim from existing policy memo. I think this language is clearer.
OPS/KMA Thanks.

For example, a beneficiary who was in the United States in H-1B status from January 1, 1999 to December 31, 2004, and then remained outside the United States for all of 2005, could seek admission in January 2006 for a new six-year period or seek to finish the "remainder" of the initial six-year period (one year).

Comment [JVT310]: SCOPS: The example is still within the 6 year since initial H1B status
OPS(JVT): I think this example is ok. Steven and Kate - any concerns?
RHC: In this example, the H-1B seeks admission in 2006 for the remainder time, 7 years after being admitted in 1999.

Chapter 9. Limitations on Period of Stay

The following table provides a brief summary of the limitations of periods of stay depending on the occupation. The sections that follow provide additional information.

Specialty Occupation Limitations on Period of Stay

Applicant	Code of Admission	Original Period and Extensions	Total Period of Stay
Special Occupation	H-1B	3 years	6 years
Special Occupation • Department of Defense Worker	H-1B2	5 years	10 years
Fashion Models	H-1B3	3 years	6 years

Comment [JVT311]: SCOPS: INA 214(g)(7) gives CAP exemption to: "Any alien (1) who has already been counted, within the 6 years prior to the approval of a petition... (2) unless the alien would be eligible for a full 6 years..."

Comment [RHC312]: Note that this is not entirely applicable since we include fashion models in the chart...
OPS/KMA See edits

Comment [HJC313]: AAO: We recommend removing the word "professional" here and below as the word no longer accurately captures the specialty occupations described in the table.
OPS(JVT): Fine with deleting professional from these tables

³⁰⁵ See 8 CFR 214.2(h)(13)(iii)(C).

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Special Occupation and Singapore)	[REDACTED] Chile	H-1B1	1 year	Indefinite (however, cap number must be available after the 5th consecutive extension)
Special Occupation Australia)	[REDACTED]	E-3	2 years	Indefinite

A. H-1B Time Limit

Generally, an H-1B beneficiary in a specialty occupation or H-1B3 beneficiary may only be in the United States for a maximum period of six years.³⁰⁶ USCIS may approve an initial petition for H-1B or H-1B3 classification for a period of up to three years and an extension request may be authorized for a period of up to three additional years.³⁰⁷

For H-1B2 beneficiaries may be admitted for a period not to exceed [REDACTED] ten years.³⁰⁸ USCIS may approve the initial H-1B2 petition for a period of up to five years and an extension request may be authorized for a period of up to five additional years.³⁰⁹

Maximum Authorized Periods

Generally, a beneficiary who has spent the maximum authorized period in the United States in H-1B, H-1B2, or H-1B3 classification may not seek an extension, change of status, or be readmitted to the United States in the same classification.³¹⁰

Barring the applicability of an exception, USCIS may not approve a new petition or a change of status to H or Intracompany Transferee (L) classification unless the beneficiary has resided and been physically present outside the United States, for at least one year immediately prior to the new petition. USCIS exempts brief trips for business or pleasure for the immediate prior year from the residence and physical presence requirements.³¹¹

Comment [RHC314]: revised this sentence because the DOD statutory provisions do not use the same term [authorized admission] that is used for H-1Bs in INA 214(g)(4). That results in different treatment (e.g. we don't allow for recapture of time for DOD, right?) so want to be careful with the use of terminology here.

Also corrected the footnote citation since INA 214(g)(4) does not speak to H-1B2 time – just speaks to the 6 year H-1B time.

DPS/KMA Thanks!

³⁰⁶ See INA 214(g)(4). See 8 CFR 214.2(h)(13)(iii)(A).

³⁰⁷ See 8 CFR 214.2(h)(9)(iii)(A)(1) and 8 CFR 214.2(h)(9)(iii)(A)(3). See 8 CFR 214.2(h)(15)(ii)(B)(1).

³⁰⁸ See Pub. L. 101-649 section [REDACTED]. See 8 CFR 214.2(h)(13)(ii)(B).

³⁰⁹ See 8 CFR 214.2(h)(9)(iii)(A)(2) and 8 CFR 214.2(h)(15)(ii)(B)(2).

³¹⁰ See 8 CFR 214.2(h)(13)(iii)(A). See Chapter 11, Recapture of Time Abroad for Period of Stay Purposes [2 USCIS-PM H.11] for exceptions of extensions of stay beyond the maximum period of admission.

³¹¹ See 8 CFR 214.2(h)(13)(iii)(A) and 8 CFR 214.2(h)(13)(iii)(B).

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Intracompany Transferee (L-1) Time

Time spent in an Intracompany Transferee (L-1) nonimmigrant status applies to the H-1B time limit. In other words, an L-1 nonimmigrant who has already been physically present in the United States for three years and who changes status to H-1B nonimmigrant classification would only be eligible for a three-year period of admission as an H-1B. Similarly, time spent as an H-1B nonimmigrant counts against the applicable time limits for the L-1 nonimmigrant category.³¹²

If the beneficiary has spent six years in the United States in L-1A nonimmigrant status, he or she would not be eligible for H-1B nonimmigrant status until the beneficiary has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

H-1B1 Time

Time spent in H-1B1 nonimmigrant status does not apply to the H-1B time limit.

1. Spouse and Dependents

H-1B time limits apply only to the principal H-1B nonimmigrant and do not apply independently to the principal's spouse and children.

Previous Time

Time spent as an H-4 or L-2 dependent does not count against the maximum allowable period of stay available to principals in H-1B status. Therefore, an H-1B beneficiary who was previously an H-4 or L-2 beneficiary and subsequently becomes an H-1B principal could be eligible for the maximum period of stay. Conversely, an H-1B principal who subsequently changes to H-4 or L-2 status may remain in the derivative status for as long as the principal spouse maintains that principal H-1B or L-1 status.

2. Intermittent Employment

The H-1B time limits do not apply to someone who does not reside continually in the United States and whose employment in the United States is:

³¹² The L-1A and L-1B time limits are seven and five years, respectively. Therefore, an H-1B nonimmigrant who is nearing the end of the six-year period could change status to L-1A for one year if otherwise eligible, but not to L-1B, as long as the change of status occurs before the six year period has been completed.

Comment [JVT315]: SCOPS:
This statement is NOT statutorily correct.

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- Seasonal;
- Intermittent; or
- For an aggregate of six months or less per year.³¹³

Further, the limitations do not apply to beneficiaries who reside abroad and regularly commute to the United States to engage in part-time employment.³¹⁴

To qualify for these exceptions, the petitioner and the beneficiary must provide clear and convincing proof of eligibility. The petitioner and beneficiary must provide the following evidence including:

- Arrival and departure records;
- Copies of tax returns; and
- Records of employment abroad.

Comment [HJC316]: AAO: inserted "for"

DPS(JVT): thanks!

B. H-1B1 Time Limits

H-1B1 petitions for nationals of Chile and Singapore are approved for up to one year of validity. USCIS may approve extensions indefinitely in one-year increments, provided another H-1B1 cap number is available for each extension after the fifth consecutive extension and the beneficiary maintains the nonimmigrant intent.³¹⁵

C. E-3 Time Limits

An E-3 nonimmigrant is subject to the same validity limitations as imposed on E nonimmigrants. Accordingly, the E-3 may be approved for a period of up to two years and may obtain extensions in two year increments. Unlike the H-1B nonimmigrant, however, an E-3 nonimmigrant may obtain extensions indefinitely so long as the beneficiary maintains the nonimmigrant intent.

Chapter 10. H-1B Time Limit Exceptions

Congress created an exception to the six-year limit in H-1B status for beneficiaries who are subject to per country limitations and lengthy adjudication processing

³¹³ See 8 CFR 214.2(h)(13)(v).

³¹⁴ See 8 CFR 214.2(h)(13)(v).

³¹⁵ See INA 214(b) and INA 214(g)(8).

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delays [REDACTED]³¹⁶ These changes apply to H-1B beneficiaries who are in the process of seeking permanent residence based on the employment.³¹⁷

For extension requests beyond the six-year time limit, the petitioner should provide a written statement indicating the basis for the requested exemption from the H-1B time limits.

A. [REDACTED] Lengthy Adjudication Delay Exemption

The American Competitiveness in the Twenty-First Century Act (AC21)³¹⁸ permits H-1B status beyond the 6-year maximum period when at least 365 days have elapsed since the filing of the labor certification with the Department of Labor (DOL) on behalf of the foreign national or when at least 365 days have elapsed since the filing of an immigrant visa petition with USCIS.

In order to be eligible for the lengthy adjudication delay exemption under section 106(a) and (b) of AC21, an individual must:

- Have had an application for labor certification or a Form I-140 petition filed on his or her behalf at least 365 days before the date the exemption would take effect;³¹⁹
- Apply for adjustment of status or an immigrant visa within 1 year of the date an immigrant visa is authorized for issuance.³²⁰ Exemptions pursuant to section 106(a) of AC21 may only be made in 1-year increments;³²¹ and

when:

- [REDACTED]
- [REDACTED]

Comment [RHC317]: Deleted since this seems out of place here and it is repetitive since we discuss it further below.

OPS/KMA OK with deletion.

³¹⁶ See Sections 104(c) and 106(a) of AC21, Pub. L. 106-313, 114 Stat. 1251, 1253 (October 17, 2000).

³¹⁷ The changes reflect Congress' recognition of the fact that seeking and obtaining permanent residence can be a long process, often through no fault of the beneficiary. They also evidence a desire to avoid imposing the costs of government processing timelines on these beneficiaries and on their employers, as often it is the H-1B employer who is the petitioner of the immigrant petition, and whose operations would be disrupted by the H-1B worker having to leave the United States during processing of the immigrant petition.

³¹⁸ See Section 106 of AC21, Pub. L. 106-313, 114 Stat. 1251, 1253 (October 17, 2000).

³¹⁹ See 8 CFR 214.2(h)(13)(iii)(D)(1); 8 CFR 214.2(h)(13)(iii)(D)(5); and 8 CFR 214.2(h)(13)(iii)(D)(7).

³²⁰ See 8 CFR 214.2(h)(13)(iii)(D)(10).

³²¹ See 8 CFR 214.2(h)(13)(iii)(D)(2).

[REDACTED]

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- Have an otherwise approvable ~~The extension and petition.~~ [REDACTED]

USCIS allows for a lengthy adjudication delay exemption and extends the stay of such H-1B nonimmigrants [REDACTED] if otherwise eligible, in one-year increments, until a final decision is made [REDACTED] to:

- [REDACTED] Approve or deny the p~~Permanent~~ Labor certification application, and if approved, to revoke or invalidate such approval;
- Approve or deny the i~~Immigrant~~ petition, and if approved, to revoke such approval;
- Approve or deny the h~~individual's a~~ Application for immigrant visa; or application to adjust status to lawful permanent residence; or
- [REDACTED] Administratively or otherwise close the application for permanent labor certification, immigrant visa petition, or application to adjust status.

An H-1B nonimmigrants who is the beneficiary of an ~~with approved immigrant visa petitions who and who are~~ unable to adjust status because of per-country limits is ~~are~~ eligible to extend his or her ~~their~~ H-1B status until USCIS adjudicates the application for adjustment of status.³²³

An H-1B nonimmigrant is eligible for this extension even if he or she has exhausted the maximum 6-year period of authorized stay for H-1B nonimmigrants.³²⁴

To qualify for an extension under section 104(c) of AC21, t~~H-~~ H-1B nonimmigrant beneficiary must:

- Be the beneficiary of an approved immigrant visa and H~~have~~ a petition filed on his or her behalf for a preference status under an employment based (EB) petition;³²⁵ and
- Be eligible to receive that status except for the per-country limitations.

Any H-1B nonimmigrant who meets the statutory requirements above may be approved as the beneficiary of a request for an extension of H-1B status, if otherwise eligible, until a decision is made on the nonimmigrant's application for adjustment of status. USCIS [REDACTED] approve~~s~~ extensions under section 104(c) of AC21 in increments of up to three years.³²⁶

³²⁴ See INA 214(g)(4).

³²⁵ See INA 203(b)(1), INA 204(b)(2), and INA 204(b)(3).

³²⁶ See Section 104(c) of AC21, Pub. L. 106-313, 114 Stat. 1251, 1253 (October 17, 2000).

Comment [RHC318]: This is confusing. Is this

OPS/KMAM Edited.

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A request for H-1B time beyond six years should not be approved if it is based on a permanent labor certification that has expired or that is no longer valid. An approved permanent labor certification expires if it is not filed with USCIS in support of a petition within 180 days. A petitioner may not use an expired permanent labor certification to request an extension under AC21. Once filed with an immigrant visa petition, the permanent labor certification remains valid unless it is revoked or invalidated.

There is no limit on how long the per-country exemption applies, or how long the qualifying beneficiary may remain in H-1B status if the petitioner continues to demonstrate eligibility and a final decision has not been made to:

- Deny the permanent labor certification application;
- Deny the EB immigrant petition; or
- Approve or deny the adjustment of status application.

Comment [RHC319]: Should clarify which exemption this is specifically referring to.

B. Per-Country Limitation Exemption

A per-country limitation exemption arises when a foreign national who is the beneficiary of an approved immigrant visa petition and, although eligible, is prevented from being granted immigrant status due to per-country visa unavailability reasons.

The per-country limitation exemption applies to all beneficiaries of approved Form I-140 petitions whose priority dates are on or after the applicable cut-off date in either the country-specific or worldwide columns of the Visa Bulletin chart.³²⁷ The reference to “per country limitations” in section 104(c) of AC21 invokes chargeability; the determination as to which country’s numerical limits the beneficiary’s visa will be “charged to” or counted against.³²⁸ For purposes of section 104(c), when reviewing the relevant Visa Bulletin chart, there is no difference between nationals of countries who are identified separately on the Visa Bulletin because their applicable per-country limitation has been exceeded (i.e., nationals of India, China, or Mexico), and nationals of those countries who are grouped under the “All Chargeability” column, as long as the priority date has not been reached for the particular beneficiary in question.

³²⁷ See 8 CFR 214.2(h)(13)(iii)(E).

³²⁸ See INA 202(b), 8 U.S.C. 1152(b).

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105

(b)(5)

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USCIS will approve a per-country extension of stay for eligible H-1B nonimmigrants, until a final decision is made to:

- Deny the application for permanent labor certification;
- If the permanent labor certification is approved, to revoke the approved labor certification;
- Deny or revoke the approval of the employment-based immigrant petition; or
- Approve or deny the beneficiary's application for an immigrant visa or for adjustment of status.

Permanent Labor Certification, Adverse Decisions

If DOL denies or revokes the permanent labor certification application, the employer is advised that there is a period of time within which to appeal the decision to the Board of Alien Labor Certification Appeals (BALCA):

- For a denied Application For Alien Employment Certification (ETA Form 750) filed prior to March 28, 2005, the employer must file an appeal within 90 days.
- For a denied or revoked Application for Permanent Employment Certification (ETA Form 9089) the employer must file an appeal within 30 days.

If the employer does not file an appeal within the required timeframe, the denial becomes the final decision of the Secretary of Labor. USCIS will not consider a DOL decision to be final until:

- The time for appeal has run and no appeal has been filed; or
- If the petitioner timely appeals, the date a decision is issued by BALCA.

USCIS considers the permanent labor certification pending in the time period the petitioner may appeal the denial or revocation of the application, or while the appeal is actually pending, for the purposes of determining if an H-1B nonimmigrant is eligible for an H-1B extension of stay.

Immigrant Petition for Alien Worker, Adverse Decisions

Comment [RHC320]: Under 106a/b? should clarify.

OPS/KMA See restricting and edits.

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USCIS does not consider the denial or revocation of a worker petition as final for purposes of determining whether the worker qualifies for an extension of stay under AC21 106(b)³²⁹ during the period permitted for an appeal to be filed, or, if an appeal is filed, during the time the appeal is pending with the Administrative Appeals Office (AAO).³³⁰

Motions to Reopen or Reconsider

Unless USCIS indicates otherwise, the filing of a motion does not stop the effects of any decision [REDACTED] in a case. If an appeal is not timely and properly filed, USCIS considers the decision which the motion seeks to have reopened or reconsidered final once the appeal period has passed. If the motion is approved and the prior proceeding is reopened or the prior decision is reconsidered, then the prior decision is not considered final.³³¹

C. Request for 7th Year of H-1B and Beyond

In general, the current employer will request the extension of stay for the H-1B employee. However, this is not a requirement. While Tthe extension of stay request may come from the current H-1B employer, [REDACTED] it may [REDACTED] be filed instead by [REDACTED] a new H-1B employer with a request for a change of employment.

The beneficiary may obtain additional periods of H-1B admission through a petition to change status from another nonimmigrant classification or consular processing, assuming the beneficiary is otherwise eligible.³³²

1. Combined 6th and 7th Year Requests

A petitioner may simultaneously request the remaining H-1B time left in the initial six-year period of admission with the additional time allowed by AC21 (up to three years).³³³

The petitioner may make the 7th year extension of stay requests in a petition that also contains a request for an extension that reaches the maximum six-year limit.³³⁴ Officers should first

³²⁹ Sections 106(a) and (b) of AC21, Pub. L. 106-313, 114 Stat. 1251, 1253-54 (October 17, 2000), permit an indefinite number of one-year extensions of H-1B status past the traditional six-year maximum, where either a labor certification or Form I-140, Immigrant Petition for Alien Worker, was filed on the beneficiary's behalf at least 365 days ago.

³³⁰ An appeal of a denial must be submitted within 30 days of the unfavorable decision. See 8 CFR 103.3(a)(2)(i). An appeal of the revocation of an immigrant petition approval must be submitted within 15 days of the unfavorable decision. See 8 CFR 205.2(d). An additional 3 days is permitted to file an appeal if the denial or revocation notice is served by mail. See 8 CFR 103.8(b).

³³¹ See 8 CFR 103.5(a)(1)(iv).

³³² See 8 C.F.R. § 214.2(h)(13)(iii)(D)(7).

³³³ See Section 106 of AC21, Pub. L. 106-313, 114 Stat. 1251, 1253 (October 17, 2000).

³³⁴ See Section 106 of AC21, Pub. L. 106-313, 114 Stat. 1251, 1253 (October 17, 2000).

Comment [HJC321]: AAO: We understand that this was likely a plain language edit. However, it

OPS/KMA: Agree/no concerns.

Comment [HJC322]: AAO: We understand that this was likely a plain language edit. However, it

Comment [HJC323]: AAO: This rewrite left out the word current before "employer." Please see suggested revisions.

OPS(JVT): accept, thanks!

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determine the amount of H-1B extension time that USCIS may approve to reach the six-year limitation of stay, and then determine if the H-1B nonimmigrant is the beneficiary of a [REDACTED] permanent labor certification application or [REDACTED] immigrant worker petition filed at least 365 days³³⁵ before the conclusion of the six-year limitation of stay.

If so, USCIS may then approve the additional one-year extension.

If the permanent labor certification application or immigration petition was not filed at least 365 days before the end of the H-1B nonimmigrant's six-year limitation of stay [REDACTED]

[REDACTED] then USCIS may not approve the additional time beyond the 6 years. Subsequent to the approval of an AC21 extension, if the beneficiary no longer qualifies for the AC21-based exemption to the six-year limitation, USCIS may partially revoke the H-1B petition on notice to the date the beneficiary's eligibility for this exemption ended (e.g. the date the [REDACTED] immigrant worker petition was denied [REDACTED]).³³⁶

The total time given by a single H-1B approval may not exceed three years.

2. Documentation

Permanent Labor Certification

USCIS will generally accept the following documents as evidence that a permanent labor certification application filed on behalf of the H-1B beneficiary is still pending, or has been certified and is still valid at the time of filing either the [REDACTED] immigrant worker petition utilizing that certification or the H-1B petition:

- If the permanent labor certification application is still pending with DOL, a current screen-print from the DOL's Public Disclosure System (PDS) that shows the status of the labor certification is ~~is~~ "In Process/Process" or is actively "On Appeal/Appeal" and that includes the name of the petitioning employer, the date that the application [REDACTED] was filed, the name of the beneficiary, and the case number assigned to the pending application [REDACTED] or
- If the permanent labor certification application was certified before July 16, 2007, a complete copy of the labor certification which shows the date of certification and a copy

³³⁵ Starting from the filing of the permanent labor certification or immigrant petition.

³³⁶ See Section 106 of AC21, Pub. L. 106-313, 114 Stat. 1251, 1253 (October 17, 2000).

Comment [HJC324]: AAO: This appears to be

OPS/IVT: accept, thanks!

Comment [RHC325]: Seems like this should be the end of the above paragraph rather than the start of the next paragraph.

OPS/KMA Accept move.

Comment [RHC326]: This seems like an awkward way to state the requirement (should be

OPS/KMA-Thanks for the suggestion; added.

Comment [CMS327]: AAO: Same typo made here when this went through plain language.

OPS/IVT: accept, thanks!

Comment [HJC328]: AAO: For clarity, we recommend identifying the form "a complete copy" refers to. It appears to be "labor certification."

OPS/IVT: agree, thanks.

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of the [REDACTED] receipt notice for the immigrant worker petition filed on behalf of the H-1B beneficiary before January 13, 2008;³³⁷ or

- If the permanent labor certification application was denied but is on appeal, documentation from DOL or BALCA that shows the denied application [REDACTED] is on appeal; or
- If the permanent labor certification application was certified on or after July 16, 2007, a complete copy of the labor certification which shows the date of certification and the date the labor certification will expire,³³⁸ along with a copy of the [REDACTED] receipt notice for the immigrant worker petition filed on behalf of the H-1B beneficiary prior to the labor certification's expiration.

If an applicant for extension of stay cannot present a screen print from the PDS, the applicant may instead present a letter from DOL issued within the previous 60 days prior to the filing of the extension petition. The DOL letter must explain why the PDS screen print is unavailable and verify that an application for a labor certification is pending.

Visa Unavailability

USCIS interprets section 104(c) of AC21 as [REDACTED] applicable when the H-1B nonimmigrant is the beneficiary, [REDACTED] of an approved immigrant petition,³³⁹ and is otherwise eligible for lawful permanent resident (LPR) status but for application of the per country and worldwide limitations.³³⁹ Eligibility for a per-country exemption will cease if the approval of an immigrant visa petition is revoked, or when there is a final decision to approve or deny the immigrant visa or application to adjust status to permanent residence. A petition approval will remain valid in the event that a petitioner withdraws the immigrant petition or if a petitioner's business terminates 180 days or more after approval or 180 days or more after the associated application for adjustment of status has been filed.³⁴⁰ In such cases, the H-1B nonimmigrant would remain eligible for H-1B extensions under the per-country exemption, if otherwise eligible for the nonimmigrant benefit. Any petitioner seeking an H-1B petition extension on behalf of an H-1B beneficiary must establish that at the time of filing for such extension, the beneficiary is not eligible to receive LPR status due to the per country immigrant visa limitations.

³³⁷ Approved labor certifications granted before July 16, 2007 are only valid for 180 days from July 16, 2007. See 20 CFR 656.30(b)(2). 180 days from July 16, 2007 is January 12, 2008.

³³⁸ Approved labor certifications granted on or after July 16, 2007 are only valid for 180 days from the date of certification. See 20 CFR 656.30(b)(1).

³³⁹ See Section 104(c) of AC21, Pub. L. 106-313, 114 Stat. 1251, 1253 (October 17, 2000).

³⁴⁰ 8 CFR 205.1(a)(3)(iii)(C) and (D).

Comment [BEH329]: AAO: "Form I-140" was deleted here. This now has petition twice. Please see suggested revisions to fix this and clarify what type of petition we're referring to here.

OPS(JVT): accept edits.

Comment [HJC330]: AAO: For clarity, we recommend stating "a complete copy of the labor certification."

DPS(JVT): accept edits.

Comment [HJC331]: AAO: Same changes here as above. We recommend identifying the name of the petition or inserting "immigrant worker" before petition to help clarify what type of petition we're talking about here.

OPS(JVT): accept edits.

Comment [RHC332]: Is this requirement

[REDACTED]

Comment [RHC333]: What if the approved

[REDACTED]

Comment [RHC334]: Revised because I don't want us to suggest that it is their petition since they are merely the beneficiary.

OPS/KMA accept revisions.

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USCIS will accept a copy of the [REDACTED] approval notice³⁴¹ issued for the immigrant petition filed on behalf of the H-1B beneficiary as evidence of the H-1B beneficiary's eligibility for an extension of H-1B status.

Officers review the U.S. Department of State (DOS) Immigrant Visa Bulletin that was in effect at the time of the filing of the Petition for a Nonimmigrant Worker (Form I-129~~140~~) in which the petitioner requests an extension. If the H-1B beneficiary is shown to be ineligible for LPR status because of the per country visa limitations, then USCIS may approve the H-1B petition extension request for a maximum of three-year increments, until USCIS adjudicates the application for adjustment of status.

Comment [HJC335]: AAO: Changed to Form I-129.

DPS(JVT): accept edits. Also, will need to fix typo in Form Name. (Petition for a Nonimmigrant Worker)

Chapter 11. Recapture of Time Abroad for Period of Stay Purposes

Time spent outside the United States does not count toward the limit on time spent as an H-1B. An H-1B petitioner who can document time spent abroad by the beneficiary may seek to add back or recapture that time [REDACTED] so USCIS may approve the full six years of time permitted in the United States.³⁴²

A. Basis for Recapture

Only time spent in the United States in H-1B status counts towards the maximum,³⁴³ since the time is based on the period of authorized admission.

An H-1B petitioner may request that USCIS recaptured and added back to the total maximum period of stay the full days the beneficiary spent outside the United States during the period of petition validity.³⁴⁴ It is the applicant and petitioner's burden to demonstrate eligibility, and provide appropriate evidence, including:

- Photocopies of passport stamps;
- Arrival-departure records; or
- Plane tickets.

A request to recapture H-1B time should include:

³⁴¹ The approval notice shows an immigrant visa is not immediately available based on the approved petition's priority date.

³⁴² See 8 C.F.R. § 214.2(h)(13)(iii)(C).

³⁴³ See INA 214(g)(4). Admission is the lawful entry of the foreign national into the United States after inspection and authorization by an immigration officer. See INA 101(a)(13)(A).

³⁴⁴ Regulations refer only to time spent "in the United States." See 8 CFR 214.2(h)(13)(iii)(A).

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- A list of the number of days to be recaptured and all dates spent outside the United States; and
- Relevant independent documentary evidence.

Purpose of Time Abroad

A beneficiary may recapture any time for a trip of at least one 24-hour day outside the United States for any purpose, personal, or business. The beneficiary does not need a reason for the absence nor does the trip need a purposeful meaning.

B. Evidence

The burden of proof remains with the H-1B petitioner to submit evidence documenting all exact periods of physical presence outside the United States when seeking [REDACTED] to recapture H-1B time [REDACTED]

Petitioners must submit sufficient documentary evidence establishing that the beneficiary was outside of the United States during all the days, weeks, months or years sought to recapture. Evidence may include:

- Photocopies of passport stamps;
- Arrival-departure records; or
- Plane tickets.

USCIS may add to the eligible period of admission for extension of stay any periods of time for which the petitioner met the burden. However, USCIS may not approve an extension of stay for periods of time that are not supported by independent documentary evidence. Officers only send a Request for Evidence (RFE) for any claimed periods that are unsupported by evidence.

In some instances, USCIS may not approve the petition for the entire period of time requested, because the evidence submitted does not establish eligibility for the entire period the petition requested. USCIS then issues the approval notice only for the period of time the beneficiary demonstrated eligibility.

Officers should not issue an RFE solely for unaccounted periods of recaptured time. If an RFE is required for other issues, the officer may request additional evidence for unaccounted periods of recaptured time.

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Dependents

The status of an H-4 dependent of an H-1B nonimmigrant is subject to the same period of admission and limitations as the principal beneficiary. For example, if an H-1B beneficiary is able to recapture a two-week business trip abroad for each year for five years in a row (for a total of 10 weeks), then his or her H-4 dependents, if seeking extension of stay, ~~are~~ may be given an extension of stay up to the new expiration of the H-1B beneficiary's stay.

Chapter 12. Adjudications

A. Adjudicative Issues

Officers must carefully review each petition for an H-1B, ~~H-1B1~~, or E-3 temporary worker to ensure compliance with the intent of the H-1B and ~~E-13~~ categories to perform services in a specialty occupation. Unless otherwise specified, officers should apply a “preponderance of the evidence” standard when evaluating eligibility for the benefit sought.³⁴⁶ Preponderance of the evidence means that it is more likely than not that the beneficiary qualifies for the benefit sought.³⁴⁷ The burden of proving eligibility rests solely with the petitioner to establish that ~~it he or she~~ is eligible for the benefit sought.³⁴⁸

In accordance with the statute and regulations, factors to consider during the adjudicative process include determining whether:

- The proposed employment is a specialty occupation.³⁴⁹

³⁴⁶ If the petitioner submits evidence that leads an officer to believe that the claim is “probably true” or “more likely than not,” the petitioner has satisfied the standard of proof. (“More likely than not” is generally considered as a greater than 50 percent probability of having something occur.) This means that the petition should be approved if the evidence provided tips in favor of the petitioner (50.1%).

However, the officer should not approve the petition if he or she can articulate a material doubt sufficient to justify a request for evidence or, if that doubt leads the officer to believe the claim is not true, a denial.

See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (citing *Matter of E-M*, 20 I&N Dec. 77, 79-80 (Comm. 1989)).

³⁴⁷ See *Matter of E-M*, 20 I&N Dec. 77 (BIA 1999).

³⁴⁸ If a petitioner provides supporting documentation that satisfies the regulatory criteria, and such documentation is legitimate (not forged, not issued in error, accurate), an officer cannot unilaterally impose novel substantive or evidentiary requirements beyond those set forth in regulatory requirements. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

³⁴⁹ Although the definition of specialty occupation is included in the statute itself and the regulations are specific regarding the criteria for determining what qualifies as a specialty occupation, approval or denial often comes down to a judgment call by the adjudicating officer. There are numerous references available (such as the DOL’s Occupational Outlook Handbook) to describe specific vocational preparation for various occupations. However, it is important to note that occupations are rapidly evolving and job titles themselves are often meaningless. In order to correctly adjudicate a case, it is necessary to consider all the facts surrounding the petition: the specific job

Comment [CMS336]: AAO: This section



Comment [RHC337]: What about H-1B1?
OPS/KMA-edited.

Comment [RHC338]: E-1?
OPS/KMA-edited.

Comment [CMS339]: AAO: Preponderance, for example, is a general issue applicable to all other



Comment [HJC340]: AAO: We recommend changing “he/she” to “it” since the sentence is referring to the petitioner.

DPS(JVT): agree

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- The petitioner or beneficiary is subject to the statutory numerical limitation.
- The petitioner is subject to and has paid all additional H fees.
- There is a valid Labor Condition Application (LCA) from the Department of Labor.
- The U.S. employer or agent qualifies as a United States employer [REDACTED] and has an employer-employee relationship with the beneficiary.
- The petitioner has a bona fide position available for the beneficiary.³⁵⁰
- The beneficiary qualifies for the positions, including a determination of the equivalency of the beneficiary's experience and education³⁵¹ and a review of [REDACTED] evaluations.³⁵²

Adjudicative Issues

duties described by the petitioner, the beneficiary's education and work experience, the nature of the petitioner's business, industry practice, and salary (both offered to the beneficiary and typical for the industry). It is important not to be so influenced by a single factor, such as the job title or salary, that other indicators are overlooked.

³⁵⁰ This issue is occasionally present in H-1B petitions filed by small businesses for beneficiaries with professional skills not normally associated with persons employed in such a business. For example, a petition for an accountant filed by an auto repair business or restaurant. Often, such petitions are filed by a relative or family friend as an accommodation to the beneficiary. Either the beneficiary will be employed in a lesser capacity or he or she will seek other employment immediately upon arrival. The burden of proof falls on the petitioner to demonstrate the need for such an employee.

³⁵¹ See 8 CFR 214.2(h)(4)(iii)(D) for the kind and amount of experience which can be used to establish the equivalency of a degree. [REDACTED]

[REDACTED]

Comment [RHC341]: This edit makes this bullet

OPS/KMA Agree with OCC. Recommend reverting to original text.

Comment [HJC342]: AAO: Changed to singular to be consistent with other bullet points.

OPS/KMA Thank you.

Comment [HJC343]: AAO: As this FN does not

OPS/KMA No concerns with the suggested edits, but it appears that Craig deleted that portion of the footnote.

Comment [RHC344]: Not sure I understand the relevance of "unsolicited" here.

OPS/KMA. I think it would be fine to delete. I don't have a relevance explanation.

Comment [CMS345]: AAO: Why is this here?

OPS(JVT): fine with deletion. Steven and Kate, any major concerns?

OPS/KMA: Agree.

Comment [CMS346]: AAO: Why is this here?

OPS(JVT): fine with deletion. Steven and Kate, any major concerns?

cern.

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General Issues to Consider	Related Factors
Type of Employment	<ul style="list-style-type: none"> Is the proposed employment a specialty occupation? Does the petitioner have a bona fide position available for the beneficiary?
Administrative Issues (Cap and Fees)	<ul style="list-style-type: none"> Is the petitioner or beneficiary subject to the statutory numerical limitation? Is the petitioner subject to additional H fees? If so, have the additional H fees been paid?
Petitioner Issues	<ul style="list-style-type: none"> Does the U.S. employer or agent qualify as an H-1B petitioner? Does the petitioner have an employer-employee relationship with the beneficiary?
Beneficiary Issues	<ul style="list-style-type: none"> Does the beneficiary qualify for the position? If applicable, can the kind and amount of the beneficiary's experience, training, and/or education be used to establish the equivalency of a U.S. degree?

Comment [JVT347]: JVT: Makes sense to put the new H-1B affiliate/subsidiary memo language into this part (admin issues) when complete

Comment [CMS348]: AAO: This section is also new.

Comment [KMA349]: The AAO offers suggested

Comment [CMS350]: AAO: Please see

OPS(JVT): Ok with AAO's edits. Steven and Kate, any concerns?

OPS/KMA NO concern.

Comment [CMS351]: AAO: We should probably FN here the requirement that the petition may not be filed more than six months prior to the need.

OPS(JVT): Ok with adding a FN

OPS/KMA added a footnote.

B. Approvals

If an officer is satisfied that the Labor Condition Application (LCA) and all other required documents are present and the petition is approvable, the officer should endorse the approval block. Before endorsing the petition, the officer should ensure:

- The length of petition approval is correct. Initial petition approvals may be for a period of up to three years (up to five years for DOD Research and Development projects), but may not exceed the period of time requested on the petition or the validity period of the LCA, whichever is less.³⁵³
- The beginning validity date for a petition matches either the date requested by the petitioner or the approval date, whichever is later.
- That the approval is no more than six months earlier than the date of need.³⁵⁴
- Unless an exception applies, if a beneficiary has been in the United States on another H-1B petition, the petition may not be approved for a period which would permit the

³⁵³ The validity period may be limited based on a lack of evidence to demonstrate that the petitioner will maintain a valid employer-employee relationship for the requested validity period. If the employer can demonstrate that a valid employer-employee relationship will exist for a limited time, the officer should limit the validity period to the time that eligibility has been established.

³⁵⁴ See 8 CFR 214.1(a)(3)(i).

(b)(5)

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beneficiary to remain for an aggregate of more than six years (10 years for DOD Research and Development project workers).³⁵⁵

Once the petition is approved, the officer must notify the petitioner of the action taken using a Notice of Action (Form I-797).

C. Split Decisions

If a nonimmigrant in the United States wants to change nonimmigrant status or extend his or her stay in a nonimmigrant status, he or she generally must be maintaining a nonimmigrant status at the time of filing. The adjudication of the H-1B petition of a nonimmigrant currently in the United States has two distinct parts: (1) adjudication of the H-1B petition; and (2) the adjudication of the change of status (COS) and/or extension of stay (EOS) request.

If an officer approves the H-1B petition, but the beneficiary is not in or maintaining a valid nonimmigrant status when filing a request for an EOS and/or COS, or if there is another reason which may warrant a denial, USCIS may deny the EOS and/or COS request. This is called a split decision. In this case, the beneficiary would have to depart the United States and re-enter on a valid H-1B visa (unless visa exempt) to effectuate his or her H-1B status.

D. Requests for Evidence (RFE)

Officers may issue an RFE when the petition has failed to establish eligibility for the benefit being sought.³⁵⁶ The RFE should specifically state what is at issue and be tailored to request specific types of evidence from the petitioner that directly relates to the deficiency the officer has identified.

Officers should state what element the petitioner has failed to establish and provide examples of documents that could be provided to cure the deficiency.

E. Revocations and Notices of Intent to Revoke (NOIR)

A petition may be revoked if the beneficiary, upon arrival at a Port of Entry in the United States, is found not to be entitled to his or her visa classification. In addition, a petition may be revoked automatically if a petitioner dies, goes out of business, or withdraws the petition,³⁵⁷ and it may be revoked on notice for any of the following reasons:

³⁵⁵ However, a beneficiary may be eligible for an extension of stay under sections 104 or 106 of AC21, Pub. L. 106-313, 114 Stat. 1251, 1252-53 (October 17, 2000). See *Matter of Safetran*, 20 I&N Dec. 49 (Comm. 1989).

³⁵⁶ See 8 CFR 103.2(b)(8).

³⁵⁷ See 8 CFR 214.2(h)(11).

Comment [STN352]: Is it necessary to note that there may be other reasons for which an EOS or COS may be denied?

OPS/KMA Added text.

Comment [HJC353]: AAO: We recommend adding citations to this section. For example, 8 CFR 103.2(b)(8).

DPS(JVT): Ok with adding citations.
OPS/KMA Added cite.

Comment [HJC354]: AAO: We recommend deleting this sentence as it appears to contradict the sentence immediately before.

DPS(JVT): fine with deletion, but defer to SCOPS.

Comment [STN355]: Can be revoked in other circumstances also

OPS/KMA See additional text.

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- If a beneficiary no longer works for the petitioner;
- If the statement of facts in the petition or on the LCA was not true;
- If the petitioner violated the terms and conditions of the petition;
- If the petitioner violated pertinent INA or regulatory requirements; and
- If the petition violated 8 CFR 214.2(h)(11) or involved gross error.³⁵⁸

A Notice of Intent to Revoke (NOIR) is necessary where there is no legal provision that would allow for an automatic revocation. The NOIR should include a list of the types of evidence that would allow the petitioner to overcome deficiencies in the petition.³⁵⁹ If a petitioner submits initial evidence but does not establish eligibility for H-1B status, USCIS may deny the benefit request for ineligibility, or may request additional evidence.³⁶⁰ A request for evidence or Notice of Intent to Deny (NOID) will specify the required evidence and will provide adequate notice of the bases for the proposed denial and evidence which may address eligibility.³⁶¹ A petitioner may appeal a decision to revoke within 15 days of the service of the revocation.³⁶²

F. Denials (Notices of Intent to Deny and Final Denial Notices)

USCIS may issue a Notice of Intent to Deny (NOID) before issuing a final denial. This allows a petitioner or applicant the opportunity to respond to any derogatory or disqualifying information. A NOID is also required when derogatory information is uncovered during the course of the adjudication that the petitioner or applicant does not know and that derogatory information will form the basis of an adverse decision.³⁶³ Officers may also issue a NOID when:

- There is little or no evidence submitted; or
- The person has met the basic eligibility requirements, the adjudication has a discretionary component, and the person has not established that USCIS should exercise favorable discretion.

In the NOID, the officer should inform the petitioner that USCIS intends to deny the petition and the petitioner has 30 days to respond to the NOID.

³⁵⁸ See 8 CFR 214.2(h)(11)(iii)(A).

³⁵⁹ See 8 CFR 103.2(b)(8)(ii).

³⁶⁰ See 8 CFR 103.2(b)(8)(iii).

³⁶¹ See 8 CFR 103.2(b)(8)(iv).

³⁶² See 8 CFR 205.2(d).

³⁶³ See 8 CFR 103.2(b)(16).

Comment [STN356]: Perhaps mention that

Comment [HJC357]: AAO: We recommend adding citations to this section. For example, 8 CFR 103.2(b)(8)(iii) and (iv), 8 CFR 103.2(b)(11), and (13)(i).

Further, we think we need to add more content to this section. For example, we should specifically include the 5 grounds for revocation on notice under 8 C.F.R. § 214.2(h)(11)(iii)(A).

OPS(JVT): agree that citations can be added. Additional content may be appropriate – need to confer with SCOPS.

OPS/KMA see additions.

Comment [CMS358]: AAO: This language is necessary, because it is only when the unknown information will be used to take an adverse action that notice is required.

OPS(JVT): ok with edit.

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If the petitioner does not meet the basic statutory or regulatory requirements, the officer may deny the petition.³⁶⁴ If the officer denies the petition, he or she must prepare a final notice of action, which includes information explaining why the petition is denied. Additionally, officers should include information about appeal rights and the opportunity to file a motion to reopen or reconsider in the denial notice. The Administrative Appeals Office (AAO) has jurisdiction over the appeal.

G. Categories of Specialty Occupations

The following table provides the classes of nonimmigrant visas available for specialty occupations.

Classes of Applicants and Corresponding Codes of Admission	
Beneficiary	Code of Admission
Special Occupation- [REDACTED]	H-1B
• Department of Defense (DOD) Worker or Project Employee	H-1B2
Fashion Models	H-1B3
Special Occupation [REDACTED] (-Chile and Singapore)	H-1B1
Spouse or Child of H-1B, H-1B2, H-1B3, H-1B1	H-4
Special Occupation [REDACTED] (-Australia)	E-3
Special Occupation (-Spouse – Australia)	E-3D

Comment [RHC359]: Note that fashion models are technically not considered in a specialty occupation as that term is defined.

Also, we had the same chart earlier in this PM, so not sure why we need it twice.

Comment [HJC360]: AAO: As previously stated, we recommend deleting the word "professional" in describing the specialty occupation categories.

OPS(JVT): fine with deleting professional

Chapter 13. Admissions, Grace Periods, Change of Status, Extension of Stay, and Advance Parole

A. Admissions

The petitioner may request ~~its~~ ~~their~~ Notice of Approval (Form I-797) and corresponding H-1B petition be sent to a U.S. consulate abroad, a Port of Entry, or Pre-flight Clearance, so that the nonimmigrant can apply for admission at his or her ~~their~~ desired location. The petitioner may also request that the nonimmigrant's status be changed or his or her stay be extended in ~~the~~ H-1B status within the United States, if eligible.

Comment [HJC361]: AAO: We recommend rewording "their" to "its."

OPS(JVT): accept

Comment [JRB362]: AAO: Suggest rewording to "his or her" to be consistent with rest of PM

OPS(JVT): accept

³⁶⁴ See 8 CFR 103.2(b)(8).

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B. Grace Periods

Ten-Day Grace Periods

A foreign national is admitted to the United States for the validity period of the petition plus an additional period up to 10 days before the validity period begins and 10 days after the validity period ends.³⁶⁵ A grace period of up to 10 days before the authorized validity period begins allows these foreign nationals a reasonable amount of time to enter the United States and prepare to begin employment in the country. A grace period of up to 10 days after their petition or authorized validity period ends, provides a reasonable amount of time for the them to depart the United States or take other actions to extend, change, or otherwise maintain lawful status.

Sixty-Day Grace Periods

If the employment ceases to exist, the foreign national will have up to 60 consecutive days or until the end of the authorized validity period, whichever is shorter, during each authorized validity period, to pursue new employment should the foreign national be eligible for other employer-sponsored nonimmigrant classifications or employment in the same classification with a new employer. As such, a petitioner may file a new petition during the 60-day grace period and/or a beneficiary could commence employment pursuant to H-1B portability, if otherwise eligible. The foreign national must not work during the grace period.³⁶⁶

Officers have discretion to either eliminate or shorten the 60-day period on a case-by-case basis.³⁶⁷ In addition, the foreign national may benefit from the 60-day grace period multiple times during his or her total time in the United States; however, this grace period may only apply one time per authorized nonimmigrant validity period.

As an example, a nonimmigrant present in the United States in may face termination of employment prior to the end of the individual's petition validity period. Several weeks later a new employer may file a nonimmigrant petition on that individual's behalf and request an extension of stay. Even though the individual's prior employment may have terminated several weeks prior to the filing of the new petition, DHS may consider that individual to have not violated his or her nonimmigrant status for up to 60 days and allow that individual to extend his or her stay with a new petitioner, if otherwise eligible. If the new petition is granted, the individual may be eligible for an additional grace period of up to 60 days in connection with the new authorized validity period. In sum, this 60-day grace period further supports goals similar

³⁶⁵ See 8 CFR 214.2(h)(13)(i)(A) and 214.1(l)(1).

³⁶⁶ See at 8 CFR 214.1(l)(3).

³⁶⁷ See 8 CFR 214.1(l)(2).

(b)(5)

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to those underlying the intent of AC21 to allow certain nonimmigrants to change jobs or employers.

A foreign worker, during either a 10-day or 60-day grace period, may apply for and, if otherwise eligible, be granted an extension of stay or change of status. The beneficiary may also commence employment under H-1B portability per § 214.2(h)(2)(i)(H), if otherwise eligible.

B. Change of Status (COS)³⁶⁸

To request a COS, the beneficiary must:

- Be physically in the United States at the time of filing the [REDACTED] request;
- Be physically in the United States while the petition is pending; departure is treated as an abandonment of the change of status request if the beneficiary departs prior to final adjudication;
- Be maintaining status;³⁶⁹ and
- Have a petition that was filed prior to the expiration of his or her stay. Failure to file before the previously authorized period of stay expired may be excused if there are extraordinary circumstances.³⁷⁰

Some nonimmigrant classifications do not permit a change to H-1B status.³⁷¹

³⁶⁸ For more information about changes of status, see Chapter 2, General Filing Requirements [2 USCIS-PM H.2]

³⁶⁹ If credible documentary evidence is provided in support of a petition seeking change of status to another classification indicating that the beneficiary faced retaliatory action from his or her former employer based on a report regarding a violation of that employer's labor condition application obligations, officers may consider a loss or failure to maintain H-1B status by the beneficiary related to such violation as due to, and commensurate with, "extraordinary circumstances" as defined by 8 CFR 214.1(c)(4) and 8 CFR 248.1(b). See 8 CFR 214.2(h)(20).

³⁷⁰ See 8 CFR 248.1(b).

³⁷¹ These classifications include, but are limited to: a J-1 exchange visitor who is subject to the two-year foreign residence requirement of INA 212(e); an M-1 student, if the education or training which the nonimmigrant received while in M-1 status enables the nonimmigrant to meet the qualifications for temporary worker classification;³⁷¹ an H-2B temporary non-agricultural worker who has spent three years in the United States under INA 101(a)(15)(H) or INA 101(a)(15)(L) may not seek an EOS, COS, or be readmitted under those sections until they are outside of the United States for the immediately preceding three months; and an H-3 trainee, who has spent 24 months in the United States under INA 101(a)(15)(H) or INA 101(a)(15)(L) may not seek an EOS, COS, or be readmitted under those sections until they are outside of the United States for the immediately preceding six months.

Comment [STN363]: Among other things, but is that needed for us to note?

OPS/KMA: I think that it works as written.

Comment [JVT364]: OPS(JVT): accept edit, thanks!

Comment [JVT365]: SCOPS edit

OPS(JVT): accept edit

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C. Extension of Stay (EOS)³⁷²

To request an EOS, the beneficiary must:

- Be physically in the United States at the time of filing the  request;³⁷³
- Have a passport that is valid at the time of filing;³⁷⁴
- Be maintaining status;³⁷⁵ and
- Have a petition that was filed prior to the expiration of his or her stay;³⁷⁶ Failure to file before the previously authorized period of stay expired may be excused if there are extraordinary circumstances.³⁷⁷

If the beneficiary does not meet the EOS requirements, an officer may send a request for evidence (RFE) or deny the EOS request.

The beneficiary does not have to be physically present in the United States while the EOS request is pending. The beneficiary is permitted to depart the United States; departure is not treated as abandonment of the EOS request.

D. Advance Parole

1. General

A nonimmigrant in H-1B status with a pending adjustment of status application may apply for and receive advance parole before leaving the United States. Upon returning to the United States, the nonimmigrant may be paroled in. If or choose to be admitted as an H-1B nonimmigrant if he or she has the requisite visa. If paroled in, and iff the nonimmigrant

³⁷² See 8 CFR 214.1(c)(4). For more information, see Chapter 2, General Filing Requirements, Section E, Filing Location, Subsection 4, H-1B Extensions [2 USCIS-PM H.2(E)(4)].

³⁷³ The beneficiary does not have to physically be in the United States while the EOS is pending. In addition, a departure from the United States is not considered abandonment while the EOS is pending.

³⁷⁴ 214.1(a)(3)(i).



³⁷⁷ See 8 CFR 214.1(c)(4)(i).

Comment [STN366]: Among other things, but is that needed for us to note?



Comment [CMS367]: AAO: Isn't there a six month validity requirement at 8 CFR 214.1 unless the particular country is a party to the int'l agreement that provides an automatic 6 month extension? Can you please verify and add this caveat either here or in a FN?

OPS(JVT): that is correct and can add FN. Thanks.

OPS/KMA-I found a general cite, but not one for Craig's point. Please edit as needed.

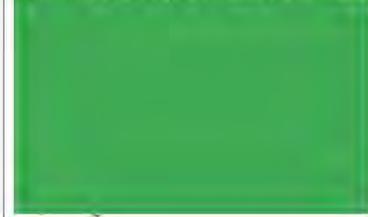
Comment [HJC368]: AAO: Added citation.

OPS(JVT): accept.

Comment [HJC369]: AAO: Added citation.

OPS(JVT): accept.

Comment [CMS370]: AAO: This language



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wishes to continue H-1B employment with the previous H-1B petitioner, the petitioner can then file a Petition for a Nonimmigrant Worker (Form I-129) requesting H-1B status.

2. Adjudicating Petition for Beneficiary on Advance Parole

If the previous status would have already been expired at the time of filing, officers should adjudicate the petition as a split decision:

[REDACTED]

Comment [CMS371]: AAO: This is not very clear. Can you please rephrase?

[REDACTED]

OPS/KMA This revision works for me; added.

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121

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Appendix: H-1B Visa Limitations by Fiscal Year

H-1B Visa Limitations by Fiscal Year		
FY	Number of H-1B Visas	Date Cap Met
1992 to 1996	65,000	Cap not met
1997	65,000	September 1, 1997
1998	65,000	May 11, 1998
1999	115,000	Cap exceeded; overage applied to FY2000 cap.
2000	115,000	July 21, 2000
2001	195,000	Cap not met
2002	195,000	Cap not met
2003	195,000	Cap not met
2004	65,000	February 17, 2004
2005	<ul style="list-style-type: none"> 65,000 Regular 20,000 U.S. Advanced Degree 	<ul style="list-style-type: none"> October 1, 2004 Advanced Degree cap not met⁷⁸
	<ul style="list-style-type: none"> 65,000 Regular 20,000 U.S. Advanced Degree 	<ul style="list-style-type: none"> August 10, 2005 January 17, 2006
2006	<ul style="list-style-type: none"> 65,000 Regular 20,000 U.S. Advanced Degree 	<ul style="list-style-type: none"> May 26, 2006 July 26, 2006
	<ul style="list-style-type: none"> 65,000 Regular 20,000 U.S. Advanced Degree 	<ul style="list-style-type: none"> April 3, 2007 April 30, 2007
2007	<ul style="list-style-type: none"> 65,000 Regular 20,000 U.S. Advanced Degree 	<ul style="list-style-type: none"> April 7, 2008 April 7, 2008
	<ul style="list-style-type: none"> 65,000 Regular 20,000 U.S. Advanced Degree 	<ul style="list-style-type: none"> April 7, 2008 April 7, 2008

Comment [JVT372]: SCOPS:
Please double check these dates.

OPS(JVT): ok, will double check.

OPS/KMA: The Advanced degree cap date is reported as having been reached on 4/30/07 in this alert:
https://www.uscis.gov/sites/default/files/files/press_release/H1Bfy08CapUpdate050407.pdf.

The 65,000 regular was reported as having been reached on 4/3/07 in this alert:
https://www.uscis.gov/sites/default/files/files/press_release/H1Bfy08Cap040307.pdf.

⁷⁸ The 20,000 master's degree and higher education exemption was created by the H-1B Visa Reform Act of 2004, which became effective on May 5, 2005, eight months into the 2005 Fiscal Year.

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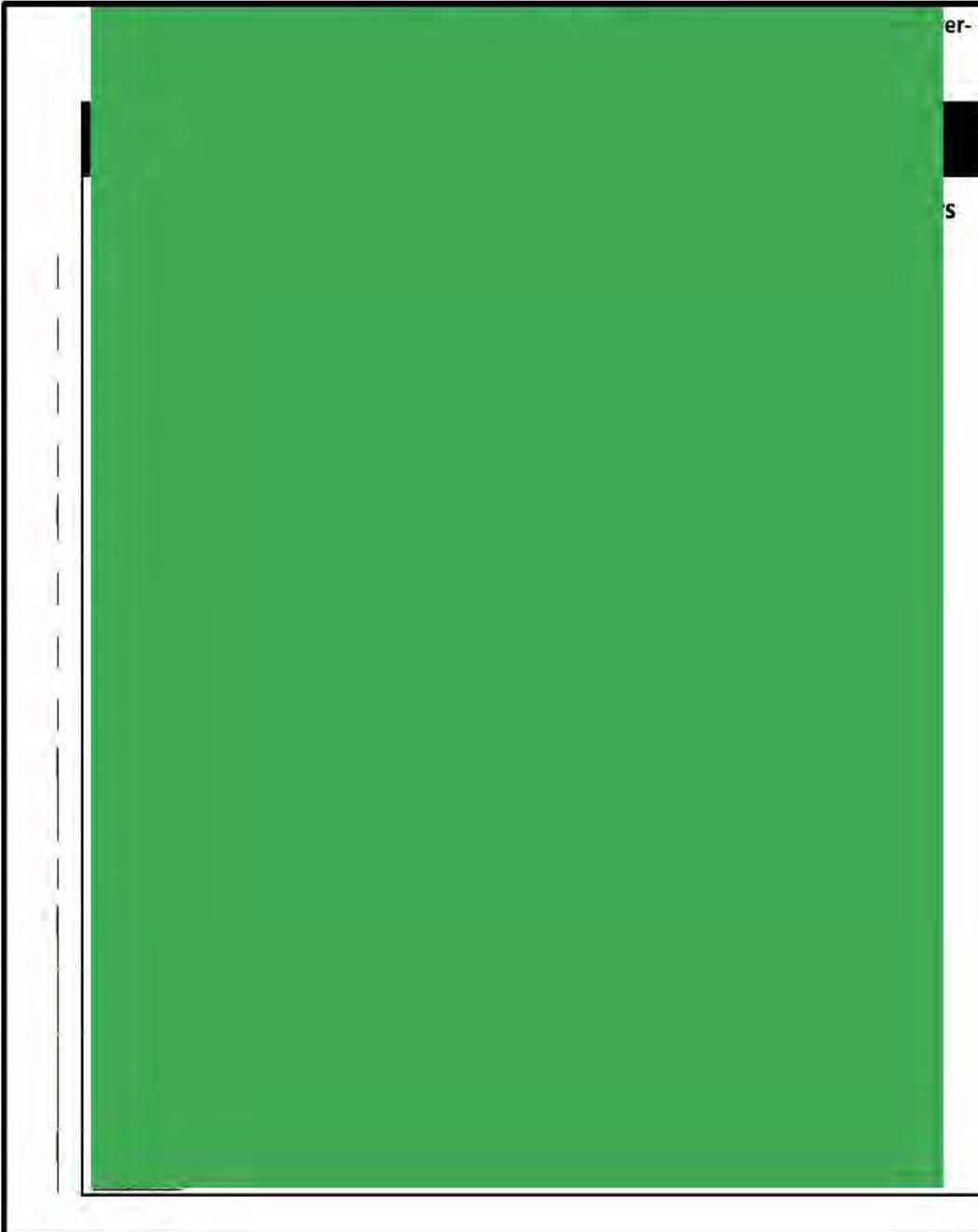
H-1B Visa Limitations by Fiscal Year		
FY	Number of H-1B Visas	Date Cap Met
	Degree	
2010	<ul style="list-style-type: none">• 65,000 Regular• 20,000 U.S. Advanced Degree	<ul style="list-style-type: none">• December 21, 2009• July 9, 2009
2011	<ul style="list-style-type: none">• 65,000 Regular• 20,000 U.S. Advanced Degree	<ul style="list-style-type: none">• January 26, 2011• December 22, 2010
2012	<ul style="list-style-type: none">• 65,000 Regular• 20,000 U.S. Advanced Degree	<ul style="list-style-type: none">• November 22, 2011• October 19, 2011
2013	<ul style="list-style-type: none">• 65,000 Regular• 20,000 U.S. Advanced Degree	<ul style="list-style-type: none">• June 11, 2012• June 7, 2012
2014	<ul style="list-style-type: none">• 65,000 Regular• 20,000 U.S. Advanced Degree	<ul style="list-style-type: none">• April 7, 2013• April 7, 2013
2015	<ul style="list-style-type: none">• 65,000 Regular• 20,000 U.S. Advanced Degree	<ul style="list-style-type: none">• April 7, 2014• April 7, 2014
2016	<ul style="list-style-type: none">• <u>65,000 Regular</u>• <u>20,000 U.S. Advanced</u> Degree	<ul style="list-style-type: none">• <u>April 7, 2015</u>• <u>April 7, 2015</u>
2017	<ul style="list-style-type: none">• <u>65,000 Regular</u>• <u>20,000 U.S. Advanced</u>	<ul style="list-style-type: none">• <u>April 7, 2016</u>• <u>April 7, 2016</u>

Comment [RHC373]: Should update to include FY16.
OPS/KMA Added FY 16 and 17.

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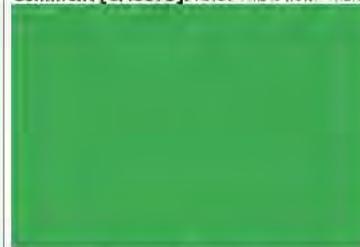


er-

Comment [JVT374]: SCOPS:

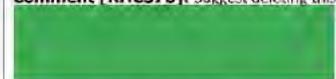


Comment [CMS375]: AAO: This is new. There



S

Comment [RHC376]: Suggest deleting this



OPS/KMA OK with deleting chart.

Comment [HJC377]: AAO: Supervision is listed twice.

OPS/KMA OBE if we delete chart.

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You may submit additional evidence to satisfy this requirement. Evidence may include, but is not limited to, a combination of the following or similar types of evidence:
XXX[DELETE ITEMS THAT WERE ALREADY PROVIDED OR NOT APPLICABLE]XXX

- A letter explaining how the Level I wage designation LCA that you have provided corresponds to the proffered specialty occupation position.
- Documentation to support that the Level I wage designation on the LCA corresponds to the proffered position.

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• [REDACTED]

Comment [RHC1]: [REDACTED]

Comment [RHC2]: Suggest deleting until we [REDACTED]

You may submit additional evidence to satisfy this requirement. Evidence may include, but is not limited to, a combination of the following or similar types of evidence:

XXX[DELETE ITEMS THAT WERE ALREADY PROVIDED OR NOT APPLICABLE]XXX

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- A letter explaining how the Level I wage designation LCA that you have provided corresponds to the proffered specialty occupation position.
- Documentation to support that the Level I wage designation on the LCA corresponds to the proffered position.

• 



change may result in the denial of your petition.

Comment [RHC2]: Suggest deleting until we 

XXX[INSERT AS LCA SNIPPET INTO 2120 IF NEEDED]XXX

You must establish that your petition is supported by a Form ETA 9035(E) Labor Condition Application (LCA) which corresponds with the proffered position described in the petition.

XXX[You did not submit any evidence for this requirement.]XXX

XXX[OR]XXX

XXX[To satisfy this requirement, you submitted:]XXX

- XXX

As discussed above, you have not demonstrated that the proffered position is a specialty occupation. However, if it is your claim that the proffered position is not entry level, but is instead a more advanced or complex position, which normally requires the attainment of a bachelor's degree or higher in a specific specialty as a minimum requirement, you must submit evidence to demonstrate that the LCA you have provided, with a Level I wage designation, properly corresponds to the proffered position.

You may submit additional evidence to satisfy this requirement. Evidence may include, but is not limited to, a combination of the following or similar types of evidence:

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XXX[DELETE ITEMS THAT WERE ALREADY PROVIDED OR NOT APPLICABLE]XXX

- A letter explaining how the Level I wage designation LCA that you have provided corresponds to the proffered position.
- Documentation to support that the Level I wage designation on the LCA corresponds to the proffered position.

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change may result in the denial of your petition.

Comment [RHC2]: Suggest deleting until we

XXX[INSERT AS LCA SNIPPET INTO 2120 IF NEEDED]XXX

You must establish that your petition is supported by a Form ETA 9035(E) Labor Condition Application (LCA) which corresponds with the proffered position described in the petition..

XXX[You did not submit any evidence for this requirement.]XXX

XXX[OR]XXX

XXX[To satisfy this requirement, you submitted:]XXX

- XXX

As discussed above, you have not demonstrated that the proffered position is a specialty occupation. However, if it is your claim that the proffered position is not entry level, but is instead a more advanced or complex position, which normally requires the attainment of a bachelor's degree or higher in a specific specialty as a minimum requirement, you must submit evidence to demonstrate that the LCA you have provided, with a Level I wage designation, properly corresponds to the proffered position.

You may submit additional evidence to satisfy this requirement. Evidence may include, but is not limited to, a combination of the following or similar types of evidence:

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~~XXX[DELETE ITEMS THAT WERE ALREADY PROVIDED OR NOT APPLICABLE]XXX~~

- A letter explaining how the Level I wage designation LCA that you have provided corresponds to the proffered position.
- Documentation to support that the Level I wage designation on the LCA corresponds to the proffered position.

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- 
change may result in the denial of your petition.



Comment [RHC2]: Suggest deleting until we



[REDACTED]

[REDACTED]

From your description of the beneficiary's duties, it appears that the beneficiary will perform many of the duties of a [INSERT AS APPROPRIATE: Computer Programmer / Computer Systems Analyst / Web Developer / Computer Support Specialist / Network and Computer Systems Administrator] as listed in the *Occupational Outlook Handbook* ("OOH") in publication of the U.S. Department of Labor. The OOH indicates that and [Insert specific OOH position title] is an occupation that does not normally require a bachelor's level of education or higher or its equivalent in a specific specialty as a minimum for entry into the occupation.

[REDACTED]

USCIS routinely consults the Department of Labor's *Occupational Outlook Handbook* (OOH) for information about the duties and educational requirements of particular occupations. You have petitioned and provided a labor condition application (LCA) for the position of XXXX[POSITION]XXX under the Computer Occupations – All Other occupational classification. The OOH does not contain descriptions for this occupation. You did not provide other evidence to show that a bachelor's degree or higher or its equivalent in a specific specialty is normally required for entry into the position.

[REDACTED]

Further, your assertion that the position is more complex or specialized than similar positions within the occupation appears inconsistent with your classification of the position on the LCA as "Wage Level I". According to U.S. Department of Labor (DOL) guidelines on wage determinations, a level one wage is used for the following:¹

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results

¹ http://www.fldatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf
Accessed on February 5, 2018

those normally performed by similar workers, and how the duties of the proffered position are more specialized and complex.

USCIS may use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Chan International*, 19 I&N Dec. 791 (Comm'n 1988). As a reasonable exercise of USCIS' discretion, USCIS discounts the advisory opinion as not probative of any criterion of 8 CFR § 21.13(b)(1)(ii)(A).

[REDACTED]

You submitted job postings for several positions at your organization. The degree requirements in the job postings include computer science, engineering, information technology, management information systems, business administration or computer information systems. The degrees listed in the job postings are not closely related to each other.

Further, you indicate that the duties of the proffered position can be performed by an individual with a bachelor's degree or higher in engineering. However, the field of engineering is a broad category that covers numerous and various specialties, some of which are only related through the basic principles of science and mathematics, e.g., nuclear engineering and aerospace engineering. Thus, a general degree in engineering or one of its other specialties, such as chemical engineering or mechanical engineering, is not closely related to computer science. Therefore, since you have indicated that a person may qualify to perform the position based on a broad range of degree fields, some of which do not closely relate to the proffered position, you have failed to establish that the proffered position normally requires a bachelor's or higher degree in a specific specialty as a minimum requirement for entry into the position. Hence, you have not established that the position is a specialty occupation.

Also, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement at INA § 21.13(b)(1)(B), provided the specialties are closely related, e.g., chemistry and biochemistry. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in seemingly disparate fields, such as business (with no specialization), engineering or computer related fields would not meet the statutory requirement that the degree be "in the specific specialty (or its equivalent)," unless you establish how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of those different specialties. Here, you never explained how degrees in business administration, engineering or computer science are directly related to each other and to the duties of the proffered position.

[REDACTED]

- A copy of a position description or any other documentation that describes the skills required to perform the job offered, the tools needed to perform the job, the product to be developed or the service to be provided, the method of payment, whether the work to be performed is part of your regular business, the provision of employee benefits, and the tax treatment of the beneficiary by you.
- Copies of company brochures, pamphlets, internet website, or any other printed work published by you that outlines, in detail, the products or services provided by your organization.
- Evidence of sufficient production space and equipment to support the beneficiary's specialty occupation work.
- Income and expense projections, timelines and number of workers that are required for the project.



- Copies of critical reviews of your software in trade journals that describes the purpose of the software, its cost, and its ranking among similarly produced software manufacturers.
- A copy of the marketing analysis for your final software product.
- A copy of a cost analysis for your software product.



If you are requesting consulate/embassy notification, provide the following evidence in duplicate. Any document submitted to U.S. Citizenship and Immigration Services (USCIS) containing a foreign language, must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English.

Evidence Pertaining to the Labor Condition Application (LCA)

You must establish that your petition is supported by an ETA Form 9035(E), Labor Condition Application (LCA), that corresponds ~~to with~~ the proffered position described in the petition.

[SCENARIO 1: OES WAGE SURVEY USED AND LCA CERTIFIED AT WAGE LEVEL 1]

In support of your petition, you provided an LCA that designated the proffered position as a Level I wage (the lowest of four assignable wage levels). According to U.S. Department of Labor (DOL) guidelines on wage determinations, a Level I wage is used for the following:¹

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.²



¹ See DOL's *Employment and Training Administration Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs*, Rev. November, 2009.

² In comparison, a level II certification is for "qualified" employees who have "attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment." A level III certification is for "experienced" employees "who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff." A level IV certification is for "fully competent" employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."



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Comment [LIH1]: I think we should be consistent in either calling it "Level I wage" or "level one wage" throughout the RFE.

Comment [CSC - DHN2]: Changed to "Level I"

Comment [LIH3]: I don't think we need footnotes for an RFE, if we are concerned about further citing the source we could use: The DOL's *Employment and Training Administration Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs*, Rev. November, 2009.

Comment [CSC - DHN4]: Changed the footnote to cite DOL's *Employment and Training Administration Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs*, Rev. November, 2009.

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research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

By designating the proffered position at a Level I wage, you indicated that the proffered position is an entry-level position relative to other positions within the occupation.

[REDACTED]

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Yet however, you also indicate that the beneficiary will perform duties such as:

- [INSERT DUTIES THAT ARE CLEARLY INCONSISTENT WITH WAGE LEVEL 1 I.E. SUPERVISION]

[REDACTED]

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[REDACTED]

These duties do not correspond to the Level I wage description as they do not appear to encompass "only a basic understanding of the occupation." The duties as described appear to contain more than "routine tasks that require limited, if any, exercise of judgement."

Here, provided that the proffered position was in fact found to be a higher-level and more complex position as claimed elsewhere in the petition that could only be filled by someone with extensive experience, it appears that you did not submit an LCA that corresponds to the claimed duties and requirements of the position.

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The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position are materially inconsistent with the certification of the LCA for a Level I, entry-level position. This aspect of the LCA also undermines the credibility of the petition, and, in particular, the credibility of your assertions regarding the demands, level of responsibilities and requirements of the proffered position.

[REDACTED]

[REDACTED]

You stated that the beneficiary will perform duties such as [QUOTE SUPERVISORY DUTIES THAT ARE NOT NORMALLY ASSOCIATED WITH THE POSITION, I.E. POSITION IS NOT A MANGERIAL/SUPERVISORY POSITION] and "[lead and oversee design verification efforts of a cluster of blocks." These duties appear to involve supervising and managing team members. These duties are not entry level duties that "require limited, if any, exercise of judgment."

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[REDACTED]

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[REDACTED]

You indicate that the beneficiary will be stationed off-site, at the [END-CLIENT NAME] client location. You indicate [PROVIDE ANALYSIS OF OFF-SITE SUPERVISION AS DESCRIBED IN PETITION OR INDICATE THAT THEY HAVE NOT PROVIDED ANY DESCRIPTION]. Accordingly, it is not apparent how the beneficiary will "work under close supervision and receive specific instructions on required tasks and results expected." Similarly, it is not apparent how the beneficiary's work will be "closely monitored and reviewed for accuracy."

[REDACTED]

USCIS is unable to determine that the LCA you submitted corresponds to the proffered position because [CHOOSE: the duties the position as described [REDACTED] are vague [REDACTED] OR the duties of the position as described are incomplete OR {you are in the information technology consulting industry and} you have not established the duties and nature of the proffered position].
~~You may submit additional evidence to clarify this issue. Evidence may include but is not limited to the following:~~

[REDACTED]

Accordingly, you have not established that the petition is supported by an LCA that corresponds with the proffered position. You may submit additional evidence to establish eligibility on this issue. Evidence may include but is not limited to the following:

- A statement that explains how a Level I wage designation on the submitted LCA corresponds to the proffered position;
- Documentation to show that a Level I wage designation on the LCA corresponds to the proffered position;
- A new LCA that was certified prior to filing, with a different wage designation and/or job code and title, that corresponds to the proffered position. If you submit a new LCA, you should provide an explanation for the change. Note that eligibility for H-1B employment must be established as of the Form I-129 filing date. Therefore, the LCA must have been certified prior to the Form I-129 filing date; or
- Documentation to establish that the educational and experience requirements of the proffered position are commensurate to the educational and experience requirements of an entry-level position, such as job offers, official position descriptions, and job announcements.

- [REDACTED]
- [REDACTED]
 - [REDACTED]
 - [REDACTED]

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[REDACTED]

Comment [LIH6]: RCR: There is no discussion

Comment [CSC - DHN7]: Inserting more sample analyses.

Comment [LIH8]: I think the summary in the original RFB is more appropriate with just the last line changed to: "As such, you have not established that the petition is supported by an LCA which corresponds with the proffered position and, therefore, that the LCA is certified for the specialty occupation in which the beneficiary will be employed."

Comment [CSC - DHN9]: Changing language a bit.

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[SCENARIO 2: LCA WAGE LEVEL MARKED N/A. NON-OES OR PRIVATE WAGE SURVEY USED]

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You indicated on Page 3, Section G, Item a.8 of the LCA that the wage level of the proffered position is "N/A" or not applicable. You also indicated on Item a.11b that you utilized a wage survey named [INSERT PRIVATE WAGE SURVEY NAME] to determine the prevailing wage of the proffered position in the area of intended employment. The record does not contain copies of this wage survey and other documents to show how you arrived at the prevailing wage. Please submit additional information regarding the LCA wage level and wage surveys that you utilized to arrive at the wage level for the proffered position. Evidence may include but is not limited to the following:

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- A statement and documentation that explain how the wage level corresponds to the proffered position;
- Copies of the [INSERT PRIVATE WAGE SURVEY NAME] wage survey and supporting documentation that show how you determined the prevailing wage and wage level;
- A new LCA that was certified prior to filing, with a different wage designation and/or job code and title, that corresponds to the proffered position. If you submit a new LCA, you should provide an explanation for the change. Note that eligibility for H-1B employment must be established as of the Form I-129 filing date. Therefore, the LCA must have been certified prior to the Form I-129 filing date; or
- Documentation to establish that the educational and experience requirements of the proffered position are commensurate to the educational and experience requirements of the wage level, such as job offers, official position descriptions, and job announcements.

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Statutory Background

Established in 1990, the H-1B program allows US employers to hire foreign nationals to work in *specialty occupations*.¹

- A. The primary statutory basis for this classification is INA § 101(a)(15)(H);
- B. “Specialty occupation” – as this term concerns H-1B workers – is defined at INA § 214(i)(1) and (2). Per this definition, a specialty occupation requires “(A) theoretical and practical application of a body of specialized knowledge and (B) 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 United States.”²

The Department of Labor (DOL) has provided more detail about specialty and non-specialty occupations in its Occupational Outlook Handbook (OOH), which can be found online (<http://www.bls.gov/ooh/>). The OOH offers a layman’s definition of each occupation and a description of the duties and educational requirements for the various occupations that it addresses. While USCIS recognizes DOL’s OOH as one authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses, it is not always determinative. USCIS also considers other sources provided

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by the petitioner. Additionally, the DOL provides information regarding the prevailing wages for various occupational classifications.³ Prevailing wage information, grouped together with summaries of the OOH job definitions, can be found online at the website of the Foreign Labor Certification (FLC) Data Center, <http://www.flcdatacenter.com/>.

Comment [RHC1]: Added a new footnote since we should note that the DOL/OES is not the only source to determine the required wage. Officers should be aware that the petitioner may have relied on a different authoritative source to determine the required wage.

- C. There is no requirement that companies employing H-1B workers first attempt to recruit U.S. citizens or lawful permanent residents *unless the respective company is H-1B dependent or a willful violator*.

An H-1B dependent employer is defined at INA § 212(n)(3). It means:

- The employer has 25 or fewer full-time equivalent employees who are employed in the U.S., of whom eight or more are H-1Bs, or;
- The employer has 26 to 50 full-time equivalent employees who are employed in the U.S., of whom 13 or more are H-1Bs, or;

¹ The H-1B classification also includes certain fashion modes and Department of Defense workers, but those subtypes will not be discussed here.

² See also 8 CFR § 214.2(h)(4)(iii).

³ Note that a petitioner may also rely upon other authoritative sources to establish the prevailing wage, such as private wage surveys based on the “median wage of workers similarly employed in the area of intended employment. 20 CFR 656.731(b)(3)(iii)(B) and (C).

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- The employer has more than 50 full-time equivalent employees who are employed in the U.S. and 15% or more are H-1B nonimmigrants.

H-1B-dependent employers and willful violators have more procedures to go through, and more obligations to comply with, before filing a petition for an H-1B worker unless the worker is considered an exempt worker as defined at INA § 212(n)(3)(B)(i)(I) and (II):

- The employer will compensate the H-1B worker at \$60,000 or more per year, or;
- The H-1B worker has attained a master's degree or higher in a field related to the specialty occupation.

Note that the "\$60,000 exception" mentioned above is statutory and has not changed since 1998, meaning it also has not been adjusted for inflation or otherwise in almost 20 years. This means a wage of \$60,000 is now worth much less in real dollars than in 1998, especially considering that many areas with high concentrations of IT workers, such as Silicon Valley, Irvine, CA, Schaumburg, IL, Fairfax, VA, etc., have a much higher than average cost of living.

Further statutory language to keep in mind when considering abuses of the H-1B nonimmigrant visa classification is found at INA § 212(n)(1)(A)(ii). This language reads:

No alien may be admitted or provided status as an H-1B nonimmigrant...unless the employer has filed with the Secretary of Labor an application stating...[it] will provide working conditions for such a nonimmigrant ***that will not adversely affect the working conditions of workers similarly employed.*** [Emphasis added]

Filing Procedures

Before a petitioner can employ an H-1B worker, three things must happen:

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- A. There must be a position available in a specialty occupation and the beneficiary must be qualified for that position [REDACTED]

Comment [RHC2]: On further thought, we decided to tweak.

- B. The employer must file a Labor Condition Application, aka LCA (Form ETA-9035), with the Department of Labor (DOL) and the DOL must certify (approve) this form. By filing the LCA, the employer is attesting to various obligations per INA § 212(n);
- C. The employer must file a Petition for Nonimmigrant Worker (Form I-129) with USCIS and USCIS must approve this form, unless the H-1B workers is eligible for H-1B portability under INA § 214(n) (if eligible under H-1B portability, the H-1B worker can commence new employment upon the filing of the H-1B petition with USCIS);

Note: there is no charge for filing an LCA, which a potential employer can do electronically. USCIS charges a \$460 filing fee for the I-129 petition. In some instances,

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an additional \$500 "Fraud Detection and Prevention" fee applies. There is also a fee of either \$750 or \$1,500 associated with the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) for initial I-129 filings and first extensions. If the employer has fewer than 26 employees, it pays \$750; if 26 or more, it pays \$1,500. Finally, Public Law 114-113 imposes a \$4,000 fee on certain employers seeking initial H-1B status for a worker or obtaining authorization for a worker to change employers. This \$4,000 fee only applies to employers who have 50 or more workers in the United States and half of those workers are in H-1B, L-1B, or L-1A status. The total amount an employer must pay to obtain authorization to employ an H-1B worker will thus vary depending on the type of filing (initial, first extension, second extension) and the employer's size.

Processing/adjudication times for LCAs and I-129s vary. The DOL strives for a five-to-seven-business-day processing time for LCAs. USCIS takes longer, which has led many employers to use the premium processing option, when available. For an additional \$1,225, an I-129 can be accompanied by a Form I-907 (the premium processing form) and USCIS will take adjudicative action on the I-129 in 15 calendar days. If USCIS cannot meet this deadline, it must refund the premium processing fee. Note: premium processing and the 15-day deadline are regulatory, see 8 CFR Part 103.7(e)(2). Also note that premium process may sometimes be temporarily suspended. Be sure to check the USCIS public website to see if premium process is currently available for H-1B filings.

Abuses of the H-1B Program and How to Check for Them

In 2007, the USCIS Office of Fraud Detection and National Security (FDNS) conducted a Benefits Fraud Assessment (BFA) of the H-1B program. USCIS released the results in 2008, which showed that nearly 21% of the I-129s randomly chosen for review were not in compliance with the law and regulations. Of this 21%, FDNS determined that over 13% contained evidence of fraud/misrepresentation and over 7% suffered from technical violations that invalidated the terms and conditions of their respective H-1B visas.

Abuses of the terms and conditions of H-1B visas include:

- A. **Prevailing Wage Abuse – the Geographic Area Aspect:** employers are required to pay H-1B workers the actual or prevailing wage, whichever is higher, for position. The DOL Bureau of Labor Statistics (BLS) determines prevailing wages based on occupational classification and geographic areas, which sometimes correspond to Metropolitan Statistical Areas (MSAs).

1. For example:



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- [REDACTED]
2. An FDNS site visit confirms the company contracted out the H-1B worker's labor to

[REDACTED]

[REDACTED]

3. The company is thus undercutting the prevailing wage in the area of employment by

[REDACTED]

[REDACTED]

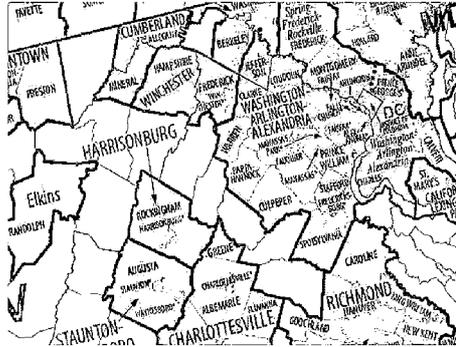
Below are some tools to help you determine the geographic area of employment and corresponding prevailing wage.

An MSA map:

http://www2.census.gov/geo/maps/metroarea/us_wall/Feb2013/cbsa_us_0213.pdf

Here is a close-up view of Northern Virginia taken from the MSA map:

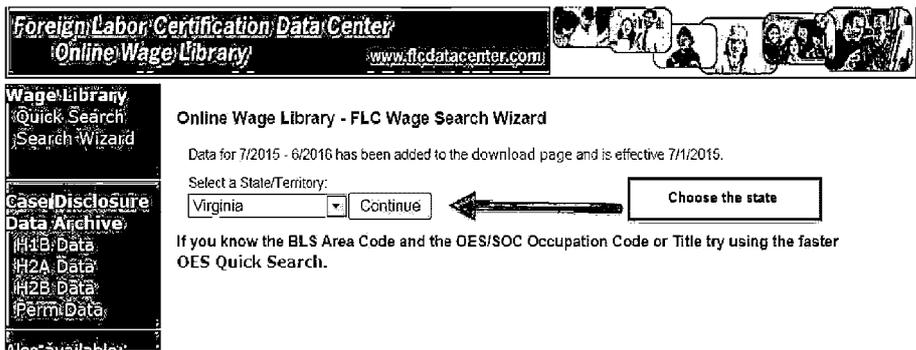
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The thick green lines represent an MSA’s borders. (Informational: dark green areas represent Metropolitan Statistical Areas and light green areas, like Elkins, WV, represent Micropolitan Statistical Areas. This distinction can be ignored for the purpose of reviewing prevailing wages.)

Note: areas outside of MSAs (the white areas on the MSA map) are listed in the Foreign Labor Certification Data Center Online Wage Library as “nonmetropolitan areas.” Also, some areas have similar names, and this has caused confusion for officers. For example, dealing within Virginia there is both a because Richmond County (nonmetropolitan area) and a is completely different than the City of Richmond. There may be other instances like this in other states, so be careful when reviewing the worksite location.

Wages sometimes vary within MSAs. For help determining what the correct prevailing wage should be, you can turn to the FLC Data Center Online Wage Library, <http://www.flcdatacenter.com/OesWizardStart.aspx>. The screen captures below should help you learn to navigate this website.



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Wage Library
Quick Search
Search Wizard

Case Disclosure
Data Archive
H1B Data
H2A Data
H2B Data
Perm Data

Online Wage Library - Quick Search New Quick Search New Search Wizard

Data for 7/2016 - 6/2017 has been added to the download page and is effective 7/1/2016.

Select a Data Source: ①

7/2016 - 6/2017 All Industries Database

7/2016 - 6/2017 ACWIA - Higher Education Database

7/2015 - 6/2016 All Industries Database

7/2015 - 6/2016 ACWIA - Higher Education Database

7/2014 - 6/2015 All Industries Database

7/2014 - 6/2015 ACWIA - Higher Education Database

7/2013 - 6/2014 All Industries Database

7/2013 - 6/2014 ACWIA - Higher Education Database

Choose your database. It will usually be the All Industries one. The ACWIA database is used for individuals seeking employment at colleges, universities, or research institutions. 20 CFR 655.40(e) defines what represents a college, university, and research institution.

Foreign Labor Certification Data Center
Online Wage Library
www.flcdscenter.com

Wage Library
Quick Search
Search Wizard

Case Disclosure
Data Archive
H1B Data
H2A Data
H2B Data
Perm Data

Also available:
File Archive

Skill Level
Explanation

SVP Explanation

FLC Wage Data
updated
July 1, 2016

Job Zones updated
August 26, 2016
See change
history

Technical Support
& Help/FAQ page

FLC Data Center - FLC Wage Search Wizard New Quick Search New Search Wizard

Data for 7/2016 - 8/2017 has been added to the download page and is effective 7/1/2016.

You have requested data for Virginia

Select a Data Source: ①

7/2016 - 6/2017 All Industries Database

Select an area based on: County/Township BLS Areas

DURHAM VISTA CITY - Northwest Virginia nonmetropolitan area

CAMPBELL - Lynchburg, VA MSA

CAROLINE - Richmond, VA MSA

CARROLL - Southwest Virginia nonmetropolitan area

CHARLES CITY - Richmond, VA MSA

CHARLOTTE - Southside Virginia nonmetropolitan area

CHARLOTTESVILLE CITY - Charlottesville, VA MSA

CHESAPEAKE CITY - Virginia Beach-Norfolk-Newport News, VA-NC MSA

CHESTERFIELD - Richmond, VA MSA

CLARKE - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division

CLIFTON FORGE CITY - Northwest Virginia nonmetropolitan area

COLONIAL HEIGHTS CITY - Richmond, VA MSA

COVINGTON CITY - Northwest Virginia nonmetropolitan area

CRAIG - Roanoke, VA MSA

CULPEPER - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division

CLIMBERLAND - Southside Virginia nonmetropolitan area

DANVILLE CITY - Southside Virginia nonmetropolitan area

DICKENSON - Southwest Virginia nonmetropolitan area

DINWIDDIE - Richmond, VA MSA

EMPIRIA CITY - Southside Virginia nonmetropolitan area

ESSEX - Northeast Virginia nonmetropolitan area

FAIRFAX - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division

FAIRFAX CITY - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division

FALLS CHURCH CITY - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division

FALLOCHER - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division

Next, choose the area in which the H-1B worker's worksite is or will be located. The worksite, not the petitioner's business or mailing address, determines the prevailing wage. For the purposes of this example, we have chosen Fairfax, VA.

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You have requested data for Virginia

Select a Data Source: ①
7/2016 - 6/2017 All Industries Database

Select an area based on: ② County/Township BLS Areas ③
FAIRFAX - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Divisi

Enter a keyword or phrase: ④

OR Select an occupation from the list: ⑤

- 13-2072 | Loan Officers
- 13-2081 | Tax Examiners and Collectors, and Revenue Agents
- 13-2082 | Tax Preparers
- 13-2099 | Financial Specialists, All Other
- 15-1111 | Computer and Information Research Scientists
- 15-1121 | Computer Systems Analysts
- 15-1122 | Information Security Analysts
- 15-1131 | Computer Programmers
- 15-1132 | Software Developers, Applications
- 15-1133 | Software Developers, Systems Software
- 15-1134 | Web Developers
- 15-1141 | Database Administrators
- 15-1142 | Network and Computer Systems Administrators
- 15-1143 | Computer Network Architects
- 15-1151 | Computer User Support Specialists
- 15-1152 | Computer Network Support Specialists
- 15-1199 | Computer Occupations, All Other
- 15-2011 | Actuaries
- 15-2021 | Mathematicians

Informational: the SOC can be found on p. 1 of the LCA. It should align with the specialty occupation listed on Part 5 of the I-129.

A. Employment-Based Nonimmigrant Visa Information	
1. Indicate the type of visa classification supported by this application (Write classification symbol). *	H-1B
B. Temporary Need Information	
1. Job Title *	PROGRAMMER ANALYST
2. SOC (ONET/OES) code *	15-1131
3. SOC (ONET/OES) occupation title *	COMPUTER PROGRAMMERS
4. Is this a full-time position? *	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Period of Intended Employment	
5. Begin Date * <small>(mm/dd/yyyy)</small>	09/12/2013
6. End Date * <small>(mm/dd/yyyy)</small>	09/10/2016

Once you have input the database (All Industries, usually), location (Fairfax County, not City, for the purposes of our example), and SOC (Computer Programmer in our example), click on 'Search'. This provides the following result:

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Foreign Labor Certification Data Center
 Online Wage Library
 www.fldatacenter.com

Wage Library: Quick Search Search Wizard
 Case Disclosure Data Archive: H1B Data H2A Data H2B Data Perm Data
 Also available: File Archive
 Skill Level Explanation
 SVP Explanation
 FLC Wage Data Updated: July 1, 2016

FLC Wage Results New Quick Search New Search Wizard

You selected the All Industries database for 7/2016 - 6/2017.

Your search returned the following: Print Format

Area Code: 47894
 Area Title: Washington-Arlington-Alexandria, DC-VA-MD-WY Metropolitan Division
 OES/SOC Code: 15-1131
 OES/SOC Title: Computer Programmers
 GeoLevel: 1
 Level 1 Wage: \$31.98 hour - \$66,514 year
 Level 2 Wage: \$39.68 hour - \$82,534 year
 Level 3 Wage: \$47.38 hour - \$98,550 year
 Level 4 Wage: \$55.08 hour - \$114,566 year
 Mean Wage (H-2B): \$47.38 hour - \$98,550 year

This wage applies to the following O*Net occupations:
 15-1131.00 Computer Programmers

Create, modify, and test the code, forms, and script that allow computer applications to run. Work from specifications drawn up by software developers or other individuals. May assist software developers by analyzing user needs and designing software solutions. May develop and write computer programs to store, locate, and retrieve specific documents, data, and information.

Prevailing wages by wage level
 Summary of a Computer Programmer's Duties, When How Often O*Net illustrates

Where you discover that the H-1B worker is not employed in the geographic area listed on the I-129 and in the certified LCA submitted in support of the petition, you need to



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B. **Prevailing Wage Abuse – the Wage Level Aspect:** ~~the~~The DOL recognizes four wage levels, which are based on a worker’s job responsibilities, education and/or experience. The DOL’s Employment and Training Administration (ETA) issued revised guidance about wage levels in November 2009 (see p. 7 of the DOL guidance found at http://www.fldatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf). The higher the wage level, the higher the prevailing wage – as you can see from the FLC Data Center’s website screen capture above for Computer Programmers in Fairfax, VA.

You can find the wage level listed on p. 3 of the LCA:

Prevailing Wage Information (corresponding to the place of employment location listed above)	
7. Agency which issued prevailing wage \$ N/A	7a. Prevailing wage tracking number (if applicable) \$ N/A
8. Wage level * <input checked="" type="checkbox"/> I <input type="checkbox"/> II <input type="checkbox"/> III <input type="checkbox"/> IV <input type="checkbox"/> N/A	
9. Prevailing wage * \$ 48864.00	10. Per: (Choose only one) * <input type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Bi-Weekly <input type="checkbox"/> Month <input checked="" type="checkbox"/> Year

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USCIS Policy Memorandum 602-0142 of 03/31/2017 provides the following guidance about wage levels: “USCIS officers must also review the LCA to ensure the wage level designated by the petitioner corresponds to the proffered position. If a petitioner designates a position as a Level I, entry-level position, for example, such an assertion will likely contradict a claim that the proffered position is particularly complex, specialized, or unique compared to other positions *within the same occupation.*” [Italics in original]

- Wage-level abuse occurs when a company lists an H-1B worker at a lower wage level even though that worker’s job responsibilities correspond to a higher level.

- [Redacted]
- [Redacted]
- [Redacted]

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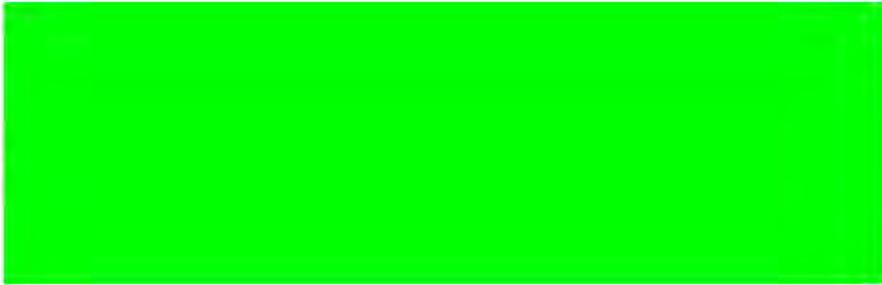
[Redacted]

The previously cited USCIS Policy Memo 602-0142 of 03/31/2017 reminds USCIS personnel that the wage level “reflects the job requirements, experience, education, special skills/other requirements, and supervisory duties.”

- C. **Standard Occupational Classification (SOC) Abuse:** each occupation is defined in layman’s terms by the DOL through the OOH, as discussed above. Through “Standard Occupational Classification,” or SOC, DOL provides codes to facilitate classification of occupations. For our purposes, we can use “SOC” and “occupation” interchangeably.

1. SOC abuse is straightforward: as mentioned earlier, Systems Analysts and Computer [Redacted]

2.



A good way to determine this type of abuse is to have the H-1B worker and his or her

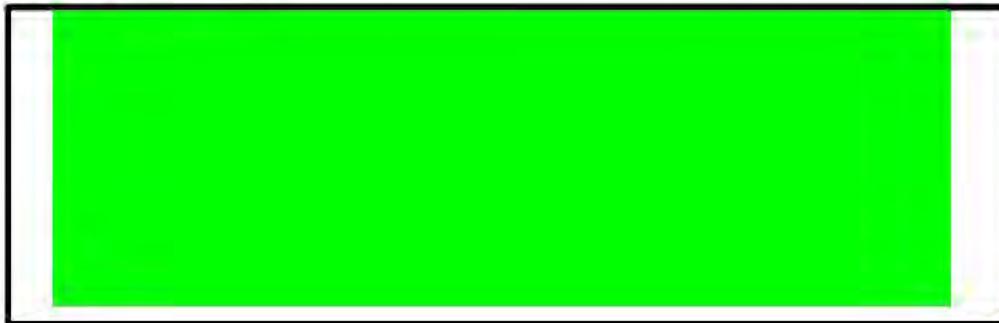


129.) For example:

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- Conduct research into fundamental computer and information science as theorists, designers, or inventors. Solve or develop solutions to problems in the field of computer hardware and software.
- Convert project specifications and statements of problems and procedures to detailed logical flow charts for coding into computer language. Develop and write computer programs to store, locate, and retrieve specific documents, data, and information. May program web sites.
- Develop, create, and modify general computer applications software or specialized utility programs. Analyze user needs and develop software solutions. Design software or customize software for client use with the aim of optimizing operational efficiency. May analyze and design databases within an application area, working individually or coordinating database development as part of a team.
- Research, design, develop, and test operating systems-level software, compilers, and network distribution software for medical, industrial, military, communications, aerospace, business, scientific, and general computing applications. Set operational specifications and formulate and analyze software requirements. Apply principles and techniques of computer science, engineering, and mathematical analysis.
- Provide technical assistance to computer system users. Answer questions or resolve computer problems for clients in person, via telephone or from remote location. May provide assistance concerning the use of computer hardware and software, including printing, installation, word processing, electronic mail, and operating systems.
- Analyze science, engineering, business, and all other data processing problems for application to electronic data processing systems. Analyze user requirements, procedures, and problems to automate or improve existing systems and review computer system capabilities, workflow, and scheduling limitations. May analyze or recommend commercially available software. May supervise computer programmers.
- Coordinate changes to computer databases, test and implement the database applying knowledge of database management systems. May plan, coordinate, and implement security measures to safeguard computer databases.
- Install, configure, and support an organization's local area network (LAN), wide area network (WAN), and Internet system or a segment of a network system. Maintain network hardware and software. Monitor network to ensure network availability to all system users and perform necessary maintenance to support network availability. May supervise other network support and client server specialists and plan, coordinate, and implement network security measures.
- Analyze, design, test, and evaluate network systems, such as local area networks (LAN), wide area networks (WAN), Internet, intranet, and other data communications systems. Perform network modeling, analysis, and planning. Research and recommend network and data communications hardware and software. Includes telecommunications specialists who deal with the interfacing of computer and communications equipment.
- Plan, coordinate, and implement security measures for information systems to regulate access to computer data files and prevent unauthorized modification, destruction, or disclosure of information.

Each of the descriptions above corresponds to a SOC (Systems Analysis, Computer Programmer, Software Engineer, Database Administrator, etc.) – see the attached Computer Skills Key.



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(b)(7)(e)

D. **H-1B Workers' Payment of Certain Fees Associated with I-129 filings:** this is unlawful, but it happens.

1. INA § 212(n)(2)(C)(vi)(II) stipulates that employers cannot require H-1B workers to pay any part of the ACWIA fee;
2. INA § 214(c)(12)(A) stipulates that the fraud fee is imposed on the employer;
3. 20 CFR 655.731(c)(9) stipulates that an employer may not recoup H-1B costs if these are considered a "business expense." So if an employer declares the I-129 form-filing fee of \$460 or the premium processing fee of \$1,225 as a business expense for tax purposes, the employer cannot deduct these sums from the H-1B worker's pay or otherwise require the H-1B worker to pay these fees if such deduction would reduce the H-1B worker's pay below the required wage.

The table below is a visual aid for the H-1B fee structure:

Fee	Amount	Who Pays?
Form Filing Fee	\$460	Generally employer
American Competitiveness and Workforce Improvement Act (ACWIA) Fee	\$750 (if employer has fewer than 26 employees) \$1,500 (if 26 or more)	Employer <i>only</i> – see INA § 212(n)(2)(C)(vi)(II)
Fraud Fee	\$500	Imposed "on an employer" – see INA § 214(c)(12)(A)
Attorney's Fee	Vary	Employer or H-1B Worker
Premium Processing Fee	\$1,225	Generally employer



E. **No position available at the time of filing / 'benching' issues:** in some instances,



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(b)(7)(E)

1. If there was no position available from the start, the petitioner may have willfully misrepresented its need for the H-1B worker and the I-129 may be subject to revocation. The worker could find him/herself without status in this situation and thus removable per INA § 237(a)(1)(C).
2. If an H-1B worker is not being paid while in the United States as he or she is waiting for projects or work, (b)(5) (b)(5) he/she is generally considered "benched." Because the H-1B worker is in the U.S. to work, benching makes him or her a status violator (not necessarily willful) and possibly removable.
 - a. There are exceptions to this definition of benching: for example, a worker may be on extended unpaid leave, such as unpaid leave under the Family and Medical Leave Act. (b)(7)(E)

(b)(7)(E)

b. (b)(7)(E)

Here it is important to note that an alien worker is generally not able to change or extend nonimmigrant status or adjust through an immigrant worker petition if s/he has violated the terms of his or her underlying nonimmigrant visa (H-1B, F-1, L-1A, etc.).

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Targeted Site Visit and Verification Program – H-1B Training

Statutory Background

Established in 1990, the H-1B program allows US employers to hire foreign nationals to work in *specialty occupations*.¹

- A. The primary statutory basis for this classification is INA § 101(a)(15)(H);
- B. “Specialty occupation” – as this term concerns H-1B workers – is defined at INA § 214(i)(1) and (2). Per this definition, a specialty occupation requires “(A) theoretical and practical application of a body of specialized knowledge and (B) 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 United States.”²

The Department of Labor (DOL) has provided more detail about specialty and non-specialty occupations in its Occupational Outlook Handbook (OOH), which can be found online (<http://www.bls.gov/ooh/>). The OOH offers a layman’s definition of each occupation and a description of the duties and educational requirements for the various occupations that it addresses. While USCIS recognizes DOL’s OOH as one authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses, it is not always determinative. USCIS also considers other sources provided by the petitioner. Additionally, the DOL provides information regarding the prevailing wages for various occupational classifications.³ Prevailing wage information, grouped together with summaries of the OOH job definitions, can be found online at the website of the Foreign Labor Certification (FLC) Data Center, <http://www.flcdatacenter.com/>.

- C. There is no requirement that companies employing H-1B workers first attempt to recruit U.S. citizens or lawful permanent residents *unless the respective company is H-1B dependent or a willful violator*.

An H-1B dependent employer is defined at INA § 212(n)(3). It means:

- The employer has 25 or fewer full-time equivalent employees who are employed in the U.S., of whom eight or more are H-1Bs, or;

¹ The H-1B classification also includes certain fashion modes and Department of Defense workers, but those subtypes will not be discussed here.

² See also 8 CFR § 214.2(h)(4)(iii).

³ Note that a petitioner may also rely upon other authoritative sources to establish the prevailing wage, such as private wage surveys based on the “median wage of workers similarly employed in the area of intended employment.” 20 CFR 656.731(b)(3)(iii)(B) and (C).

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- The employer has 26 to 50 full-time equivalent employees who are employed in the U.S., of whom 13 or more are H-1Bs, or;
- The employer has more than 50 full-time equivalent employees who are employed in the U.S. and 15% or more are H-1B nonimmigrants.

H-1B-dependent employers and willful violators have more procedures to go through, and more obligations to comply with, before filing a petition for an H-1B worker unless the worker is considered an exempt worker as defined at INA § 212(n)(3)(B)(i)(I) and (II):

- The employer will compensate the H-1B worker at \$60,000 or more per year, or;
- The H-1B worker has attained a master's degree or higher in a field related to the specialty occupation.

Note that the "\$60,000 exception" mentioned above is statutory and has not changed since 1998, meaning it also has not been adjusted for inflation or otherwise in almost 20 years. This means a wage of \$60,000 is now worth much less in real dollars than in 1998, especially considering that many areas with high concentrations of IT workers, such as Silicon Valley, Irvine, CA, Schaumburg, IL, Fairfax, VA, etc., have a much higher than average cost of living.

Further statutory language to keep in mind when considering abuses of the H-1B nonimmigrant visa classification is found at INA § 212(n)(1)(A)(ii). This language reads:

No alien may be admitted or provided status as an H-1B nonimmigrant...unless the employer has filed with the Secretary of Labor an application stating...[it] will provide working conditions for such a nonimmigrant ***that will not adversely affect the working conditions of workers similarly employed.*** [Emphasis added]

Filing Procedures

Before a petitioner can employ an H-1B worker, three things must happen:

- A. There must be a position available in a specialty occupation and the beneficiary must be qualified for that position;
- B. The employer must file a Labor Condition Application, aka LCA (Form ETA-9035), with the Department of Labor (DOL) and the DOL must certify (approve) this form. By filing the LCA, the employer is attesting to various obligations per INA § 212(n);
- C. The employer must file a Petition for Nonimmigrant Worker (Form I-129) with USCIS and USCIS must approve this form, unless the H-1B workers is eligible for H-1B portability under INA § 214(n) (if eligible under H-1B portability, the H-1B worker can commence new employment upon the filing of the H-1B petition with USCIS);

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Note: there is no charge for filing an LCA, which a potential employer can do electronically. USCIS charges a \$460 filing fee for the I-129 petition. In some instances, an additional \$500 “Fraud Detection and Prevention” fee applies. There is also a fee of either \$750 or \$1,500 associated with the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) for initial I-129 filings and first extensions. If the employer has fewer than 26 employees, it pays \$750; if 26 or more, it pays \$1,500. Finally, Public Law 114-113 imposes a \$4,000 fee on certain employers seeking initial H-1B status for a worker or obtaining authorization for a worker to change employers. This \$4,000 fee only applies to employers who have 50 or more workers in the United States and half of those workers are in H-1B, L-1B, or L-1A status. The total amount an employer must pay to obtain authorization to employ an H-1B worker will thus vary depending on the type of filing (initial, first extension, second extension) and the employer’s size.

Processing/adjudication times for LCAs and I-129s vary. The DOL strives for a five-to-seven-business-day processing time for LCAs. USCIS takes longer, which has led many employers to use the premium processing option, when available. For an additional \$1,225, an I-129 can be accompanied by a Form I-907 (the premium processing form) and USCIS will take adjudicative action on the I-129 in 15 calendar days. If USCIS cannot meet this deadline, it must refund the premium processing fee. Note: premium processing and the 15-day deadline are regulatory, see 8 CFR Part 103.7(e)(2). Also note that premium process may sometimes be temporarily suspended. Be sure to check the USCIS public website to see if premium process is currently available for H-1B filings.

Abuses of the H-1B Program and How to Check for Them

(b) (7)(E)

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(b) (7)(E)

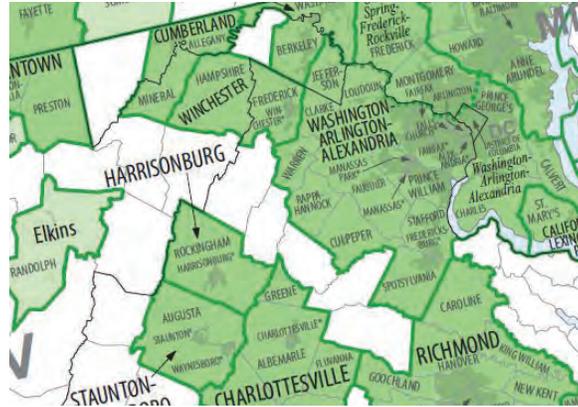
Below are some tools to help you determine the geographic area of employment and corresponding prevailing wage.

An MSA map:

http://www2.census.gov/geo/maps/metroarea/us_wall/Feb2013/cbsa_us_0213.pdf

Here is a close-up view of Northern Virginia taken from the MSA map:

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The thick green lines represent an MSA’s borders. (Informational: dark green areas represent Metropolitan Statistical Areas and light green areas, like Elkins, WV, represent Micropolitan Statistical Areas. This distinction can be ignored for the purpose of reviewing prevailing wages.)

Note: areas outside of MSAs (the white areas on the MSA map) are listed in the Foreign Labor Certification Data Center Online Wage Library as “nonmetropolitan areas.” Also, some areas have similar names, and this has caused confusion for officers. For example, in Virginia there is both a Richmond County (nonmetropolitan area) and a completely different City of Richmond. There may be other instances like this in other states, so be careful when reviewing the worksite location.

Wages sometimes vary within MSAs. For help determining what the correct prevailing wage should be, you can turn to the FLC Data Center Online Wage Library, <http://www.flcdatacenter.com/OesWizardStart.aspx>. The screen captures below should help you learn to navigate this website.



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Wage Library
Quick Search
Search Wizard

**Case Disclosure
Data Archive**
H1B Data
H2A Data
H2B Data
Perm Data

Online Wage Library - Quick Search [New Quick Search](#) [New Search Wizard](#)

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Select a Data Source: 

- 7/2016 - 6/2017 All Industries Database
- 7/2016 - 6/2017 ACWIA - Higher Education Database
- 7/2015 - 6/2016 All Industries Database
- 7/2015 - 6/2016 ACWIA - Higher Education Database
- 7/2014 - 6/2015 All Industries Database
- 7/2014 - 6/2015 ACWIA - Higher Education Database
- 7/2013 - 6/2014 All Industries Database
- 7/2013 - 6/2014 ACWIA - Higher Education Database

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Next, choose the area in which the H-1B worker's *worksite* is or will be located. The worksite, not the petitioner's business or mailing address, determines the prevailing wage. For the purposes of this example, we have chosen Fairfax, VA.

Select a Data Source: 

7/2016 - 6/2017 All Industries Database

Select an area based on County/Township BLS Areas 

- BUENA VISTA CITY - Northwest Virginia nonmetropolitan area
- CAMPBELL - Lynchburg, VA MSA
- CAROLINE - Richmond, VA MSA
- CARROLL - Southwest Virginia nonmetropolitan area
- CHARLES CITY - Richmond, VA MSA
- CHARLOTTE - Southside Virginia nonmetropolitan area
- CHARLOTTESVILLE CITY - Charlottesville, VA MSA
- CHESAPEAKE CITY - Virginia Beach-Norfolk-Newport News, VA-NC MSA
- CHESTERFIELD - Richmond, VA MSA
- CLARKE - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
- CLIFTON FORGE CIT - Northwest Virginia nonmetropolitan area
- COLONIAL HEIGHTS CITY - Richmond, VA MSA
- COVINGTON CITY - Northwest Virginia nonmetropolitan area
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- CULPEPER - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
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- DANVILLE CITY - Southside Virginia nonmetropolitan area
- DICKENSON - Southwest Virginia nonmetropolitan area
- DINWIDDIE - Richmond, VA MSA
- EMPORIA CITY - Southside Virginia nonmetropolitan area
- ESSEX - Northeast Virginia nonmetropolitan area
- FAIRFAX - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
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- FALLS CHURCH CITY - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
- FAUJOUR - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division

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Select an area based on County/Township BLS Areas

FAIRFAX - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Divisi

Enter a keyword or phrase:

OR Select an occupation from the list:

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- 13-2081 | Tax Examiners and Collectors, and Revenue Agents
- 13-2082 | Tax Preparers
- 13-2099 | Financial Specialists, All Other
- 15-1111 | Computer and Information Research Scientists
- 15-1121 | Computer Systems Analysts
- 15-1122 | Information Security Analysts
- 15-1131 | **Computer Programmers**
- 15-1132 | Software Developers, Applications
- 15-1133 | Software Developers, Systems Software
- 15-1134 | Web Developers
- 15-1141 | Database Administrators
- 15-1142 | Network and Computer Systems Administrators
- 15-1143 | Computer Network Architects
- 15-1151 | Computer User Support Specialists
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- 15-1199 | Computer Occupations, All Other
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- 15-2021 | Mathematicians

Informational: the SOC can be found on p. 1 of the LCA. It should align with the specialty occupation listed on Part 5 of the I-129.

A. Employment-Based Nonimmigrant Visa Information	
1. Indicate the type of visa classification supported by this application (Write classification symbol): *	H-1B
B. Temporary Need Information	
1. Job Title *	PROGRAMMER ANALYST
2. SOC (ONET/OES) code *	15-1131
3. SOC (ONET/OES) occupation title *	COMPUTER PROGRAMMERS
4. Is this a full-time position? *	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Period of Intended Employment	
5. Begin Date * (mm/dd/yyyy)	09/12/2013
6. End Date * (mm/dd/yyyy)	09/10/2016

Once you have input the database (All Industries, usually), location (Fairfax County, not City, for the purposes of our example), and SOC (Computer Programmer in our example), click on 'Search'. This provides the following result:

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Foreign Labor Certification Data Center Online Wage Library
www.flcdatacenter.com

Wage Library
Quick Search
Search Wizard

Case Disclosure Data Archive
H1B Data
H2A Data
H2B Data
Perm Data

Also available:
File Archive

Skill Level Explanation

SVP Explanation

FLC Wage Data updated July 1, 2016

FLC Wage Results New Quick Search New Search Wizard

You selected the All Industries database for 7/2016 - 6/2017.

Your search returned the following: [Print Format](#)

Area Code: 47894
Area Title: Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
OES/SOC Code: 15-1131
OES/SOC Title: Computer Programmers
GeoLevel: 1

Level 1 Wage: \$31.98 hour - \$66,518 year
Level 2 Wage: \$39.68 hour - \$82,534 year
Level 3 Wage: \$47.38 hour - \$98,550 year
Level 4 Wage: \$55.08 hour - \$114,566 year
Mean Wage (H-2B): \$47.38 hour - \$98,550 year

Prevailing wages by wage level

Summary of a Computer Programmer's duties, taken from official DOL literature

This wage applies to the following O*Net occupations:

15-1131.00 Computer Programmers

Create, modify, and test the code, forms, and script that allow computer applications to run. Work from specifications drawn up by software developers or other individuals. May assist software developers by analyzing user needs and designing software solutions. May develop and write computer programs to store, locate, and retrieve specific documents, data, and information.

Where you discover that the H-1B worker is not employed in the geographic area listed on the I-129 and in the certified LCA submitted in support of the petition, you need to check to see if a new or amended I-129 petition and a certified LCA for the new area of employment were filed to report the change in work location. See *Matter of Simeio Solutions*, 26 I&N Dec. 542 (2015).

If the respective petitioning employer has a history of filing I-129s for H-1B workers in “cheap” geographic areas but these workers are consistently found during later reviews in “expensive” areas, prevailing wage fraud by falsely-reported worksite location may be occurring.

- B. **Prevailing Wage Abuse – the Wage Level Aspect:** The DOL recognizes four wage levels, which are based on a worker’s job responsibilities, education, and/or experience. The DOL’s Employment and Training Administration (ETA) issued revised guidance about wage levels in November 2009 (see p. 7 of the DOL guidance found at http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf). The higher the wage level, the higher the prevailing wage – as you can see from the FLC Data Center’s website screen capture above for Computer Programmers in Fairfax, VA.

You can find the wage level listed on p. 3 of the LCA:

Prevailing Wage Information (corresponding to the place of employment location listed above)	
7. Agency which issued prevailing wage \$ N/A	7a. Prevailing wage tracking number (if applicable) \$ N/A
8. Wage level * <input checked="" type="checkbox"/> I <input type="checkbox"/> II <input type="checkbox"/> III <input type="checkbox"/> IV <input type="checkbox"/> N/A	
9. Prevailing wage * \$ 45864.00	10. Per. (Choose only one) * <input type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Bi-Weekly <input type="checkbox"/> Month <input checked="" type="checkbox"/> Year

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USCIS Policy Memorandum 602-0142 of 03/31/2017 provides the following guidance about wage levels: “USCIS officers must also review the LCA to ensure the wage level designated by the petitioner corresponds to the proffered position. If a petitioner designates a position as a Level I, entry-level position, for example, such an assertion will likely contradict a claim that the proffered position is particularly complex, specialized, or unique compared to other positions *within the same occupation.*” [Italics in original]

- Wage-level abuse occurs when a company lists an H-1B worker at a lower wage level even though that worker’s job responsibilities correspond to a higher level.
 - An LCA might list a worker as a level-one Systems Analyst or Computer Programmer because these are lower-paid occupations in the hi-tech field (see the FLC Data Center for confirmation).
 - A site visit may reveal, however, that the worker is performing his or her duties with little supervision – in other words, the worker appears to be doing level-two or higher work.
 - Looking at the difference between a level-one and a level-three Computer Programmer in the Washington, DC area, one can see the incentive to report a lower wage level on the LCA: the difference in wages is more than \$30,000 per year.

Asking the H-1B worker’s immediate supervisors, including end-client supervisors, about the level of supervision can help verify that the wage level on the LCA and compensation listed on both the LCA and I-129 match the H-1B worker’s actual duties. An immediate supervisor’s responses can also be checked against responses provided by the H-1B worker himself or herself. If an H-1B worker’s contact with a supervisor occurs once a week or less, the appropriate wage level may be higher than level one. Additional questioning should reveal the relative complexity of the H-1B worker’s duties and the amount of responsibility this worker has. Responses to this additional questioning should help to determine if the H-1B worker is being employed in the occupation and at the wage level stated in the certified LCA and I-129 petition.

The previously cited USCIS Policy Memo 602-0142 of 03/31/2017 reminds USCIS personnel that the wage level “reflects the job requirements, experience, education, special skills/other requirements, and supervisory duties.”

- C. **Standard Occupational Classification (SOC) Abuse:** each occupation is defined in layman’s terms by the DOL through the OOH, as discussed above. Through its “Standard Occupational Classifications,” or SOCs, DOL provides codes to facilitate classification of occupations. For our purposes, we can use “SOC” and “occupation” interchangeably.

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1. SOC abuse is straightforward: as mentioned earlier, Systems Analysts and Computer Programmers are among the lower-paid SOCs. FDNS officers conducting compliance reviews may encounter H-1B workers who are supposed to be working as Systems Analysts or Computer Programmers per their LCAs and I-129s but who actually perform duties associated with other, higher-paid SOCs, such as Software Developers.
2. Looking at the FLC Data Center website, you can see the incentive: rather than paying a level-two Software Developer (Applications) located in the Fairfax area \$90,646, an employer only has to pay a level-two Programmer \$82,534. This is a savings to the employer of \$8,112.

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- Conduct research into fundamental computer and information science as theorists, designers, or inventors. Solve or develop solutions to problems in the field of computer hardware and software.
- Convert project specifications and statements of problems and procedures to detailed logical flow charts for coding into computer language. Develop and write computer programs to store, locate, and retrieve specific documents, data, and information. May program web sites.
- Develop, create, and modify general computer applications software or specialized utility programs. Analyze user needs and develop software solutions. Design software or customize software for client use with the aim of optimizing operational efficiency. May analyze and design databases within an application area, working individually or coordinating database development as part of a team.
- Research, design, develop, and test operating systems-level software, compilers, and network distribution software for medical, industrial, military, communications, aerospace, business, scientific, and general computing applications. Set operational specifications and formulate and analyze software requirements. Apply principles and techniques of computer science, engineering, and mathematical analysis.
- Provide technical assistance to computer system users. Answer questions or resolve computer problems for clients in person, via telephone or from remote location. May provide assistance concerning the use of computer hardware and software, including printing, installation, word processing, electronic mail, and operating systems.
- Analyze science, engineering, business, and all other data processing problems for application to electronic data processing systems. Analyze user requirements, procedures, and problems to automate or improve existing systems and review computer system capabilities, workflow, and scheduling limitations. May analyze or recommend commercially available software. May supervise computer programmers.
- Coordinate changes to computer databases, test and implement the database applying knowledge of database management systems. May plan, coordinate, and implement security measures to safeguard computer databases.
- Install, configure, and support an organization's local area network (LAN), wide area network (WAN), and Internet system or a segment of a network system. Maintain network hardware and software. Monitor network to ensure network availability to all system users and perform necessary maintenance to support network availability. May supervise other network support and client server specialists and plan, coordinate, and implement network security measures.
- Analyze, design, test, and evaluate network systems, such as local area networks (LAN), wide area networks (WAN), Internet, intranet, and other data communications systems. Perform network modeling, analysis, and planning. Research and recommend network and data communications hardware and software. Includes telecommunications specialists who deal with the interfacing of computer and communications equipment.
- Plan, coordinate, and implement security measures for information systems to regulate access to computer data files and prevent unauthorized modification, destruction, or disclosure of information.

Each of the descriptions above corresponds to a SOC (Systems Analyst, Computer Programmer, Software Engineer, Database Administrator, etc.) – see the attached Computer Skills Key.

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D. H-1B Workers’ Payment of Certain Fees Associated with I-129 filings: this is unlawful, but it happens.

1. INA § 212(n)(2)(C)(vi)(II) stipulates that employers cannot require H-1B workers to pay any part of the ACWIA fee;
2. INA § 214(c)(12)(A) stipulates that the fraud fee is imposed on the employer;
3. 20 CFR 655.731(c)(9) stipulates that an employer may not recoup H-1B costs if these are considered a “business expense.” So if an employer declares the I-129 form-filing fee of \$460 or the premium processing fee of \$1,225 as a business expense for tax purposes, the employer cannot deduct these sums from the H-1B worker’s pay or otherwise require the H-1B worker to pay these fees if such deduction would reduce the H-1B worker’s pay below the required wage.

The table below is a visual aid for the H-1B fee structure:

Fee	Amount	Who Pays?
Form Filing Fee	\$460	Generally employer
American Competitiveness and Workforce Improvement Act (ACWIA) Fee	\$750 (if employer has fewer than 26 employees) \$1,500 (if 26 or more)	Employer <i>only</i> – see INA § 212(n)(2)(C)(vi)(II)
Fraud Fee	\$500	Imposed “on an employer” – see INA § 214(c)(12)(A)
Attorney’s Fee	Vary	Employer or H-1B Worker
Premium Processing Fee	\$1,225	Generally employer

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1. If there was no position available from the start, the petitioner may have willfully misrepresented its need for the H-1B worker and the I-129 may be subject to revocation. The worker could find him/herself without status in this situation and thus removable per INA § 237(a)(1)(C).
2. If an H-1B worker is not being paid while in the United States as he or she is waiting for projects or work, he/she is generally considered “benched.” Because the H-1B worker is in the U.S. to work, benching makes him or her a status violator (not necessarily willful) and possibly removable.
 - a. There are exceptions to this definition of benching: for example, a worker may be on extended unpaid leave, such as unpaid leave under the Family and Medical Leave Act. FDNS officers who encounter a suspected instance of benching should ensure that no exception applies. Officers should also ensure that, where (b) (7)(E)

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Here it is important to note that an alien worker is generally not able to change or extend nonimmigrant status or adjust through an immigrant worker petition if s/he has violated the terms of his or her underlying nonimmigrant visa (H-1B, F-1, L-1A, etc.).

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