

# H-1B Nonimmigrants

October 2017



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# About this Presentation

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# H-1B Petition Process

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- Petitioner files a Labor Condition Application (LCA) with Department of Labor (DOL) for certification.
- Once DOL certifies the LCA, the petitioner submits Form I-129 with a certified LCA to a USCIS Service Center.
- If USCIS approves the petition for a beneficiary who is outside the United States and requires a visa to enter the United States, the beneficiary will need to schedule a visa interview at a U.S. Embassy or Consulate abroad.
  - ✓ If issued an H-1B visa, the beneficiary may apply for admission to the United States with CBP.



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# H-1B Petition Process

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- If the beneficiary does not require a visa to enter the United States, he/she may apply for admission into the United States with CBP using the USCIS approval notice. This beneficiary can therefore obtain H-1B admission without prior contact or interaction with DOS.
- If the beneficiary is in the United States (in valid nonimmigrant status), the petitioner may include a request to change the beneficiary's status from another nonimmigrant status to H-1B or extend H-1B beneficiary's stay on the Form I-129.



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# H-1B Classification for Specialty Occupation Workers

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## H-1B

- Specialty occupation workers;
- Department of Defense (DOD) cooperative research and development project or co-production project workers; and
- Fashion models of distinguished merit and ability.



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# H-1B Classification for Specialty Occupation Workers

## H-1B1

- Pursuant to free trade agreements, specialty occupation workers that are nationals of Chile and Singapore
- A Form I-129 is not required to be filed with USCIS
  - Individuals may apply for an H-1B1 visa directly at a consular office overseas.
  - However, employers file Form I-129 with USCIS to request an extension of the H-1B1 beneficiary's status, or to request a change of the beneficiary's status from another nonimmigrant status to H-1B1, within the United States.



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# General H-1B Classification Information

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- The annual H-1B cap is set at 65,000.
- The first 20,000 H-1B petitions filed on behalf of beneficiaries with a U.S. Master's or higher degree are exempt from the annual cap.
- Petitions by, or for employment at, certain organizations are not counted against the cap (e.g. institutions of higher education and related/affiliated non-profit entities).
- Certain exemptions and exceptions that apply to the beneficiary might also render the petition cap-exempt.



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# General H-1B Classification Information

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- While in H-1B status, the nonimmigrant may also seek permanent residence in the United States.
- Labor Condition Application is required for specialty occupation and fashion model H-1B petitions.
- Maximum stay of 6 years, with limited exceptions\*



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# H-1B Classification Criteria

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- Petitioner is a U.S. employer or U.S. agent;
- Position qualifies as a specialty occupation; and
- Beneficiary is qualified to perform the specialty occupation position, including, generally, if applicable, any state licensure requirement



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# Specialty Occupation

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- “Specialty occupation” is broadly defined as an occupation which requires the “theoretical and practical application of a body of highly specialized knowledge.”
- To qualify as a specialty occupation, the position must meet one of the following four criteria:
  - A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;



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# Specialty Occupation

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- 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 an individual with a degree;
- The employer normally requires a degree or its equivalent for the position; or
- The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.



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# Recent Updates

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## **Matter of Simeio Solutions LLC**

On April 9, 2015, the Administrative Appeals Office (AAO) issued this USCIS precedent decision which held that:

- A change in the place of employment of a beneficiary to a geographical area requiring a corresponding Labor Condition Application for Nonimmigrant Workers (“LCA”) be certified to the U.S. Department of Homeland Security with respect to that beneficiary may affect eligibility for H-1B status; it is therefore a material change for purposes of 8 C.F.R. 214.2(h)(2)(i)(E) and (11)(i)(A)(2014).
- When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H-1B petition with the corresponding LCA.
- *Simeio Solutions* decision clarifies that an amended or new petition is now required prior to an H-1B worker changing locations to an area of intended employment that requires a new LCA.



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# Recent Updates

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## Rescission Memo

March 31, 2017 memo entitled “Rescission of the December 22, 2000 ‘Guidance memo on H1B computer related positions’”

- Rescinded a previously existing policy memo which discussed computer related positions and specialty occupations.
- The articulated analysis is applicable to all professions and all H-1B petitions.
- Reinforces existing statutory and regulatory requirements to evaluate petitions and make an eligibility determination, including whether the position qualifies as a specialty occupation and that the petition is supported by a certified LCA that corresponds to the petition.
- A case-by-case evaluation is required to determine whether the petition qualifies for the benefit being requested.
- An RFE may be issued when the preponderance standard is not met, including when the certified LCA, including the wage level, does not appear to correspond to the position.



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