ES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
Office of Business Liaison

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H-1B SPECIALTY WORKERS

Includes up-to-date changes in the law affecting H-1b employment!

BASIC TERMS AND CONDITIONS OF H-1B CLASSIFICATION

Note! Education, credentials and experience requirements for a position supporting H-1b classification must be specific. H-1b beneficiaries' qualifications must specifically match the position requirements**.**

Qualifying the position to be filled:

To qualify as a specialty occupation, any one of the following must apply:

- A bachelor or higher degree or equivalent[1] must the standard minimum requirement for entry into the particular specialty occupation.[2]
- The degree required for the subject position must be commonly required for similar positions within the employer/petitioner's industry. Alternatively, petitioner must demonstrate that the subject position is so complex or unique that it can be performed only by an individual with the degree or equivalent that is listed as a job requirement.
- The employer must normally require the same degree or its equivalent for the subject position.
- The specific duties of the position must be so specialized and complex that knowledge required for performance of the duties is usually associated with attainment of a bachelor level or higher degree.

Qualifying an alien to fill a given H-1b position:

To perform services in a specialty occupation, alien beneficiary must qualify under any one of the following:

- hold a bachelor or higher degree from accredited college/university required by specialty occupation
- hold foreign degree equivalent to US bachelor or higher degree (if required by the specialty occupation)
- hold any unrestricted state license, registration or certification required for immediate practice of the specialty occupation in the state of intended employment
- have a combination of education, training, and work experience in the specialty occupation equivalent to a US a bachelor's degree or higher.

STEP-BY-STEP PROCESSING OF AN H-1b PETITION BY A US EMPLOYER

See following pages for description of processing through successive steps administered by the US Department of Labor, Immigration and Naturalization Service (INS), and the US Department of State, consular service. See also **"Other Important H-1b Issues"** below.

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[1] A combination of education, training, and work experience may substitute for a bachelor's degree. In such cases, three years of specialized training and/or experience can substitute for one year of college study, if accepted by INS.

[2] The reporting of a US or foreign degree is not required in a standard format on any of the INS or DOL forms, but is generally provided by the petitioning employer in supporting documentation. In cases where the degree was earned outside of the US, the employer may have to provide a credentials evaluation stating that the foreign degree is "equivalent to" a particular US degree. INS does not certify or recommend credentialing services.

Step 1: LABOR CONDITION APPLICATION[3] (LCA) **Deciding agency: USDOL[4]**

Attestation

- The LCA is meant to prevent United States (US) employers from paying H-1b workers below prevailing wage rates[5], so that US workers paid prevailing wages will not be displaced.
- An employer/petitioner[6] must file an LCA with USDOL in the specialty occupation in which the alien(s) will be employed. The LCA should be certified by USDOL prior to filing of an H-1b petition[7].
- Employer/petitioners[8] must indicate the number of workers sought, their occupational classification[9], wage rates, and working conditions, all of which must be the same per LCA, attesting to all of the following:
  - They will pay the H-1b beneficiary(ies) the actual wage paid to similarly employed workers or the local area prevailing wage rate***, whichever is higher***.
  - Working conditions of H-1b employees will not adversely affect similarly employed US workers in the geographical area where the H-1b alien(s) will be employed.
  - The intended place of H-1b employment is not experiencing a strike or lockout and USDOL Employment and Training Administration (ETA)[10] will be notified in the event that any future strike/lockout occurs.
  - Within 30 days before the LCA is filed, notice of the filing will be given to the company's employee bargaining representative; if this does not apply, notice will be posted in conspicuous locations at the intended place(s) of employment. A copy of LCA will also be given to H-1b beneficiary(ies).

NEW! **"H-1b dependent"** and **"willful violator"** employers must provide additional attestations (see below).

Procedures and Conditions

- ***New!*** Effective January 19, 2001, USDOL changed the LCA form and filing procedure[11].
- A single LCA may cover multiple workers in the same occupation.
- USDOL reviews LCA for completeness and certifies within 7-day period[12], returning copy to employer.
- LCA must be filed no more than 6 months before the intended employment date. If approved, the LCA will be certified for the period listed on the LCA, up to a maximum period of three years.[13]
- A certified LCA is generally valid for 3 years or any lesser period requested by petitioner.
- Notice must be posted for 10 days before an H-1b arrives to work in an area covered by the LCA.
- Special rules apply if the H-1b worker is assigned to a worksite not listed on the original LCA.[14]

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[3] Employer must obtain ETA 9035CP (instructions) and complete ETA 9035 (form). Download at www.ows.doleta.gov.

[4] United States Department of Labor

[5] The State Employment Service Agency (SESA) covering the place of employment determines the prevailing wage. Alternatively, private wage surveys may be used if certain criteria are met. For more information, see www.ows.doleta.gov.

[6] Since H-1b classification is intended to meet a US employer's need for specialty services, the employer is the *H-1b petitioner*. The alien whom the employer seeks to employ is the *H-1b beneficiary*.

[7] **Note!** INS officials have stated as of the date of this bulletin that Service Centers will accept H-1b petitions with proof that LCA application has been filed with USDOL. This can be advantageous in qualifying an H-1b alien for portability employment earlier, but disadvantageous in necessitating a request for evidence (RFE) that will delay processing and ability to travel.

[8] Includes "job contractors" providing contract services of specialty workers, authorized agents, and employer representatives.

[9] Employers can find this information in the Appendix to the LCA instructions (Form ETA 9035CP).

[10] USDOL/Employment and Training Administration (ETA) is responsible for LCA processing. The Wage and Hour Division of the Employment Standards Administration (ESA) investigates and resolves complaints of an employer's failure to meet provisions of its LCA or misrepresentation of material facts.

[11] Neither the one page ETA 9035 (1994) nor two page ETA 9035 used by LCA fax system may be used after February 5, 2001, when USDOL's new 3-page ETA 9035 became required by fax (preferred) or mail. Obtain through ETA Regional Office or download at www.ows.doleta.gov. LCA process should be undertaken sufficiently in advance of filing of H-1b petition, since DOL will not postdate LCA's. Processing delays may result in gaps between existing and requested employment authorization.

[12] This period is specified by regulation, but delays occur. ***LCA processing problems should be directed to 1-877-872-5627.***

[13] There is one three-year limit for each LCA, regardless of the anticipated periods of employment for different H-1b workers included on the same LCA. LCA's approved before January 19, 1995 have up to a six-year period of validity.

[14] Of critical importance is whether it is a *new* place of employment. If not, employer may assign H-1b employees for short periods, outside LCA area, without filing a new LCA (a training seminar is not a place of employment, whereas on the job training is). Temporary placement may occur without filing a new LCA for up to 30 or 60 cumulative workdays per year, depending on the circumstances. Assignment in excess of the 30/60 day per year maximum requires a new LCA. See www.dol.gov/dol/allcfr/ETA/Title_20/Part_655/20CFR655.735.htm for detailed rules.

Step 2: PETITION FOR NONIMMIGRANT WORKER **Deciding agency: INS[15]**

Petition (Form I-129)

- H-1b petitions are approved for named beneficiaries only. Employer must file a separate petition for each H-1b beneficiary (even in cases where several petitions for similar positions are supported by a single LCA).
- Prospective employer[16] files the following at INS Service Center with jurisdiction over employment location:
  - Form I-129[17] and H Supplement
  - Form I-129W[18]
  - Photocopy of certified LCA
  - Employer letter of support[19]
  - Supporting documentation[20]
  - Filing fee(s)[21]
  - Form G-28 (Notice of Appearance) if employer is represented by an attorney.
- ***When petition must be filed*:** In addition to new H-1b employment, Form I-129 and associated documentation must be filed to request change of previously approved H-1b employment, extension of existing H-1b employment, and change of status from another nonimmigrant classification to H-1b.
- ***Notice of Action*** INS acknlowledges a properly filed petition by sending petitioner a Notice of Action Form I-797B, which serves as a receipt. If the filed petition is approvable[22] and an H-1b visa number[23] is available for the period of requested employment, INS will mail a second Form I-797B notifying petitioner or attorney of record of approval or denial of the petition. *Note that the same form is issued for both receipt and approval.*
- ***Proof of work authorization:*** If change of status, change of H-1b employment, or extension of H-1b employment is approved for an alien already present in the US, a replacement Form I-94 will be included as a tear-off portion of the Notice of Action Form I-797B. The tear-off replacement I-94 Arrival-Departure Record, indicating approved period of H-1b employment, will be required for the employer to satisfy its employment eligibility verification requirements (Form I-9)[24]. An employer who has not had an H-1b petition approved[25] by INS for a given alien may not accept that alien's I-94 for employment eligibility verification purposes, even if it is unexpired and endorsed with H-1b classification. This is because H-1b status is ***employer-specific.***
- Any H-1b beneficiary located outside the US, or an H-1b beneficiary inside the US who is ineligible for change of H-1b employment or change of status due to a status lapse (see explanation below), must go through consular processing (step 3 below) to obtain a new visa or re-enter the US under existing *unexpired* H-1b visa.

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[15] The United States Immigration and Naturalization Service is an agency of the United States Department of Justice.

[16] "Job contractors" who provide contract services are eligible to petition for specialty workers.

[17] H-1b petitions may be submitted up to 6 months in advance of desired commencement of H-1b employment or extension of stay. If the petition is not submitted at least 45 days before the employment is scheduled to begin, petition processing may not be completed before the alien's services are required or previous employment authorization ends.

[18] ***New!*** As of April 13, 2001, all H-1B petitions must include the December 18, 2000, version of this H-1B Data Collection and Filing Fee Exemption Form**,** required by INS for statistical purposes as well as determination of fee exemption.

[19] The letter of support identifies the petitioner, the position offered, the alien's credentials, and the terms of employment.

[20] See Instructions to Form I-129 for a list of documents that must be filed by the petitioner/employer.

[21] The basic petition fee is $110. In December 1998, an additional Special $500 H-1b fee was added for all employers except exempt organizations***. Effective December 18, 2000, the H-1b fee for non-exempt employers became $1000. (***See page 8 for exemptions from the fee.) As of the date of this bulletin, fees for nonexempt H-1b petitioners total $1110.

[22] LCA certification does not determine that the position is a specialty occupation; this determination is made by INS. For H-1b petition approval, beneficiary's credentials must match requirements of position to be filled within the specialty occupation. ***Note!*** In cases where change of status is requested in addition to approval of the H-1b petition, there are two independent approvals (e.g. whether petition is approved on its merits and whether beneficiary is eligible to change status). Where beneficiary is not in status when petition is filed, petition may be approved, but change of status denied. In such cases, beneficiary typically must leave the US, obtain an H-1b visa abroad, and re-enter the US (if admissible), obtaining a new Form I-94 endorsed H-1b. This I-94 is required to meet the employers' employment eligibility verification requirements (Form I-9).

[23] Federal law provides for a maximum number of H-1b visas per year. Congress raised the annual cap in late 1998 from 65,000 to 115,000 for fiscal years 1999 and 2000. As of October 16, 2000, the cap was raised to 195,000 for 3 years. When H-1b cap is reached before the end of a given fiscal year, INS publishes procedures for processing H-1b petitions between the date on which the "cap" is reached and October 1st, when the following fiscal year begins and new H-1b numbers are available.

[24] Ask for employer bulletin 102, *The I-9 Process in a Nutshell*.

[25] Exception is made for H-1b visa portability (see discussion below under AC21 changes).

Step 3: CONSULAR PROCESSING **Deciding entity: US Consulate**[26]

Consular Processing and Visa Issuance

An H-1b visa is needed by any approved H-1b beneficiary located outside the US. H-1b beneficiaries already present in the US do not need visas until they travel abroad and need to return to the US. A visa may generally be obtained from any US consulate (not restricted to the US consulate nearest to the alien's foreign residence), although the rules for third country visa applicants vary from consulate to consulate. A visa allows the visaholder to board a common carrier and apply for admission to the US under the classification indicated on the visa. An H-1b visa is required even if the alien already has an unexpired visa reflecting another classification. *Approval of an I-129 by INS petition does not guarantee that a US consulate will issue an H-1b visa.*

The following are important steps in or aspects of the process:

- INS Service Center that processed the H-1b petition cables[27] approval to US consulate indicated in the petition.[28] Beneficiaries are expected to bring the Form I-797B approval notice and copy of approved H-1b petition to the consulate to support the H-1b visa application.
- Application for a visa[29] is filed with the consulate Form OF-156. A consular officer has authority to request any supporting documentation that he/she deems necessary.[30]
- Visa issuance is subject to consular discretion. In H-1b cases, consular officers review whether the intended US activities are consistent with the H-1b classification. If it becomes known that representations made in an I-129 petition are questionable or inaccurate, the visa may be denied or investigation undertaken.
- A visa is endorsed for a single or multiple entries to the US and is valid for a designated time period (after which a new visa will be required for H-1b travel outside the US). Although an H-1b visa is required of an alien seeking admission to the US under H-1b classification, its significance ceases once the alien enters the US. *A visa does not constitute evidence of an alien's status or of work authorization in the US.*[31]
- H-1b beneficiaries are permitted to have **"dual intent,"** i.e. to engage in temporary US employment while pursuing permanent residence in the US. This means that consular officers will not require H-1b visa applicants to provide proof of unabandoned foreign residence or intent to return to the home country as required of most nonimmigrant visa applicants.

OTHER IMPORTANT H-1B ISSUES

"Grace" period: An approved H-1b beneficiary can enter the US 10 days before the period of authorized stay begins and/or can remain in the US for 10 days beyond the expiration date. Such ten day periods must be included by INS inspectors when they endorse the Form I-94 Arrival-Departure Records of arriving aliens who request this additional time. **The 10-day regulatory period is not an entitlement that automatically extends the expiration date indicated on an alien's Form I-94**.[32]

Reconsideration: Service Center may accept a request for reconsideration if petitioner suspects a processing error.

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[26] US consulates are under jurisdiction of the US Department of State.

[27] This is not an instantaneous process. "Cable" means notification to the consulate via an electronic cabling system. INS Service Center converts petition information into cable format and transmits to DOS. DOS reviews and electronically forwards it to the appropriate US consulate. **Note** that each Service Center has its own cabling procedures. If a Service Center opts not to cable, petition information is transmitted in hard copy. If notification is destined to a port-of-entry because the beneficiary is visa exempt, the Service Center transmits notification via fax.

[28] When Form I-824 is filed to obtain faster notification of approval, an actual hard copy of the petition is forwarded to the appropriate US consulate.

[29] **Canadians are visa exempt**. When appearing at a port-of-entry, Canadians present the I-797B Approval Notice and a letter from the approved H-1b employer unless the Form I-797B Approval Notice has been sent by the Service Center to the port-of-entry. A copy of the approved H-1b petition should be made available for inspection at the port of entry.

[30] Documentation typically requested includes original Form I-797B, a complete copy of the H-1b petition and supporting documents filed with INS, the visa applicant's passport, a recent photograph of the visa applicant, application fee, machine readable visa fee of $45,and evidence of lawful status obtained and maintained during prior US visits.

[31] A visa stamp in a foreign passport is distinct and separate from a Form I-94 Arrival Record, which is the proof of an alien's status in the US as well as documentation for employment eligibility verification purposes.

[32] This 10-day regulatory grace period is **not** available when approved H-1b employment ends prior to the I-94 expiration date, although, as a practical matter, H-1B beneficiaries are typically permitted ten days to leave the US unless a petition to change employment or status has been filed.

Appeal: Denial of an H-1b petition may be appealed to the INS Administrative Appeals Office (AAO).
Withdrawal of H-1b petitions: Filed petitions may be withdrawn either before or after they are processed. Employers are strongly encouraged to notify INS that H-1b employment will not take place, either by mail to the Service Center that processed the petition or by fax to INS Headquarters at 202-514-2093.
Duration of H-1b employment: Approved H-1b beneficiaries are initially admitted to the US for the requested period of employment or maximum of 3 years. Status is extendible up to a total employment period of 6 years.[33]
***Readmission under H-1b classification following maximum period of employment*:** To requalify as beneficiary of an H-1b petition following employment under H-1b classification for the maximum 6-year time period, alien beneficiary must remain outside the US for at least one year. A US employer may not file a new petition naming this beneficiary until this one year requirement has been fulfilled.
***Employer-specific work authorization*:** Work authorization for H-1b foreign specialty workers is employer/ment-specific. H-1b aliens' work authorization is restricted to the employment as described in the approved petition.
Filings not subject to annual quota: Petitions requesting extension of stay[34], amendment of approved H-1b petitions (see below), change of approved H-1b employment (portability), and concurrent H-1b employment[35] are exempt from the annual cap, although not necessarily from the special H-1b fee. See below under AC21 changes.
***Exempt petitioners*:** Institutions of higher education and non-profit research institutions are exempt from the annual cap, as well as from the special H-1b fee. See below under AC21 changes.
***Return transportation obligation*:** Petitioners who terminate H-1b beneficiaries prior to end of approved period of employment are required to pay transportation costs of returning H-1b workers to last place of foreign residence.[36]
***Employers obligation to notify INS when employee is terminated*:** Employers must notify INS[37] when H-1b workers are terminated early so that, among other reasons, INS may recapture the departed H-1b beneficiaries' visa number, if applicable, to support approval of other H-1b petitions for new employment.
***New! H-1b Visa Portability*:** Petitions requesting change of H-1b employment no longer require approval before the new employment may commence. The subsequent H-1b employer need merely have "filed" a "non-frivolous" (not without basis in law or fact) application with the appropriate INS Service Center.[38]
***Dependents*:** Qualifying family members[39] may not be employed under H-4 classification. Their status terminates when and if the status of the H-1b principal terminates (even if their Forms I-94 have not yet expired).
***Travel*:** Unexpired visa is required in order for non visa-exempt H-1b or H-4 aliens who travel abroad to be readmitted to the US. Aliens approved for change of status do not need visas until they travel outside the US. Aliens who travel while change of status requests are pending are deemed to abandon the petitions.[40] Aliens approved for extension of stay must renew visas, since visa duration typically matches H-1b approval period. Aliens who travel while extension of stay requests are pending cannot renew visas until INS approves extensions.

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[33] The maximum period of 6 years applies even if H-1b employment changes. ***Note!*** extensions beyond 6 years are now available in certain circumstances (see below) and petitions for Department of Defense projects are now extendible to 10 years.
[34] Petitions for extension of stay must be filed prior to expiration of the H-1b admission period indicated on Form I-94, but need not be approved for H-1b employee to continue working past the expiration date. H-1b employment authorization for H-1b beneficiaries is automatically extended for 240 days by timely filing (prior to expiration) for extension via submission of a new Form I-129 packet. Employers may think of this as automatically adding 8 months to the I-94 expiration date.
[35] If more than one employer will employ an H-1b nonimmigrant (i.e. the H-1b nonimmigrant will have two or more part-time H-1b positions), each employer must file a separate LCA and Form I-129.
[36] This is not required if the H-1b worker voluntarily terminates employment prior to end of approved employment period.
[37] See "withdrawal of H-1b petitions" above.
[38] Although this law went into effect as of enactment on October 16, 2000, INS has not yet formally interpreted the provisions or published implementing regulations. As a result, H-1b employers and aliens should proceed cautiously. As of the date of this bulletin, it is clear that aliens with I-94 Arrival-Departure Records indicating unexpired H-1b classification may use this documentation as evidence of employment authorization for a new H-1b employer that has filed an H-1b petition and received a receipt from INS. Aliens who travel during the portability period should carry with them copies of the filed petition, the receipt issued to the employer, and the unexpired Form I-94 relinquished upon departure from the US, as well as the unexpired foreign passport and H-1b visa. Such aliens whose H-1b visas have expired are advised not to travel prior to approval of the new H-1b petition, since they will not have the documentation required to support renewal of their H-1b visas.
[39] Qualifying dependents, admissible to the US under H-4 classification for the same admission period as the principal alien unless independently approved for another classification, include spouses and unmarried children under 21.
[40] See **note** in footnote 22.

***H-1b status during adjustment of status*:** H-1b alien beneficiaries of approved petitions for permanent residence may choose to work and travel as adjustees, using an employment authorization document (EAD) and advance parole for which they may apply, or to continue to work and travel under unexpired H-1b classification.[41]

***H-1b status terminates with H-1b employment*:** H-1b status is tied to the approved employment. As long as it is maintained, an H-1b beneficiary remains in status. This includes vacation or sick/family leave, strikes, or other inactive status provided that the employer-employee relationship persists in the same way for H-1b aliens as for US workers under the same conditions. Dependents' status terminates with that of H-1b principal.

USDOL rules regarding payment of H-1b workers*:** USDOL requires an H-1b employer to pay LCA wages 30 days from H-1b admission into the US. If alien changes status to H-1b within the US, LCA wages must commence no later than 60 following effective date of change of status. Once this 30/60-day window closes, employer must begin paying wages. ***Note! employer's wage obligation begins before 30/60-day window closes if beneficiary is available for work. If employee reports to work before 30/60 period ends, employment relationship begins at that time.

***Amendment of H-1b petitions*:** INS requires amendment of H-1b petitions when material changes in the approved employment occur. For example:

- When the job duties of the H-1b worker dramatically change so that the duties are no longer those of the position originally described on the I-129 and LCA;
- When the beneficiary changes from one specialty occupation to another; and/or
- When a new LCA is required by USDOL (see below).

***New! Mergers, acquisitions, etc.*:** Pursuant to October 30, 2000, *Visa Waiver Permanent Program Act*, INS does not require amendment of an H-1b petition where the petitioning employer is involved in a corporate restructuring where the successor H-1b employer acquires all or substantially all of the liabilities as well as assets of the original H-1b employer and where the terms and conditions of the H-1b employment remain the same except for the identity of the subsequent H-1b employer.[42]

***New! Change of circumstances requiring new LCA*:** A new LCA is required by USDOL where:

- In certain circumstances, an H-1b worker is assigned to a location not listed on the original LCA
- In certain corporate reorganizations, at least one of the following applies:
  - new employer can and/or does not assume LCA obligations of predecessor
  - H-1b worker changes jobs or location so that the terms of the original LCA no longer apply[43]
  - H-1b aliens are new hires of the new entity
  - extensions of stay for predecessor's H-1b workers are required

  Change of EIN: Prior to January 19, 2001, USDOL required a new LCA whenever there was a change in employer identification number (EIN) following reorganization. Now, the USDOL does not require a new LCA when there is a corporate reorganization resulting in a change of EIN as long as H-1b worker remains in the same location and continues to perform approved H-1b duties.

  ***Public access file*:** Even if a new LCA is not required, USDOL requires the new employer, following a corporate reorganization, to maintain a list of the H-1b workers transferred and to provide public access to a list of the affected LCA workers, their LCA certification dates, a description of the new entity as well as its actual wage system and EIN, and a sworn statement from an authorized representative of the new entity expressly assuming the liability and obligation of the LCA approved for its predecessor.

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[41] Work and travel authorization should correspond. An alien who works under an adjustment-based EAD should travel under advance parole. An alien who works under a Form I-94 reflecting unexpired H-1b classification should travel using an H-1b visa and obtain a Form I-94 that reflects H-1b status upon readmission to the US. Note, however, that the type of work authorization presented only becomes an issue when the Form I-9 indicates that employment authorization requires reverification.

[42] If the only change(s), when viewed from the alien worker's perspective, is the name and/or ownership of the employing company, no amended filing is required. If there is any other significant change, such as in job duties, location, or terms and conditions of employment (including contract length), an amended petition is required. **Note regarding travel:** Until extension petitions are adjudicated, INS cannot issue documentation reflecting the alien workers' H-1b status for the new employing entity. Accordingly, if any acquired H-1b employee needs to travel before that time, the company may wish to file an amended petition in order to obtain a new I-797 approval notice reflecting the beneficiary's current employment for re-entry purposes.

[43] See footnote 11.

***Important!* DISTINCTION BETWEEN LAPSE OF STATUS AND UNLAWFUL PRESENCE**

Lapse of Status

An alien who violates terms and conditions of his/her approved nonimmigrant classification loses that status**.** For example, since H-1b status/classification derives from the approved employment, an H-1b alien loses status if and when the approved employment ends. If this happens before a new petition/application for extension of stay, change of approved employment, change of status, or adjustment of status has been filed, the alien will likely be ineligible for approval since he/she no longer has a current status or current employment from which to change[44]. This is true without regard to the expiration date indicated on his/her Form I-94 Arrival-Departure Record.

Unlawful Presence

Lapse of status may subject the alien to deportation, if discovered. In addition, a lapse of status will likely cause a petition or application for an immigration benefit such as change of status, adjustment of status, or change in H-1b employment to be denied. For example, if an H-1b terminates the approved employment voluntarily or involuntarily and is unable to supply proof that he/she has maintained status by submitting pay stubs from the approved employer up until the date of filing, the request for the benefit will be denied even if the employer's petition is approved on its merits. In such case, not only will the petition be considered as a petition for new employment, become subject to the annual H-1b cap, and require the alien to leave the US in order to obtain a new visa (if required) and a new Form I-94 upon readmission to the US, but the finding of lapsed status by the INS adjudicator will cause unlawful presence to accumulate as of the date of the denial. Alternatively, if an alien **overstays**[45] past his I-94 expiration date, the alien's visa is automatically canceled[46] and the alien begins to accrue unlawful presence as of the expiration date. The only other time that unlawful presence begins to accrue is after an immigration judge makes a determination of breach of status.

IMPORTANT! **However unlawful presence accrues, an alien who accrues more than 180 days of unlawful presence will be barred from readmission to the US for *three years* if he/she leaves the US. Accrual of 360 or more days of unlawful presence bars the alien from readmission to the US for *ten years*.**

H-1b ALTERNATIVES

Often, an alien may be employed under more than one classification. This is particularly important in cases where the annual cap on H-1b numbers has been reached. For more information on these alternatives, you may refer to the following employer bulletins:[47]

3	Business Visitor Activities
4	Treaty Traders (E-1/E-2)
5	Employing Foreign Students (F-1)
6	Work Eligibility for Dependents in G-4 Status
8	Petitioning for Alien Labor to Fill Temporary Needs (H-2)
9	Nonimmigrant Status for Alien Trainers and Trainees (H-3)
10	Intracompany Transferees (L-1)
11	Employing Canadian and Mexican Professionals under NAFTA (TN)
14	Employment Based Permanent Residence
19	Aliens with Extraordinary Ability (O-1)
20	Internationally Recognized Alien Athletes, Artists, and Entertainers (P-1/P-2/P-3)
21	Participants in International Cultural Exchange Program (Q-1) (in progress)

[44] To determine whether the named beneficiary is in status, INS Service Centers require current pay stubs and/or other documentation up until the date of filing of a new petition, reflecting that the approved employment (and lawful H-1b status) have been maintained. In cases where this cannot be provided, change or extension will likely be denied.

[45] **Overstay** refers to the situation where the Form I-94 lawful admission period expires, approval for alternative classification has not been approved, and a petition for extension of stay has not been filed.

[46] An automatically canceled visa restricts issuance of a subsequent visa to the US consulate in the alien's home country. Third country processing (such as in Canada for non-Canadians or Mexico for non-Mexicans) is not permitted in such cases.

[47] Request a bulletin by phone (800) 357-2099, fax (202) 305-2523, or e-mail (*office.business.liaison@usdoj.gov).*

NEW! Recent Changes in Law Affecting H-1b Employment

"ACWIA" – AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT (12/98)

Statutory changes not implemented by regulation

- Whistleblower protections must be provided by the US government to current or former H-1b employees and candidates for employment who disclose employer violations or cooperate in investigations or proceedings.

Regulatory changes implementing ACWIA provisions

USDOL issued an interim final rule,[48] effective January 19, 2001, which implemented ACWIA provisions and other more recent changes to the Immigration and Nationality Act (INA) by requiring all H-1b employers:

- To offer benefits[49] to H-1b workers on the same basis as offered to their US workers.
- To pay full wages to any H-1b worker placed in nonproductive status (*"bench time")* by the employer unless it results from the H-1b worker's voluntary request or conditions unrelated to employment and the period does not require compensation under the employer's benefit plan or under other statutes.
- To comply with whistleblower provisions.[50]
- Not to permit an H-1b worker to pay H-1b filing fees, attorney fees and/or other costs of H-1b processing unless, when deducted from the employee's wage, the residual wage would meet LCA requirements.
- Not to impose a penalty via payroll deduction for an H-1b employee's voluntary termination of employment before an agreed upon date (although collection of liquidated damages pursuant to an agreement between H-1b employee and employer may be upheld).
- To follow special rules when an H-1b worker is assigned to a location not listed on the original LCA.[51]
- Until October 1, 2003, petitioning H-1b employers must determine whether they are "**H-1b dependent**" or **willful violators**, either of which triggers requirement for *additional attestations*.
  - A willful violator is an employer determined on or after October 21, 1998, in a USDOL or USDOJ proceeding, to have violated H-1b rules during the five-year period prior to filing the LCA.
  - Companies with 51 or more full-time employees[52], of which at least 15% are H-1b workers, are H-1b dependent. Companies with fewer than 25 full-time employees are H-1b dependent if 8 or more employees hold H-1b status. Employers with 26-50 full-time employees are H-1b dependent if they employ more than 12 H-1b workers.
  - All H-1b dependent employers must attest that no US employee has been or will be displaced during the 90-day period preceding or following filing of an H-1b petition.[53] They must also attest that they have taken good faith steps, pursuant to standard practices for their respective industries, to recruit for a position to be filled by another H-1b worker, and offered the job to all US applicants who are equally or better qualified than the H-1b beneficiary.
  - An H-1b dependent employer cannot place an H-1b worker on a client worksite unless the employer also declares that, pursuant to specific inquiry, the client company has not displaced and/or will not displace a US worker within the 90-day period surrounding the placement.
  - ***Exemption:*** New LCA calculations do not include H-1b beneficiaries holding at least master's degrees or equivalent in a field related to the intended employment or who will be paid at least $60,000 per year. For purposes of the calculation, exempt employees are part of the total number of employees (denominator) but not of the number of H-1b employees required for the calculation (numerator).

"AC21" - AMERICAN COMPETITIVENESS IN THE 21ST CENTURY ACT (PL 106-313, 10/17/00)

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[48] 65 Federal Register 80110 (December 20, 2000).
[49] Benefits include the opportunity to participate in health, life, disability and other insurance plans, the opportunity to participate in retirement and savings plans, and cash bonuses and noncash compensation such as stock options.
[50] For further information on whistleblower complaints and work authorization please contact our office.
[51] See footnote 11.
[52] A full-time employee is one who actually works full time or cumulatively full time in a combination of part-time jobs.
[53] While regulations still allow discharge of US workers for inadequate performance, violations of workplace rules, and other reasons, employers should document the reasons in order to avoid penalties under this provision.

AC21 increased the annual H-1b cap to 195,000 through US government fiscal year ending September 30, 2003. All of the following statutory provisions were effective immediately upon enactment, with the exception of the H-1b fee increase from $500 to $1000, which took effect on December 17, 2000:

- ***H-1b petitioners exempt from $1000 fee*** (as indicated on new Form I-129W)**:**
  - institutions of higher education and related or affiliated non-profit organizations
  - non-profit or governmental research organizations
  - any approved employer filing for the second extension of stay for a particular H-1b beneficiary
  - primary or secondary educational institutions
  - nonprofit entities who have "established curriculum-related clinical training of students"
- ***H-1b petitioners, exempt from the annual H-1b cap – Pre-AC21*** *(continue to be exempt)**:***
  - approved employers seeking extension of stay for a particular H-1b beneficiary
  - new employers seeking approval for concurrent H-1b employment of alien already in H-1b status
  - new employers seeking approval for change of approved H-1b employment (portability) of alien already in H-1b status
  - approved employers seeking amendment of previously approved H-1b petitions
- ***H-1b cap exempt petitioners under AC21:***
  - institutions of higher education (beyond secondary level)[54]
  - entities related to or affiliated with institutions of higher education
  - nonprofit research or government research organizations or institutions
  - employers seeking change of status to H-1b for J-1 nonimmigrants who have received waivers of the 2-year foreign residency requirement

Note: Aliens who change from an exempt H-1b employer to non-exempt H-1b employer are counted against the annual cap when the non-exempt employer files its H-1b petition.

- ***H-1b Visa Portability:*** An alien previously issued an H-1b visa and/or granted H-1b status may accept new H-1b employment provided that the new employer has *filed a non-frivolous petition* (not without basis in law or fact) naming that alien as beneficiary and that the alien beneficiary has not accumulated unlawful presence in the US[55]. Portability applies to petitions filed "before, on or after" enactment of AC21. In cases where H-1b petitions are denied following commencement of employment under these provisions, employment authorization of the H-1b alien ceases upon denial.
- ***Per country limits on employment-based (EB) immigrant visas (IV):*** AC21 lifts the per-country limits on employment-based immigrant visa numbers if the total number of visas available during a calendar quarter exceeds the number used. This provision will be implemented by USDOS.
- ***Exceptions to maximum H-1b stay of six years*****:**
  - *Per country limitation: W*here per country limitations cause a delay in an alien's adjustment of status application, an H-1b alien may extend H-1b status past six years until an immigrant visa is available and application for adjustment is filed and approved.
  - *Lengthy adjudication process:* H-1b beneficiaries of ***filed*** employment based I-140 (Immigrant Petition for Alien Worker) petitions may extend H-1b stay through application for and approval of adjustment, for one year at a time, in cases where the supporting labor certification has been pending for over 365 days.
- ***Adjustment portability*****:** Adjustment of status applicants whose I-485 applications have been pending for over 180 days may change positions within the same company or change employers, within the same or similar occupational classification, without invalidating the underlying labor certification or I-140 petition[56].
- ***Findings of H-1b fraud*****:** Where H-1b petitions are revoked due to fraud or misrepresentation, H-1b visa numbers will be correspondingly restored to the annual H-1b cap for the year in which the revocation occurs.

[54] Although secondary schools are exempt from $1000 fee, their H-1b petitions are not exempt from the cap.

[55] In other words, the alien may accept the new employment if he/she has maintained a period of stay authorized by the Attorney General (POSABAG). This requires the alien not to have overstayed the expiration date on his/her Form I-94 Arrival-Departure Record nor to have been found in violation of status by an immigration judge or INS examiner in the course of processing an application or petition filed on alien's behalf.

[56] As of the date of this bulletin, this provision has not yet been implemented.