

Center for International Education
Frequently Asked Questions about H-1B Temporary Work Status

Please note: *The following guide is meant to give you basic answers regarding common H-1B questions. Neither the International Student Coordinator, nor any staff member at the Center for International Education can give you legal advice or counsel concerning H-1B employment. You must consult an immigration attorney if you plan to pursue the H-1B work visa and have questions that fall outside the scope of this FAQs sheet.*

Q: What is an H-1B visa?

A: The H-1B program is the primary method for temporarily employing professional level foreign employees in the United States. It is especially useful in “new hire” situations. The H-1B category is for workers in ‘specialty occupations’ – jobs that normally require at least a four-year university degree in a specific field. Although the term H-1B visa is frequently used to describe this category of work authorization, the term “visa” relates only to the document a foreign worker must show to the immigration inspector when seeking to enter the U.S. Once here, the foreign worker is given another document (which is not a visa) that indicates the worker’s H-1B employment-authorized immigration status and the expiration date of their authorized stay in the United States.

Q: How long is an H-1B valid?

A: The initial petition for an individual worker can be approved for up to three years. The validity of an H-1B petition is linked to the particular employer, employee, job duties, location and wage. If there are material changes in the terms of employment or the legal identity of the employer during the petition period, the H-1B may be considered automatically invalidated. If the employee engages in work activities not authorized on the petition, the employee is in violation of the U.S. laws and potentially deportable.

Q: What is the H-1B cap? Who is subject to it? What are the numerical limits for the cap categories?

A: The Immigration Act of 1990 (IMMACT 90) established an annual H-1B cap of 65,000 per fiscal year, which began October 1 and ends September 30. Once the cap is reached, no new cap-subject petitions can be approved until the next fiscal year. From this supply of 65,000, 6,800 are set aside for the H-1B1 program under terms of the U.S.-Chile and U.S.-Singapore Free Trade Agreement, resulting in a supply of 58,200 for general use at the beginning of the fiscal year.

The following groups of employees are NOT subject to the general H-1B cap:

- Employment with a cap-exempt employer, including institutions of higher education, nonprofit entities related to or affiliated with an institution of higher education, nonprofit research organizations, and government research organizations.

- Certain employees who are counted against the cap during the past six years.

- Employees already in H-1B status that were already counted against the cap, and are applying for extension of stay, an amendment to the H-1B petition, or for a change of employer.
- J-1 physicians granted Conrad waivers of the 212(e) requirement.
- Citizens of Singapore and Chile applying for special H-1B status under one of the Free Trade Agreements with those countries are counted from a special set-aside of 6,800 numbers.
- The first 20,000 employees who have earned a U.S. master's degree or higher are not counted towards the cap (but are counted after the first 20,000 slots have been taken).

Q: How do I know if the employer I will be working with is a cap-subject employer?

A: The best way to find out is to ask the employer. Most employers who have experience with petitioning for H-1B status on behalf of an international employee will know whether or not their international employees would be subject to the H-1B cap or not.

Q: How long does it take to get an H-1B petition approved?

A: Currently, a reasonable window of expectation is about two weeks to four months. Because each H-1B petition revolves around facts related to the individual candidate, as well as to the employer and the position, there is some variation in the preparation and processing time needed for H-1B cases. Government processing times vary substantially, but by paying an extra expedited processing fee to the U.S. Citizenship and Immigration Services, an employer can currently anticipate H-1B petition processing within two to four weeks or less after opening a law firm file.

As described above, if the annual quota for new H-1B workers is reached, processing could be delayed until October 1, when next fiscal year begins. Always check with qualified immigration counsel regarding the most recent processing times for cases similar to yours. In some emergency situations temporary employment authorization can be obtained more quickly, occasionally within one week or less. If the candidate is outside the United States, processing time can be increased by several days or weeks while the U.S. government completes security clearances and consular visa processing.

Q: Who usually pays the H-1B filing fees?

A: A Department of Labor regulation effective since January 2001 requires that the employer must pay the H-1B filing fees. The optional Premium Processing fee (paid to obtain faster processing) may in some cases be paid by the employee or a third-party. All fees required for the filing of the LCA and H-1B petition, including lawyer fees are determined by the Department of Labor to be normal business expenses. If you as the employee pay these costs, such payments may be viewed under the regulations as an "unauthorized deduction" from your salary.

Q: Does my H-1B automatically turn into a green card?

A: No. The process of green card sponsorship is almost entirely separate from H-1B process.

Many employers choose to sponsor their H-1B workers for permanent resident (“green card”) status, starting the process at least several years prior to the end of the sixth year, in order to obtain alternate employment authorization before the six-year limit is reached.

Q: Is there a minimum salary requirement for an H-1B job position?

A: Yes. The employer must pay the H-1B employee at least as much as it pays similarly employed workers. The wage cannot be less than the prevailing wage paid to similarly employed workers in the geographic area where the beneficiary will be employed.

Q: What are the benefits of applying for F-1 Optional Practical Training versus changing status directly to H-1B?

A: There are two primary benefits of applying for F-1 Optional Practical Training and two primary benefits of applying directly for H-1B status. The two primary benefits of applying for OPT are:

- An increase in the amount of time that you may be employed in the U.S. in a legal status. With the one year of OPT, you can increase the amount of time for employment purposes from six years (the limit on H-1B) to seven years (one year in OPT plus six years on H-1B status). This one additional year may mean all the difference in applying for permanent residency if that is a future goal.
- Ability to retain tax treaty benefits as an F-1 student for one more year. Once you have changed to H-1B status, any tax treaty benefits you may receive as an F-1 student will be lost, unless there is a specific tax treaty benefit afforded in H-1B status, which is very unlikely.

The two primary benefits of applying directly for H-1B status are:

- Ability to avoid the pitfalls of trying to maintain continuity of employment while changing status from F-1 to H-1B, particularly if you are employed with a cap-subject employer. With only one year of OPT, which for the most part would typically expire in June or July, and with the federal fiscal year running from October 1 to September 30 for H-1B cap purposes, you would have to find a means to remain legally in the U.S. whether in a non-immigrant status that allows for employment or not, until October 1 arrives, leaving a gap of two months or more between the expiration of F-1 status and commencement of H-1B status. This is not an easy problem to resolve and would require the counsel of a competent immigration attorney and an employer willing to work with you and that lawyer in securing your H-1B employment despite the gap in time.
- Advantage in applying for a visa stamp when traveling outside the U.S. H-1B status allows for “dual intent.” Dual intent allows you to apply for a non-immigrant visa stamp without proving non-immigrant intent. In other words, you do not have to prove substantial ties to your home country to be eligible for the H-1B visa stamp. This may be a distinct

advantage to any student employed in a position that requires frequent travel outside the U.S. for business or personal reasons.

Q: How do you know whether or not to hire an attorney to file the H-1B petition? Who would I speak to at the company/institution that intends to hire me to determine if they file or if I must hire an attorney to file?

A: You must do your homework and find out if the employer has ever filed an H-1B petition before and if so, what process it used in filing the petition, whether filed internally or through the use of an outside immigration attorney. Typically the human resources department of any employer of substantial size should be familiar with hiring procedures, including the filling of an H-1B petition on behalf of an employee. You must also decide whether it is a conversation that should take place during the interview process or whether this is a conversation best left after you have been offered and accepted a position with the employer.

Q: What kinds of questions may an employer ask regarding my current immigration status and future prospects for employment within the U.S. as a foreign national? When, if ever, should I disclose that I am an F-1 student would require the filing of an H-1B petition to remain employed with the employer?

A: It is against the law to discriminate against a prospective employee based on nationality, and therefore the issue of your immigration status should not be a part of the interview process. Employers may ask whether or not you have legal authorization to work in the U.S. If you have applied for or have in hand an Employment Authorization Document for Optional Practical Training, you have legal authorization to work in the U.S. The issue then becomes how to attain legal authorization to work in the U.S. beyond the one year of OPT. Speaking with an immigration attorney in advance of any interview is recommended to prepare for the best strategy in disclosing your current non-immigrant status and discussing any future H-1B filing.

*****Information compiled from the [FAQ for F-1 Students Concerning H-1B Employment](#) produced by the International Student and Scholar office at Emory University and [Frequently Asked Questions about H-1B Temporary Work Status](#) by Robin R Spencer and Scott M. Borene of the Borene Law Firm.*