H-1B Visa Handbook for Employers

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What is the H-1B Visa?

- H1B visa status can be granted initially for up to three years, and then can be extended for another three years.
- The maximum amount of time a foreign national can remain in the U.S. in H1B visa status is six years.
- Once the six year cap is reached, the foreign national must be physically outside the U.S. for one full year before he/she can return to the U.S. in H1B visa status.
- In limited circumstances, H1B visa status can be extended beyond 6 years if:
    - The foreign national is the beneficiary of an approved I-140 petition.
    - The foreign national has a PERM petition that has been pending for over 365 days.
    - The foreign national is allowed to remain in status and employed for 240 days after the expiration while waiting for the H1B visa Renewal to be approved by USCIS.

Who Qualifies?

According to USCIS: (http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=73566811264a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=73566811264a3210VgnVCM100000b92ca60aRCRD)

The job must meet one of the following criteria to qualify as a specialty occupation:

- Bachelor's or higher degree or its equivalent is normally the minimum entry requirement for the position
- The degree requirement for the job is common to the industry or the job 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
- The nature of the specific 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.

How can you tell if a position requires at least a Bachelor Degree in a specific field? One easy way is to look up the job on a job search website, such as monster.com. If every listing for that specific job title requires at least a bachelor degree, then it can be safe to assume that it is an industry standard.

Another way is to look at the Foreign Labor Certification Data Center (http://www.flcdatacenter.com/):

1. Go to: http://www.flcdatacenter.com/OESWizardStart.aspx
2. Select the State, click continue.
3. Select the correct Data Source. If the sponsoring organization is an Institute of Higher Education, select ACWIA - Higher Education Database for the current year. If not, select All Industries Database.
4. Select the County for the physical work location.
5. Browse or search by keyword for the job title.
6. Click: Search.

7. The Education and Training Code should state: Bachelor Degree or Higher.

For the beneficiary worker to qualify to accept a job offer in a specialty occupation the beneficiary worker must meet one of the following criteria:

- Have completed a U.S. bachelor's or higher degree required by the specific specialty occupation from an accredited college or university
- Hold a foreign degree that is the equivalent to a U.S. bachelor's or higher degree in the specialty occupation
- Hold an unrestricted state license, registration, or certification which authorizes you to fully practice the specialty occupation and be engaged in that specialty in the state of intended employment
- Have education, training, or progressively responsible experience in the specialty that is equivalent to the completion of such a degree, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.
- If there is a requirement for a State or Federal license in order to practice any 'specialty occupation', then the alien must generally possess such a license in order to qualify for an H1B visa. For example, doctors, lawyers, accountants and similar professionals must generally have passed the relevant state licensing examination and be in all other respects qualified to practice in the State of intended employment.

It is important to note that the regulations to not speak to the size or age of the company.

We often receive questions from employers asking if their new company qualifies. Our normal response is that as long as the employer has a bona fide position available that qualifies for H-1B status (see above), then the answer is yes.

Payment of Fees

- Our focus is always to advise our clients in a prudent manner that minimizes their exposure to conflicts and insulates the employer in case of an audit/site-visit by DOL.

- With respect to the payment of the H-1B Fees, we believe it is the best practice for our clients that the H-1B employee should not pay any of the fees and costs, including but not limited to attorney's fees and USCIS filing fees (including premium processing fees), associated with H-1B Petitions.

- Although there are different requirements between USCIS and the Department of Labor with regard to this issue, the DOL has published a Fact Sheet (please see attached DOL Fact Sheet) and has audited employers pursuant to the requirements detailed in the Fact Sheet.

- Recent case law has shown that the DOL analysis around this issue focuses on whether the fees and costs paid by the employee, if deducted from their salary, would reduce it to a point below the prevailing wage in violation of the LCA.

U.S. Department of Labor

Wage and Hour Division

(August 2009)

Fact Sheet #62H: What are the rules concerning deductions from an H-1B worker's pay?

This fact sheet provides general information concerning illegal wage deductions under the H-1B program.

An H-1B worker, whether through payroll deduction or otherwise, can never be required to pay the following:

1. A penalty (as defined by state law) for the worker's failure to complete the full employment period (INA § 212(n)(2)(C)(vi)(I));

2. Any part of the statutory training and processing fee imposed by the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS) (INA § 212(n)(2)(C)(vi)(II));

3. Any part of the statutory $500 fraud protection and detection fee imposed by USCIS (INA § 214(c)(12)(A)); and/or

4. Any deduction for the employer's business expenses that would reduce an H-1B worker's pay below the required wage rate (20 C.F.R. § 655.731(c)(9)), including:

    - Any expenses, including attorney fees, directly related to the filing of the Labor Condition Application (Form ETA 9035 and/or ETA 9035E) (20 C.F.R. § 655.731(c)(9)(ii));

    - Any expenses, including attorney fees and the premium processing fee (INA § 286(u)) directly related to the filing of the Petition for Nonimmigrant Worker (Form I-129/129W) (20 C.F.R. § 655.731(c)(9)(ii) and (iii)(C));

    - Tools and equipment (20 C.F.R. § 655.731(c)(9)(iii)(C)); and

    - Travel expenses while on employer's business (20 C.F.R. § 655.731(c)(9)(ii) and (iii)(C)).

Deductions, other than those excluded above, may be made, even if they reduce the H-1B worker's pay below the required wage rate, only when the deductions satisfy one of these three categories:

1. Required by law (e.g., income taxes) (20 C.F.R. § 655.731(c)(9)(ii));

2. Reasonable and customary (e.g. union dues, insurance premiums) (20 C.F.R. § 655.7(c)(9)(ii)):or

3. Voluntarily authorized by the H-1B worker, under the following standards (20 C.F.R.§ 655.731(c)(9)(iii)):

    - There is a voluntary, written authorization by the employee;
    - For a matter principally for the benefit of the employee, such as reimbursement for travel to the United States or payment for food and lodging that was not incurred while traveling on the employer's business;
    - For an amount that does not exceed the fair market value or the actual cost (whichever is lower) of the matter covered; and
    - The amount does not exceed the limits for garnishments set by the Consumer Credit Protection Act (see WH Fact Sheet #30).

All requirements listed above can be found in 20 C.F.R. Part 655 Subparts H & I and the Immigration and Nationality Act § 212(n).

Where To Obtain Additional Information

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

For additional information, visit our Wage-Hour website:

http://www.wagehour.dol.gov and/or call our Wage-Hour toll-free information and helpline, available 8am to 5pm in your time zone, 1-866-4USWAGE (1-866-487-9243).

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

Prevailing Wage

The prevailing wage rate is defined as the average wage paid to similarly employed workers in the requested occupation in the area of intended employment.

The Employer is required to pay the H-1B worker at least the prevailing wage.

There are 2 ways to obtain the prevailing wage.

1. The first way is to file the form ETA 9141 Prevailing Wage Request Form with the DOL. This is an online filing (http://icert.doleta.gov/). This is the safe harbor approach, however current processing time is 42 days.

2. The second way is to obtain the Prevailing Wage from the Online Wage Library - FLC Wage Search Wizard.

    - How to obtain the Prevailing Wage from the Online Wage Library - FLC Wage Search Wizard:

        1. Click: http://www.flcdatacenter.com/OesWizardStart.aspx

        2. Select the State.

        3. Select the current Data Source (For private companies this is 7/2011 - 6/2012 All Industries Database.

        4. Select the County where the employment will occur.

        5. Enter a keyword for the job duty, or select from the dropdown list.

        6. Select the appropriate level:

        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.

Level II (qualified)

- Wage rates are assigned to job offers 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.
- An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

Level III (experienced)

- Wage rates are assigned to job offers 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.
- They may have supervisory authority over those staff.
- A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.
- Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker.

- Words such as ‘lead’ (lead analyst), ‘senior’ (senior programmer), ‘head’ (head nurse), ‘chief’ (crew chief), or ‘journeyman’ (journeyman plumber) would be indicators that a Level III wage should be considered.

Level IV (fully competent)

- Wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques.

- Such employees use advanced skills and diversified knowledge to solve unusual and complex problems.

- These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment’s procedures and expectations.

- They generally have management and/or supervisory responsibilities.

The LCA - (Labor Condition Application, DOL Form ETA 9035)

Employers seeking to hire H-1B nonimmigrants in specialty occupations must submit the completed and dated original Form ETA 9035 to the designated certifying officer in the Department of Labor (Department or DOL), Employment and Training Administration (ETA) Application Processing Center.

Labor condition applications are filed online using the iCERT system (http://icert.doleta.gov/)

An application which is complete and has no obvious inaccuracies will be certified by the Department and returned to the employer, who may then file it in support of its petition for an H-1B nonimmigrant with the United States Citizenship and Immigration Service USCIS (USCIS).

Current processing time is 7 days.

The Certified, signed and dated LCA must be included in the H-1B Visa petition submitted to USCIS.

Employer Labor Condition Statements

- The employer must read and agree to statements (1) through (4) below and demonstrate that agreement by marking "Yes" in Section E of Form ETA 9035 and by signing the application form.

- The employer agrees to develop and maintain documentation supporting labor condition statements (1) and (4) as specified in 20 CFR 655.731 and 655.734, and to make this documentation available to DOL officials upon request.

- The employer also agrees to make available for public examination a copy of the labor condition application and necessary supporting documentation as specified in 20 CFR 655.760 within one (1) working day after the date on which the application has been filed with DOL.

- This documentation must be retained for public examination at the place of employment or the employer's principal place of business, as specified in Item G of the LCA.

1. The First Requirement - Wages:

- The employer attests that H-1B nonimmigrants will be paid wages which are at least the higher of the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific

employment in question or the prevailing wage level for the occupational classification in the area of intended employment.

- By marking "Yes" in section E of the Labor Condition Application for H-1B nonimmigrants (Form ETA 9035), the employer also attests that it will pay H-1B nonimmigrants the required wage for time in nonproductive status due to a decision of the employer or due to the H-1B nonimmigrant's lack of a permit or license.

- The employer further attests that H-1B nonimmigrants will be offered benefits and eligibility for benefits on the same basis, and in accordance with the same criteria, as offered to U.S. workers. See 20 CFR 655.731.

- The above is a summary. For additional information the LCA wage requirements, please click here: http://www.usavisanow.com/h-1b-visa/h1b-visa-resources/labor-condition-application-lca/the-first-lca-requirement-regarding-wages/

2. The Second Requirement - Working Conditions:

- The employer attests that the employment of H-1B nonimmigrants in the named occupation will not adversely affect the working conditions of workers similarly employed.

- The employer further attests that H-1B nonimmigrants will be afforded working conditions on the same basis, and in accordance with the same criteria, as offered to similarly employed U.S. workers. See 20 CFR 655.732.

3. The Third LCA Requirement - Strike, Lockout, or Work Stoppage:

- This requirement is satisfied when the employer signs the LCA attesting that it is not involved in a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification in the area of intended employment.

- The employer must provide written notice to the DOL within three days of the start of a strike, lockout or other work stoppage by workers in the same occupational classification as the H-1B worker. No documentation of this requirement need be maintained.

4. The Fourth LCA Requirement: Notice

- This requirement is satisfied when the employer provides notice to the collective bargaining representative (”CBR”) that an LCA has been filed with the DOL (identifying the number of H 1B workers to be employed, the

occupational classification, the wages offered, the period of employment, and the location where the H 1B worker(s) will be employed).

- Where there is no CBR, the employer posts a notice of the LCA in at least two conspicuous locations at the place of employment (which notice includes the information required to be provided to the CBR), or through electronic notification to employees in the occupational classification for which H-1B workers are sought.

- The posted notice must state that the LCA is available for public inspection at the worksite or the principal place of business.

- If posting a notice, the notice must be posted on or within the thirty (30) days immediately prior to the date the LCA is filed and must remain posted for ten (10) days.

- Electronic notice may either be a one-time direct notice such as e-mail or a notice available for ten (10) days by electronic means such as a company intranet.

- No later than the date the H-1B worker reports to work at the place of employment, the employer must also provide the H-1B worker with a copy of the LCA certified by the DOL.

- In addition, upon request, the employer must provide the H-1B worker with a copy of the Labor Condition Application Cover Pages (Form ETA 9035CP).

H-1B Dependent Employers

- If an employer is or becomes H-1B dependent or is found to have committed a willful violation or a misrepresentation of a material fact, any labor condition application for H-1B nonimmigrants that was certified by the Department of Labor prior to January 19, 2001 will be deemed invalid and may not be used in support of a new petition or an extension of a petition for an H-1B non-immigrant.

- The determination as to whether an employer is H-1B dependent is a function of the number of H-1B nonimmigrants employed as a proportion of the total number of full-time equivalent employees employed in the U.S.

- The following table can be used to determine whether the employer is or is not H-1B dependent:

- An employer is H-1B dependent if it employs in the U.S.:

An Employer is H-1B Dependent if it employs in the U.S.:

(Total # of Full Time Workers):	# of H-1B Workers:
1 to 25	8 or more
26 to 50	13 or more
51 or more	15% or more of workforce

- See 20 CFR 655.736 for more detailed guidance as to what constitutes an "H-1B dependent employer" or a "willful violator".

- H1B dependent employer must take additional steps and make additional attestations on the Labor Condition Application. One requirement is that the H-1B Dependent employer must make "good faith" attempts to recruit resident US workers using "procedures that meet industry-wide standards" and "offering compensation at least as great as that offered to the H1B alien". See INA 212(n)(1)(E) through (G)

- The recruitment attestation described above is not required by H1B dependent employers seeking to employ aliens with Master's (or higher) Degrees, or those earning in excess of US$60,000. Non H1B dependent employers are not required to make such an attestation.

Required Supporting Documents

Required Documents From the Employer:

1) A letter from the employer containing the Job Title, Salary Offered and a Detailed Job Description. _____

2) A Company Brochure and/or any marketing material. _____

3) A copy of Previous Years Financials or Annual Report. _____

4) Copy of Articles of Incorporation (if available). _____

Required Documents – From the Foreign National (Beneficiary)

5) Copy of all printed pages of Passport, current visa (if in the U.S.) & I-94 _____

6) Copy of Resume of beneficiary. _____

7) If beneficiary is in F-1 status, include copy of F-1 visa, I-20 and EAD Card _____

8) One of the following:

Copy of alien's U.S. Baccalaureate (or higher) degree, or _____

Copy of foreign degree and evidence that it is equivalent to the U.S. degree, or, _____

Evidence of education and experience which is equivalent to the required U.S. degree. _____

9) Copies of transcripts from university degrees. _____

10) Copies of letters of experience from previous employers. _____

11) Copies of 3 most recent paychecks if worker is currently on an H-1B Visa. _____

Obtaining an Academic Evaluation

If the alien's University Diploma is from a foreign (non-U.S.) University, the alien should have an academic evaluation completed to prove to the USCIS that he or she has at least the equivalent of a U.S. Bachelor Degree in the appropriate field.

Typically, a foreign degree is not the equivalent of a U.S. Degree. For example, it might take a Bachelor of Science Degree in Computer Science and a Master Degree in Computer Science from a University in India to be the equivalent of a U.S. Bachelor of Science Degree in Computer Science.

Filing the H-1B Petition with USCIS

Applying for a New H-1B Visa

- Obtain the Prevailing Wage.
- When you have the prevailing wage, obtain the Labor Condition Application. Complete Form ETA – 9035 online: **http://icert.doleta.gov/index.cfm?event=ehPortal.lcaSummary**
- When you obtain the Certified ETA 9035, complete USCIS Form I-129. these with the Required Supporting Documents at USCIS Regional Service Center for your state.
- Include the filing fees of (make checks payable to Department of Homeland Security – staple to I-129):
- $460 – for I-129 Filing fee (check can be separate or added to Education and Training Fee)
- $1,500 - H-1B "Education and Training Fee" for each H-1B petition filed for a new employer, change of employer, and first extension for an existing employer. Employers with fewer than 25 full time employees (including U.S. affiliates and subsidiaries) pay $750. (check can be separate or added to I-129 Filing Fee)
- $500 – for Anti Fraud Fee (separate check)
- The following employers are exempt from the "Education and Training Fee":

  1. Institutions of higher education and related or affiliated non-profit organizations;
  2. Non-profit and governmental research organizations;
  3. Any employer who is filing for a second extension of stay for an H-1B nonimmigrant;
  4. Primary or secondary education institutions; and
  5. Nonprofit entities which are engaged in "established curriculum-related clinical training of students".

- Total processing time for approval is approximately 60 to 150 days from date of filing with the USCIS.
- **Premium Processing** is 15 days. Add an additional $1,225 check to Department of Homeland Security and Employer completes and signs Form I-907.

Procedure – Applying for the Transfer of an H-1B Visa

- Obtain the Prevailing Wage.
- When you obtain the prevailing wage, obtain the Labor Condition Application. Complete Form ETA – 9035 online: **http://icert.doleta.gov/index.cfm?event=ehPortal.lcaSummary**
- When you obtain the Certified ETA 9035, complete USCIS Form I-129. File these with the Required Supporting Documents at USCIS Regional Service Center for your state.
- Include the filing fees of (made check out to USCIS – staple to I-129):
- $460 – for I-129 Filing fee (check can be separate or added to Education and Training Fee)
- $1,500 - H-1B "Education and Training Fee" for each H-1B petition filed for a new employer, change of employer, and first extension for an existing employer. Employers with fewer than 25 full time employees (including U.S. affiliates and subsidiaries) pay $750. (check can be separate or added to I-129 Filing Fee)
- $500 – for Anti Fraud Fee (separate check)
- The following employers are exempt from the "Education and Training Fee":

  1. Institutions of higher education and related or affiliated non-profit organizations;
  2. Non-profit and governmental research organizations;
  3. Any employer who is filing for a second extension of stay for an H-1B nonimmigrant;
  4. Primary or secondary education institutions; and
  5. Nonprofit entities which are engaged in "established curriculum-related clinical training of students".

- Total processing time for approval is approximately 60-90 days from date of filing with the USCIS.
- Premium Processing is 15 days. Add an additional $1,225 check to USCIS and Employer completes and signs Form I-907.
- **Transfer petitions are NOT subject to the annual quota.**
- **Employees may work for the new company upon filing of the transfer petition with USCIS. They do NOT have to wait for the filing receipt or the USCIS approval to begin work for the new employer (Section 105 – AC21).**

Procedure – Applying for the Renewal / Extension of an H-1B Visa

- Obtain the Prevailing Wage.
- When you have the prevailing wage, obtain the Labor Condition Application. Complete Form ETA – 9035 online: **http://icert.doleta.gov/index.cfm?event=ehPortal.lcaSummary**
- When you obtain the Certified ETA 9035, complete USCIS Form I-129. these with the Required Supporting Documents at USCIS Regional Service Center for your state.
- Include the filing fees of (make checks payable to Department of Homeland Security – staple to I-129):
- $460 – for I-129 Filing fee (check can be separate or added to Education and Training Fee)
- $1,500 - H-1B "Education and Training Fee" for each H-1B petition filed for a new employer, change of employer, and first extension for an existing employer. Employers with fewer than 25 full time employees (including U.S. affiliates and subsidiaries) pay $750. (check can be separate or added to I-129 Filing Fee). Ignore this fee if it is the 2nd or subsequent Renewal / Extension with the same employer.
- The following employers are exempt from the "Education and Training Fee":

  1. Institutions of higher education and related or affiliated non-profit organizations;
  2. Non-profit and governmental research organizations;
  3. Any employer who is filing for a second extension of stay for an H-1B nonimmigrant;
  4. Primary or secondary education institutions; and
  5. Nonprofit entities which are engaged in "established curriculum-related clinical training of students".

- Total processing time for approval is approximately 60 to 150 days from date of filing with the USCIS.
- **Premium Processing** is 15 days. Add an additional $1,225 check to Department of Homeland Security and Employer completes and signs Form I-907.

When to Apply

New H-1B Visa

- The annual quota is 65,000 (and an additional 20,000 for US Master Degree holders) for the fiscal year FY 2019.
- Applications are accepted 6 months prior to the earliest requested start date.
- 4/1/2018 is the earliest date to file for the 10/1/2018 start date.

H-1B Transfer

- H-1B Transfer petitions are not subject to the annual quota.
- The H-1B Visa holder can start work at the new employer as early as the day USCIS receives the H-1B Transfer petition.
- In order for a worker to qualify for the H-1B Transfer, the worker must be employed in H-1B Visa status with the employer who sponsored their H-1B, and the beneficiary's previous H-1B petitioner/employer was not a CAP exempt organization as defined below in a., b., and c.

    a. The petitioner is an institution of higher education as defined in section 101(a) of the Higher Education Act, of 1965, 20 U.S.C. 1001(a).

    b. The petitioner is a nonprofit entity related to or affiliated with an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a).

    c. The petitioner is a nonprofit research organization or a governmental research organization as defined in 8 CFR 214.2(h)(19) (iii)(C).

H-1B Renewal / Extension

- The earliest that you can apply is 180 days (6 months) prior to the expiration of the current H-1B Visa.
- 240 Day Rule: Please see 240 day rule: http://www.usavisanow.com/h-1b-visa/h1b-visa-resources/h-1b-renewal-extension/

The H1B visa 240 day rule where an H-1B Worker can continue to work for the current employer for up to 240 days after the current H-1B visa expiration if he/she is waiting for the USCIS decision.

8 C.F.R. § 274a.12(b)(20)

(20) A nonimmigrant alien within the class of aliens described in paragraphs (b)(2), (b)(5), (b)(8), (b)(9), (b)(10), (b)(11), (b)(12), (b)(13), (b)(14), (b)(16), and (b)(19) of this section whose status has expired but who has filed a timely application for an extension of such stay pursuant to §§214.2 or 214.6 of this chapter.

These aliens are authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay.

Such authorization shall be subject to any conditions and limitations noted on the initial authorization.

This rule does not allow you to stay beyond the expiration date requested in the petition for which you are awaiting the decision.

However, if the district director or service center director adjudicates the application prior to the expiration of this 240 day period and denies the application for extension of stay, the employment authorization under this paragraph shall automatically terminate upon notification of the denial decision.

Note. If the H1B worker needs to travel during this time, they may not be able to return until they receive the new H-1B Visa. Premium processing is a viable option in this scenario.

H-1B Visa Stamping at a US Embassy

When an H-1B worker travels outside the United States, he or she has to get the visa stamped on his passport unless he has already done so for re-entry in the United States.

Here is the website for all US Embassies: http://www.usembassy.gov/

The interview is taken in the US Embassy by a visa officer.

In some cases H-1B workers can be required to undergo "administrative processing" involving lengthy background checks.

These checks are supposed to take ten days or less, but in some cases, have lasted months and years.

Site visits by USCIS or DOL

- USCIS has an anti-fraud initiative to investigate and seek out potential abuses of the H-1B temporary worker program.
- Under this anti-fraud initiative, USCIS has hired private contractors to conduct approximately random site visits of H-1B employers across the country.
- The purpose of these visits is to confirm the legitimacy of the employing entity, that the H-1B employee is actually working for the employer and that the terms and conditions of the employment are as described in the H-1B visa petition and related documentation submitted to USCIS and the U.S. Department of Labor (DOL).
- These random site visits are part of the government's larger anti-fraud enforcement efforts in response to reported abuses of the H-1B visa program.
- The funding for this initiative is coming from the $500 Anti-Fraud filing fee included with all new H-1B petitions.
- The most common offense was failure to capture the H-1B worker's work location(s). H-1B workers are only authorized to work at locations specifically identified in the employer's I-129 Petition filed with USCIS and the Labor Condition Application filed with DOL.
- Another common offense was failure to pay the requisite wage to the H-1B employee. All H-1B employers must pay the higher of the actual or prevailing rate of pay for the occupation.
- Employers should identify a company contact (likely within the legal or human resources department) to serve as the lead contact during a potential site visit, interact with the USCIS investigator and provide the requested information.
- The USCIS investigator may ask to speak with the employer representative who signed the I-129 Petition for H-1B status.
- The investigator may also ask to speak with both a human resources representative familiar with the H-1B employment and the H-1B employee beneficiary.
- Employers should take steps to confirm that both the company and the H-1B worker are prepared to answer specific questions about the H-1B employment and that all relevant parties are familiar with the specific

position title/ description and wage information contained in the H-1B petition.

- If any changes have occurred since the filing of the H-1B petition with USCIS (including but not limited to new job title, salary decreases or changes in job responsibilities or work location), employers should immediately discuss such changes with qualified immigration attorney. Additional posting notice obligations and/or amended H-1B filings may have been required with USCIS prior to such changes and appropriate remedies should be immediately addressed.

- During the site visit, the employer should be prepared to answer questions and/or provide documentation related to the employer's business, the H-1B worker's date of hire, title, work location, salary information, present a copy of the H-1B worker's current payroll record, and provide confirmation that the company paid all H-1B related fees and costs.

- The investigator will usually ask to speak privately with the H-1B worker. The H-1B worker may be asked to present identification to confirm the he or she is the same individual referenced in the H-1B petition. The H-1B worker also should be prepared to answer questions and/or provide documentation related to their job title, educational background, job duties, salary, hours, work address and verbally confirm that the company paid all H-1B related fees and costs.

- The investigator may take photographs of the employer's facilities and the H-1B worker's workspace.

- Employers should also use this time of increased awareness of H-1B obligations to carefully review the mandatory H-1B Public Inspection File that must be maintained for each H-1B worker. While these files are mandated by the DOL, it is possible that USCIS site investigators could ask to review each file. There are numerous documents that must be maintained within the Public Inspection File pertaining to the precise terms and conditions of the H-1B employment.

Changes in Employment

1) **Change in Employer Corporate Address**:

Required Action: Call USCIS and update each pending case.

2) **Change in Employee Work location**:

Required Action:

- If employee has NOT moved to new work location - An amended LCA filing and posting.
- If employee HAS moved to new work location prior to filing and posting of LCA - An amended H-1B filing with USCIS.

3) **Change in Employee Job Title and Job Duties**:

Required Action:

- An amended H-1B petition filing with USCIS prior to employee moving to new position.
- Must wait for H-1B approval before moving employee to new position.

4) **Change in Employee Salary**:

Required Action:

- DOL and USCIS guidance are not clear.
- A general practical rule is that if the salary is an increase of over 10%, a new LCA is recommended.
- The salary may not be reduced below the prevailing wage or actual wage paid to other workers in same position.

5) **Change from Full Time to Part Time, or Part Time to Full Time**:

Required Action: An amended H-1B petition must be filed with USCIS.

6) **Employee is Terminated or Resigns**:

Required Action:

Recent trends at the Department of Labor (DOL) reinforced by the recent decision in Limanseto v. Ganze, OALJ Case No. 2011-LCA-00005, has placed a burden on employers to carefully follow and document DOL's interpretation of the statutes and regulations of both DOL and USCIS when terminating an H-1B employee.

In Ganze, the ALJ ordered that the employer MUST prove a bona fide termination to end its federal liability under the Immigration and Nationality Act and the Secretary of Labor's labor condition application regulations.

The ALJ held that bona fide termination of an H-1B worker requires the employer to give:

1. notice to the worker

2. notice to Immigration and Customs Enforcement authorities so that Form I-129 "Petition for a Nonimmigrant Worker" can be cancelled and

3. offer of reasonable payment for worker's transportation home.

Please note that if the employee resigns, step 3 is not required.

However, the employer should ensure that the resignation is written and signed by the employee.

If the employee refuses to provide a written resignation notice, the employer should confirm their resignation in writing.

The ALJ in Ganze (http://www.usavisanow.com/2011/07/28/withdrawing-h-1b-visa/) held that failure of the employer to not only perform these steps but also to keep records documenting same, leaves the employer liable for the H-1B's worker's wages and benefit, even where the employee never worked for the employer a single day under H-1B, where the employee worked for another employer under H-1B at a higher wage, and where the employee spent approximately two of the three years in Indonesia unavailable to employer.