THE ROAD TO H-1B STATUS

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Overview

- Foundation for Classification in the Law/Hierarchy of Laws
- How/When Changes to Laws Can Occur
- Eligibility for H-1B Classification
- Process for filing H-1B Petition
- Alternatives to H-1B Petitions
- OPT
- 212(e)
- Crimes to Avoid
- Question and Answer Period
1. US Constitution
2. Laws (statutes) enacted by Congress
3. Rules promulgated by federal agencies
4. State constitution
5. Laws enacted by state legislature
6. Rules promulgated by state agencies
7. City/county charters (“the constitution” for the city or county)
8. Local laws and ordinances
9. Rules promulgated by local agencies
Laws are enacted, interpreted and enforced at the federal, state and local level.

All three levels contain a constitution (charter at local level).

Laws are enacted by a legislative body, adopted by the people and promulgated by individual agencies.

Constitution (or charter), law or rule cannot contradict a higher law, constitution or rule.

Memoranda by enacting/promulgating authorities explaining their understanding of the nature and purpose of the laws and rules. Part of legislative history.
Laws enacted by legislative body, rules promulgated by an administrative agency collected by subject matter and compiled as they are codified.

Laws passed by Congress and signed by President are given a Public Law number and published chronologically in Statutes at Large, their provisions are collected, by subject matter, in the United States Code.

Federal Administrative Rules are published chronologically in the Federal Register and codified in the Code of Federal Regulations.

These constitutions, charters, statutes, laws and rules are interpreted in decisions by courts and administrative agencies.
Immigration and Nationality Act of 1952 defined nonimmigrant temporary worker as an alien having residence in foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability.


Originally workers were admitted under H-1 Visa and job was temporary.

Eventually worker could have dual intent to stay either temporarily or permanently.
Congress never defined term “distinguished merit and ability”

*Matter of Shaw*, 11 I&N Dec. 277 (D.D. 1965), an administrative decision, held that term “implies a degree of skill and recognition substantially above that ordinarily encountered, to the extent that the person so described is preeminent in his field of endeavor”.

1970-House Judiciary Committee adopted INS’s interpretation of the term except replaced “preeminent” with “prominent” and added “or has a high level of education”.

Ability to hire for permanent positions since 1970

Immigration and Nationality Act Amendments of 1976 increased total number of visas allocated from 34k to 58k.


Attainment of undergraduate degree alone equates to distinguished merit and ability if degree is basis for entering the profession.
- 1980s – INS scrutinized from organized labor and Congress
- Large number of H-1 nonimmigrants filling entry-level positions
- 1988 – INS commissions Booz, Allen and Hamilton to conduct a study
- Immigration Nursing Relief Act of 1989 – Separated nurses from H-1 by setting up H-1A visa (expired in 1995)
- Rest of classification became H-1B
Congress began imposing restrictions intended to protect domestic workers.

Originally visa had no numerical limitations and few labor protections.


Employer required to attest that they would meet certain labor standards

Separated out H-1B occupations such as entertainers and models into new visa categories (O and P)

Employer now required to file labor condition applications with U.S. Dept of Labor (wage and working conditions)

House Committee Report said “will provide a more valid test of employer-asserted need”
1990 Act passed due to growing backlog for legal admissions in the permanent employment-based classes (Act tripled number of permanent spots available)

At that time many potential applicants bypassed temporary visa and went directly to permanent residence status

Processing backlogs for permanent visas = greater demand for temporary visa
Numerical limitation of 65,000 a year

Legislation limited duration of H-1B to six years

IMMMACT90 removed language in the H-1 statutory description that required person to have “residence in a foreign country which he has no intention of abandoning”

Encourages path to residency
Foundation for Classification in the Law/Hierarchy of Laws

- Employer now required to pay prevailing wage
- Provide working conditions for H-1B that would not adversely affect working conditions of U.S. workers
- No strike or lockout in the course of a labor dispute involving the occupational classification at the place of employment
- Notice to bargaining representative, or if not unionized post notice in conspicuous places
Foundation for Classification in the Law/Hierarchy of Laws

- September 1997 – 65k ceiling met for first time ever
- H-1B admissions halted for remainder of fiscal year
- Unmet demand for high-tech workers in computer industry (justified increasing the quota)
- INS uses accounting gimmicks to defer some visas until 1998 so they could approve without exceeding the cap
Senator Kennedy (committee and Senate floor), proposed amendments to legislation to protect American workers

Amendments killed on Senate Floor

Larger bill passed in 1998 by Congress

Began 10/1998

H-1B visas increased from 65k per year to 115k per year in 1999 and 2000, 107,500 in 2001, 65k in 2002 and beyond

Worker protections for H-1B dependent businesses

Had to attest that no U.S. workers are laid off for 3 months before hiring H-1B and 3 months after

Had to attest that they’ve made significant steps to recruit US workers

Temporarily in place during the increase
ACWIA, continued

- H-1B workers receive same fringe benefits as U.S. workers
- Additional $500 fee
- New investigative procedures and new penalties for violations
- Universities, federally-funded research institutes exempt
- Reporting requirements, i.e. origin, occupation, educational level, compensation
In 1999, INS approved 21,888 H-1B in excess of fiscal year cap
Swept under rug by legislation called AC21
AC21 implemented a retroactive increase for 1999 to cover all petitions approved by INS
2000-Cap increased to 195,000
2001-195,000 Cap met
Allowed H-1B holders to extend their stay beyond 6-year period if labor cert has been pending for 365 days
Extensions requested on yearly basis until green card received
Changes to H-1B

- October 1, 2003 – Cap reverted back to 65,000 for fiscal year 2004
- Omnibus Appropriations Act of 2005 – Signed by President Bush
- Reinstituted the ACWIA fee and raised it to $1500
- 25 full-time employees - $750
- More than 25 - $1500
- Act also created Fraud Prevention and Detection Fee of $500 – initial grants
- First 20,000 H-1B beneficiaries who have earned a master’s degree or higher from a U.S. institution of higher education are not subject to the cap of 65,000. Once 20,000 slots are filled, USCIS counts those cases against the cap for the fiscal year.
Public Law 108-441 extended Conrad 30 J-1 program for medical grads
Nonimmigrants in US on J-1 exchange visa who received waiver of two-year foreign residency requirement 212(e) exempt from cap
Raised filing fees for employers with workforce of more than 50 employers when more than 50 percent hold H-1B, L-1 or L-2
Additional fee of $2000 for H-1B (increase ended 09/30/14)
Changes to H-1B

- 2013 – Cap reached first week, highlights need for immigration reform
- 2014 Cap reached right away (same cap for more than 10 years)
- Final rule 02/25/2015, into effect on 05/26/2015
- H-4 authorization for those on a path to residency
- 12/18/15 Omnibus Appropriations Bill for 2016 signed into law
- H-1B fees for 50/50 companies increase from 2k-4k (initials and extensions), valid through 09/30/2025
Changes with Administration

- Stepping up efforts to ferret out fraud
- No discrimination against US workers
- Site visits on cases where an employer’s basic business information cannot be validated through commercially available data
- Target companies with high ratio of H-1B to U.S. employees and employers that petition for H-1B workers who will work off-site
- Impact on IT consulting companies
- Dedicated email address to report H-1B fraud
- Last year 200,000 applications filed
Computer programmer no longer automatically a specialty occupation

USCIS will conduct additional interviews and follow-up visits with H-1B holders

Stricter adjudication standards

Executive Order “Buy American and Hire American” to root out “fraud and abuse”

Order asks four department heads to suggest reforms to ensure H-1B’s are given to the “most skilled or highest paid”

Doesn’t like lottery

Changes to H-1B program require legislative action (Congress) or rulemaking (opportunity for viewing and comment)
Bills introduced to eliminate lottery in favor of preference system

Leg up for foreign students educated in the US, advanced degree holders, those with a high wage and valuable skills

H-1B approvals down

Passive-aggressive strategy by USCIS to bury lawyers and their clients in requests for evidence, clarification on points already clear in initial filing

Forces some employers to give up
USCIS questions Level 1 wage (out of 4-tier system)
Does the position truly require a Bachelor’s if it is a Level 1 Wage?
Asking for proof there is sufficient work
Results in agency and not Congress effectuating change in law
No new legislation has been passed
Same level of scrutiny will now apply to initial petitions and extensions
Threat to H-4 employment authorization
Eligibility for H-1B

- **Specialty Occupation**
  - Theoretical and practical application of a body of highly specialized knowledge and attained of bachelor’s of higher in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the US

- Coming temporarily to the US (dual intent permitted)

- Maintenance of foreign residence not required

- Labor Condition Application (LCA) (Electronic form 9035E through DOL iCERT Visa Portal System)

- Employer must pay petition-stated wage within 30 days of entry or 60 days from employee’s COS if in the US

- Employer must pay costs for petition process

- Wage must be 100% of the prevailing wage

- If H-1B employee is terminated prior to end of period of admission, employer liable for reasonable costs of return transportation
Eligibility for H-1B

- 65,000 per year, 20,000 for U.S.-earned Master’s or higher degree
- Cap Exempt
  - J-1 Physicians who obtained a waiver pursuant to the State 30 program or federal program
  - Beneficiaries of employment offers at institutions of higher education, or related or affiliated with non-profit entities, or nonprofit research organizations, or governmental research organizations
  - If H-1B is concurrently employed with an exempt and nonexempt employer, she will NOT be counted toward the cap
  - Deference to prior determinations
  - New employment only if a person has been counted in the cap in the past 6 years, USCIS cannot account within the cap
Issues with cap being reached –

- Person applying for COS where the H-1B cap is reached will be treated as out of status if he or she falls out of status before the beginning of the next fiscal year on Oct 1.
- F-1 and J-1s and dependent with DOS can file for COS within the designated grace period (60 days for F-1s and 30 days for J-1s) and if the October 1 date is reached during those periods they will remain in status.
- Status and work authorization of OPT with timely filed COS to H-1B will be automatically extended to Oct 1.
- H-1B can port from ca-exempt employer to cap-subject as long as the cap-subject H-1B petition is approved, the LCA covers the entire period of employment, and the I-94 extends to October 1.
Eligibility for H-1B

- Petitioner must be a US Employer
  - Engage a person to work in US
  - Employer/employee relationship (hire, pay, fire, supervisor or control work)
  - IRS Tax ID number
- If beneficiary is the sole owner, operator, manager and employee, cannot be fired by the petitioning company, and there is no outside entity exercising control over her, no employee-employer relationship
- More than 50% ownership interest may defeat the employer-employee relationship
- Beneficiaries who are not claimed as employees for tax purposes, work not controlled by petition is not an employee
Employee may attend school, but may not engage in “moonlighting” such as other self-employment or work for another employer.

Employer must pay the wage in the application.

Employer cannot move the employee to another job or location without filing an amended application.
H-1B Nonimmigrant Visas: Timing of Cap Subject Applications

- Deadline April 2, 2018
- Approved employees first possible day of work October 1
- Eligible for up to 3 years on first application
- 1st Extension another 3 years
- Additional extensions allowed
  - Recapture of all time outside the U.S.
  - Pending permanent residency case filed before the 5th anniversary of H-1B
Employer submits Internal Revenue Service Employer Identification Number to the Department of Labor

Prevailing wage at flc data center or through a private wage survey

Attorney or employer completes and submits the Labor Condition Application form at the iCERT Visa Portal System

Employer signs and posts at the place of employment the certified Labor Condition Application

Employer files H-1B application with U.S. Citizenship and Immigration Services

After application approved

- Employee in U.S. on F-1/J-1 may start work October 1
- Employee outside U.S. may apply for visa approval as of October 1 and after entry start work
The Department of Labor requires employers to pay the government filing fees because it is considered an unlawful reduction in payment of the prevailing wage if the employee pays the fees. This makes it difficult to convince employers unfamiliar with the H-1B program to file.

**Government Filing Fees**
- $1,225 Form I-907 Premium Processing Fee (Optional)
- $460 Form I-129 Fee
- $750 Data Collection ACWIA Fee (Small Employers)
- $500 Anti-Fraud Fee
-$2,935 Total Fees
O-1 Status: Individuals with Extraordinary Ability or Achievement

- Individuals who possess extraordinary ability in the sciences, arts, education, business, or athletics, or who has a demonstrated record of extraordinary achievement in the motion picture or television industry and has been recognized nationally or internationally for those achievements.

- Reason to Apply: H-1B time running out, priority date not current
O-1 Status: Evidentiary Criteria for O-1A

Evidence that the beneficiary has received a major, internationally-recognized award, such as a Nobel Prize, or evidence of at least (3) three of the following:

- Receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor
- Membership in associations in the field for which classification is sought which require outstanding achievements, as judged by recognized national or international experts in the field
- Published material in professional or major trade publications, newspapers or other major media about the beneficiary and the beneficiary’s work in the field for which classification is sought
- Original scientific, scholarly, or business-related contributions of major significance in the field
- Authorship of scholarly articles in professional journals or other major media in the field for which classification is sought
- A high salary or other remuneration for services as evidenced by contracts or other reliable evidence
- Participation on a panel, or individually, as a judge of the work of others in the same or in a field of specialization allied to that field for which classification is sought
- Employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation
- If the above standards do not readily apply to the beneficiary’s occupation, the petitioner may submit comparable evidence in order to establish eligibility.
O-1 Status: Process

- A written advisory opinion from a peer group (including labor organizations) or a person designated by the group with expertise in the beneficiary’s area of ability.
- Petition application with supporting evidence of awards and recognition, written advisory opinion, and contract terms with employer or agent to perform
- Up to 3 years, extensions in 1 year increments
Immigrant Status: Permanent Residency Programs

- Sponsored
- Self-Petition
Immigrant Status: Permanent Residency Programs

- Sponsored
  - Employment
  - U.S. or Permanent Resident Family

- Self- Petitioning
  - Asylum or Refugees
  - Diversity Lottery
  - National Interest Waiver Employment
  - U Victims of U.S. Crimes
  - T Trafficking Victims
  - VAWA Abused Spouses and Children of U.S. Citizens or Residents
  - Special Immigration Juvenile Status
  - Amerasian
  - Registry
Unable or unwilling to return to their country on account of persecution or a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion. One year after the receipt of asylum status, asylees may apply for lawful permanent residence. One of the enumerated grounds was or will be “at least one central reason” for their persecution, and allows immigration judges to require credible asylum and withholding applicants to obtain corroborating evidence “unless the applicant does not have the evidence and cannot reasonably obtain the evidence
The generic name given to the immigrant visa lottery program established by the Immigration Act of 1990 that makes available up to 55,000 immigrant visas per federal fiscal year to persons from low-admission states and low admission regions. The Diversity Immigrant Visa Lottery (DV) program is administered by the Department of State, which establishes the rules for the lottery and tracks the available visa numbers.

A nation is considered underrepresented if less than 50,000 people from that nation immigrated to the US in the past five years. To be eligible for the Diversity Lottery Program, you should have either a high school education, its equivalent or two years work experience within the last five years in a job which demands two years training. You or your spouse must be a native of a nation eligible for the Diversity Lottery Program. You may be eligible if your parent was born in a country eligible to participate in the lottery. Instructions are typically made available in August, and the registration period begins October.
There are four statutory eligibility requirements. The individual must:

- The individual must have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity.
- The individual must have information concerning that criminal activity.
- The individual must have been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the crime.
- The criminal activity violated U.S. laws.
EB-1 – 3 Types
● Possess Extraordinary Ability in the Sciences, Arts, Education, Business or Athletics, or
● Are Outstanding Professors or Researchers, or
● Managers and Executives of multinational business entities who are on international transfer

EB-2 – 3 Types
● Advanced Degree – job requires minimum of Masters or B.S. plus 5 years progressive work experience (LABOR CERTIFICATION REQUIRED), or
● Exceptional Ability employee in the sciences, arts, or business; a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business
● National Interest Waiver (Self-Petitioning)

EB-3 – 2 Types
● Professional B.S. job (LABOR CERTIFICATION REQUIRED), or
● Skilled Workers, job requires 2 years experience (LABOR CERTIFICATION REQUIRED)
Both require at least three of the following:
• Official academic record showing that you have a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to your area of exceptional ability
• Letters documenting at least 10 years of full-time experience in your occupation
• A license to practice your profession or certification for your profession or occupation
• Evidence that you have commanded a salary or other remuneration for services that demonstrates your exceptional ability
• Membership in a professional association(s)
• Recognition for your achievements and significant contributions to your industry or field by your peers, government entities, professional or business organizations
• Other comparable evidence of eligibility is also acceptable.
Labor Certification

Certification by the Department of Labor (DOL) that there exists an insufficient number of U.S. workers who are able, willing, qualified, and available at the place of proposed employment, and that employment of the alien for whom certification is sought will not adversely affect the wages and working conditions of U.S. workers similarly employed (the employer must therefore offer the job at the “prevailing wage” in the particular market). A labor certification does not entitle the alien to admission; a visa petition must still be filed on his or her behalf. In December 2004, DOL issued its long-awaited PERM regulations which, effective March 28, 2005, established a new system for filing labor certifications. Filed electronically a the ETA Foreign Labor Certification web page.

http://www.plc.doleta.gov/eta_start.cfm?actiontype=home&CIFID=3553348&CFTOKEN=58248810
The date on which a person submitted documentation establishing prima facie eligibility for an immigrant visa. For family-based immigrants, the priority date is the date on which the family-based petition is filed. If the alien relative has a priority date on or before the date listed in the visa bulletin, then he or she is eligible for an immigrant visa. For employment-based cases, it is the date of the filing of the labor certification application, or if no labor certification is required, the date the immigrant visa petition is filed.
OPT

- Limited to 12 months and must completing training within 14 months of graduation. 12 and 14 month limitations do not apply to STEM (science, technology, engineering or mathematics).
- STEM must be F-1’s major or dual major
- 24 month extension for STEM
Training in field that can be utilized in foreign country and on Exchange Visitor Skill List

Participation financed in whole or in part, directly or indirectly, by an agency of the government of the US or by the government of his nationality or last residence

Came to US or acquired J status after Jan 10, 1997 to receive graduate medical education or training

Must return to home country or country of last residence upon completion of their US training before they can apply for IV, AOS, C/S to another NIV status

Also ineligible for visa in K-1, H-1, L-1, or spouse or minor child of H-1/L-1
USCIS can grant waiver upon favorable recommendation by DOS

Four-Step Process
- Applicant submits Data Sheet to DOS Waiver Review Division with 2 stamped self-addressed envelopes and appropriate fee
- DOS sends case number and instruction sheet to applicant. The instruction sheet will depend on the type of waiver indicated on the Data Sheet.
- Next step depends on category
  - Persecution and Hardship categories, file Form I-612 with USCIS. If I-612 is granted, USCIS transmits information to DOS.
  - For “Interested Government Agency” and “No Objection” categories, the next step is an application to the agency or foreign government
- DOS reviews the application and forwards the recommendation to USCIS with a copy to the applicant and J-1 sponsor. If DHS grants the persecution or hardship waiver it transmits the information to WRD which makes a recommendation after reviewing the “program, policy and foreign relations aspects of the case”.

Waiver of 212(e)
Waiver of 212(e)

- If USCIS denies request prior to referral to DOS, can appeal to AAO.
- If waiver is denied due to negative DOS recommendation, there is no appeal but can refile.
Crimes to Avoid

- Driving illegally
- Lying to obtain a driver’s license
- Lying to the police, better to remain silent
- Lying to avoid paying taxes on auto registration or other taxes
- Lending your documents to other people
- Threatening other people
- Driving under the influence
- Consuming alcohol in public place
- Taking someone else’s things
- Domestic abuse – scaring or threatening someone, harassing, insulting or offensive touching, slapping, kicking, yanking, hitting, choking, pulling hair
- Using/selling/sharing marijuana or other drugs
- Fake marriages
Unlawful Presence Accrual: Avoid Illegal Work

- 8 C.F.R. §§214.2)(f)(5-6) A student who is employed without authorization, or not pursuing a full course of study, or transfers schools without permission, or false to complete a full course of study in time and is ineligible for a program extension, is out of status and subject to removal. *Matter of Yazdani*, 17 I&N Dec. 626 (BIA 1981).

- Most common example: F-1 or J-1 engaging in unauthorized off-campus employment working in a restaurant or for cash.

- Cannot change status to an H-1B or family/employment preference permanent residency without leaving the U.S. Leaving the U.S. after 180 or 365 days out of status triggers the 3 and 10 year bar to returning and waivers forgiving the 3 and 10 year bar are only available through a qualifying spouse or parent.