



Employment Law Guide

↳ **Chapter: Workers in Professional and Specialty Occupations (H-1B and H-1B1 Visas)**

Updated: September 2005

**Sections 101(a)(15)(H)(i)(b) and (b1); 212(n) and (t), and 214(g) of the
Immigration and Nationality Act (INA) as amended
(8 USC §1101(a)(15)(H)(i)(b) and (b1), 1182(n) and (t), 1184(g);
20 CFR Part 655 Subparts H and I)**

Who is Covered

The H-1B program applies to employers seeking to hire nonimmigrant aliens as workers in specialty occupations or as fashion models of distinguished merit and ability, using the H-1B nonimmigrant visa classification. The H-1B1 program applies to employers seeking to hire nonimmigrant aliens from Chile and Singapore as workers in specialty occupations.

Basic Provisions/Requirements

The Immigration and Nationality Act (INA) allows employment of alien workers in certain specialty occupations (generally those requiring a bachelor's degree or its equivalent). Alien workers such as engineers, teachers, computer programmers, medical doctors, and physical therapists may be employed under the H-1B visa classification, as may fashion models of distinguished merit and ability.

The INA sets forth certain prerequisites for employers wishing to employ H-1B and H-1B1 nonimmigrant workers. To obtain H-1B or H-1B1 status approval, the employer must first file a Labor Condition Application (LCA), Form ETA 9035 or Form ETA 9035E, with the Department of Labor. The employer must state that it will:

- Pay the nonimmigrant workers at least the local prevailing wage or the employer's actual wage, whichever is higher; pay for non-productive time in certain circumstances; and offer benefits on the same basis as for U.S. workers;

- Provide working conditions for H-1B or H-1B1 workers that will not adversely affect the working conditions of workers similarly employed;

- Not** employ an H-1B or H-1B1 worker at a location where a strike or lockout in the occupational classification is occurring, and notify the Employment and Training Administration (ETA) of any future strike or lockout; and

- On or within 30 days before the date the LCA is filed with ETA, provide notice of the employer's intent to hire H-1B or H-1B1 workers. The employer must provide this notice to the bargaining representative of workers in the occupation in which the H-1B or H-1B1 worker will be employed. If there is no bargaining representative, the

employer must post such notices in conspicuous locations at the intended place(s) of employment, or provide them electronically.

H-1B visas are capped at 65,000 during a fiscal year, subject to certain exceptions. H-1B1 visas are limited to 1,400 nationals of Chile and 5,400 nationals of Singapore.

Additional rules apply to H-1B dependent employers and willful violators of the H-1B rules. These rules sunsetted for H-1B employment under LCAs filed after September 30, 2003 but were restored effective March 8, 2005 by the H-1B Visa Reform Act of 2004. An H-1B dependent employer is, roughly, one whose H-1B workers comprise 15% or more of the employer's total workforce. (Different thresholds apply to smaller employers.) H-1B dependent employers who wish to hire only H-1B workers who are paid at least \$60,000 per year or have a master's degree or higher in a specialty related to the employment can be exempted from these additional rules.

H-1B dependent employers and willful violator employers must attest to the following three elements addressing non-displacement and recruitment of U.S. workers:

The employer will not displace any similarly employed U.S. worker within 90 days before or after applying for H-1B status, or an extension of status for any H-1B worker;

The employer will not place any H-1B worker employed pursuant to the LCA at the worksite of another employer **unless** the employer first makes a bona fide inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within 90 days before or after the placement of the H-1B worker; and

The employer, before applying for H-1B status for any alien worker pursuant to an H-1B LCA, took good faith steps to recruit U.S. workers for the job for which the alien worker is sought, at wages at least equal to those offered to the H-1B worker. Also, the employer will offer the job to any U.S. worker who applies and is equally or better qualified than the H-1B worker. This attestation does not apply if the H-1B worker is a "priority worker" within the meaning of Section 203(b)(1)(A), (B), or (C) of the INA.

After the Department of Labor certifies the LCA, the employer will apply to the U.S. Citizenship and Immigration Services (USCIS) for approval to employ an alien worker under H-1B status so that alien workers may be hired. For H-1B1 visas, after the Department of Labor certifies the LCA, the employer must follow the procedures of USCIS and the Department of State, which differ in some respects from procedures for H-1B visas.

Employee Rights

H-1B and H-1B1 workers are granted a number of important rights. The employer must give the worker a copy of the LCA. The employer must pay the worker at least the same wage rate as paid to other employees with similar experience and qualifications or the local prevailing wage for the occupation in the area of employment, whichever is higher. The employer must pay for non-productive time caused by the employer or by the worker's lack of a license or permit. The employer must offer the worker fringe benefits on the same basis as its other employees.

Also, the employer may not require the worker to pay a penalty for leaving employment prior to any agreed date. However, this restriction does not preclude the employer from seeking "liquidated damages" pursuant to relevant state law. Liquidated damages are

generally estimates stated in a contract of the anticipated damages to the employer caused by the worker's breach of contract.

U.S. workers and job applicants may also have certain rights under the H-1B and H-1B1 programs. U.S. workers employed by an H-1B dependent or willful violator employer may not be laid off within 90 days before or after the employer files a USCIS petition to employ an H-1B worker in an essentially equivalent job. In addition, an H-1B dependent employer or willful violator must offer the job to any U.S. worker who applies and is equally or better qualified for the job than the H-1B alien worker. The U.S. Department of Justice has the authority to investigate complaints of failure to hire qualified U.S. workers.

No employer of H-1B or H-1B1 workers may intimidate, threaten, blacklist, discharge, or in any other manner discriminate against any employee, former employee, or job applicant for disclosing violations of H-1B or H-1B1 provisions or for cooperating in an official investigation of the employer's compliance.

U.S. workers and H-1B/H-1B1 workers may also examine the public disclosure documents that the employer is required to maintain that provide information about the employer's compliance with the attestation elements.

Complaints about non-compliance with H-1B/H-1B1 labor standards may be filed with local Wage and Hour Division offices.

Compliance Assistance Available

Information on filing and processing LCAs may be found on the Foreign Labor Certification page of the Employment and Training Administration's (ETA) Web site. Links to the *Federal Register* that contain detailed technical regulations controlling the H-1B and H-1B1 program, as well as non-technical information, may be found on ETA's H-1B Specialty (Professional) Workers page.

More detailed information may also be obtained by contacting the national office of ETA or the Wage and Hour Division of the Employment Standards Administration (1-866-4USWAGE). Information on how to submit a petition requesting an H-1B or H-1B1 visa may be obtained from the USCIS.

Penalties/Sanctions

When violations are found, the Administrator of the Wage and Hour Division may assess civil money penalties with maximums ranging from \$1,000 to \$35,000 per violation, depending on the type and severity of the violation. The Administrator may also impose other remedies, including payment of back wages.

Within 15 days of the date of the determination, any interested party may request a hearing on the Wage and Hour Administrator's determination before an administrative law judge. Within 30 days of the decision by an Administrative Law Judge, an interested party may request a review of the ALJ's decision by the Department's Administrative Review Board.

Employers found to have committed certain violations may also be precluded from future access to the H-1B program and other immigrant programs for a period of at least one year.

Effective March 8, 2005, an H-1B employer will be considered in compliance notwithstanding a technical or procedural failure if such employer:

- Makes a good faith attempt to comply;
- Voluntarily corrects violations within 10 business days of being advised by an enforcement authority; and
- Has not engaged in a pattern or practice of willful violations; and
- For prevailing wage violations, can establish that the wage was calculated consistent with recognized industry standards and practices.

Relation to State, Local, and Other Federal Laws

Various other laws, such as worker's compensation, tax (unemployment insurance, local, state, and federal), the Fair Labor Standards Act, and the Family and Medical Leave Act, may apply to the employment of these workers.

The Employment Law Guide is offered as a public resource. It does not create new legal obligations and it is not a substitute for the U.S. Code, Federal Register, and Code of Federal Regulations as the official sources of applicable law. Every effort has been made to ensure that the information provided is complete and accurate as of the time of publication, and this will continue. Later versions of this Guide will be offered at www.dol.gov/compliance or by calling our Toll-Free Help Line at 1-866-4-USA-DOL (1-866-487-2365).