EB5 ATTORNEYS

H 1B Employer Sponsorship Process Explained

A comprehensive guide from EB5 Attorneys

H 1B employer sponsorship requires the hiring company to file a petition with USCIS on behalf of the foreign worker. The employer must obtain a certified Labor Condition Application from the Department of Labor, pay at least the prevailing wage for the position and geographic area, and submit Form I 129 during the annual filing window. Most H 1B petitions enter a lottery when demand exceeds the 65,000 cap (plus 20,000 for U.S. master's degree holders). This guide explains every step from LCA to green card.

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Understanding the H 1B Cap and Annual Lottery

Congress set the annual H 1B numerical cap at 65,000 visas under INA Section 214(g)(1)(A), with an additional 20,000 visas available to beneficiaries who earned a master's degree or higher from a U.S. institution. When USCIS receives more registrations than available numbers during the March registration window, it conducts a computer generated random lottery. Under the rule effective January 1, 2025 (8 CFR 214.2(h)(8)(iii)(A)), registrants with a U.S. advanced degree are entered in both the advanced degree pool and the regular cap pool, improving odds slightly.

The fiscal year 2025 lottery received approximately 470,000 unique registrations for 85,000 available slots, yielding a selection rate below 20 percent. Employers must register each prospective H 1B worker electronically during the registration period, typically March 1 through March 22. Selected registrations receive a notice, after which the employer has 90 days to file the full I 129 petition along with the certified LCA, Form I 129 (currently $730 filing fee), the ACWIA Training Fee ($750 to $1,500 depending on employer size under INA Section 214(c)(9)), the Fraud Prevention and Detection Fee ($500), and, for employers with 50 or more employees where more than 50 percent are H 1B or L 1 workers, an additional $4,000 fee under the Consolidated Appropriations Act.

Fiscal year runs October 1 through September 30, so petitions selected in the March lottery with a start date of October 1 must be filed by late June. Missing this deadline forfeits the registration selection and requires re entering the lottery the following year. Employers who have never participated in the H 1B process frequently underestimate the lead time required to prepare a legally sufficient petition after a lottery selection.

Labor Condition Application: Prevailing Wage and Attestations

Before filing any H 1B petition, the employer must obtain a certified Labor Condition Application from the Department of Labor under INA Section 212(n) and 20 CFR Part 655, Subpart H. The LCA is filed through DOL's FLAG system and must be certified before the I 129 is submitted to USCIS.

The LCA requires four attestations: (1) the employer will pay the H 1B worker the greater of the actual wage paid to similarly employed workers or the prevailing wage for the occupation in the area of intended employment; (2) the employment of the H 1B worker will not adversely affect the working conditions of similarly employed U.S. workers; (3) there is no strike, lockout, or work stoppage in the applicable occupational classification at the place of employment; and (4) notice of the LCA filing has been provided to the bargaining representative or, if none, posted in two conspicuous locations at the worksite for at least 10 days.

Prevailing wages are determined using the Occupational Employment and Wage Statistics (OEWS) data published by DOL. There are four wage levels: Level I (entry), Level II (qualified), Level III (experienced), and Level IV (fully competent). Selecting the correct wage level for the position is critical. DOL audits and USCIS reviews frequently identify cases where the selected wage level does not match the actual duties and experience required. If the position requires a bachelor's degree plus five years of experience and independent judgment, a Level I prevailing wage is inappropriate and will trigger scrutiny.

The LCA also identifies the area of intended employment, which must match the location where work will actually be performed. When H 1B workers work at client sites or multiple locations, each worksite may require a separate LCA or at minimum a proper geographic scope on the existing LCA. Employers with mobile or traveling employees must understand the short term placement and continuous workday rules under 20 CFR 655.735.

Specialty Occupation: Meeting the Statutory Definition

The H 1B classification is available only for specialty occupations under INA Section 214(i)(1), defined as an occupation that requires theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

USCIS evaluates specialty occupation status under a four factor analysis from 8 CFR 214.2(h)(4)(ii): (1) a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position; (2) the degree requirement is common to the industry in parallel positions among similar organizations; (3) the employer normally requires a degree or its equivalent for the position; or (4) 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 baccalaureate or higher degree.

RFE trends from 2023 and 2024 show that USCIS scrutinizes IT consulting, business analyst, and market research positions most heavily. Officers frequently issue RFEs questioning whether a position requires a specific degree rather than simply any bachelor's degree. The petitioner must demonstrate that the specific specialty of the degree is related to the duties of the position. A computer science degree is more clearly related to a software engineering role than a business degree is to a general market research position.

The worker's qualifications must also match the stated requirement. Foreign degrees must be evaluated by a credential evaluation service to confirm U.S. equivalency. When a worker holds a three year bachelor's degree from countries such as India, the evaluation must address whether the degree, potentially combined with work experience, is equivalent to a U.S. four year degree under the three for one rule recognized in Matter of Shah, 17 I&N Dec. 244 (BIA 1977).

Cap Exempt Employers and H 1B Without the Lottery

Not all H 1B petitions are subject to the annual cap and lottery. Under INA Section 214(g)(5) and 8 CFR 214.2(h)(8)(iii)(F), certain employers and beneficiaries are exempt from the numerical limit.

Employers who are institutions of higher education as defined in 20 U.S.C. 1001, nonprofit organizations or governmental research organizations affiliated or related to such institutions, and nonprofit research organizations or governmental research organizations are cap exempt. Workers already counted against the cap within the past six years who have not departed the U.S. for a year or more are also cap exempt on a transfer to a new employer.

Practically, this means that universities, university affiliated hospitals, and qualifying research nonprofits can file H 1B petitions at any time of year without entering the lottery. A physician employed by a university medical center can begin H 1B employment within weeks of petition approval rather than waiting for October 1. Similarly, an H 1B worker who was previously selected in the lottery and is changing employers does not need to re enter the lottery as long as the six year period has not expired and they have maintained valid H 1B status.

Some employers deliberately structure arrangements to employ workers at cap exempt entities (for example, having an employee provide part time services to a university) to obtain cap exempt H 1B status. USCIS has challenged these arrangements where the cap exempt employment is not genuinely substantial. The cap exempt employer must be the petitioning employer, and the worker must provide services to that employer, not merely be nominally employed there while working elsewhere.

Premium Processing and Standard Processing Timelines

USCIS offers premium processing for H 1B petitions under 8 CFR 103.7(e), currently at a fee of $2,805 (adjusted periodically under the EB 5 Reform and Integrity Act's mandate to adjust fees). Premium processing guarantees a 15 business day action, meaning USCIS will either approve, deny, or issue an RFE within that window. If USCIS fails to meet the 15 business day deadline, it refunds the premium fee.

Premium processing is available year round, but during the peak April to June period following the lottery, processing centers handle extraordinarily high volumes and even premium cases can experience administrative delays before the 15 day clock begins. Premium processing does not guarantee approval; it guarantees a faster decision.

Standard processing timelines for H 1B petitions from the Texas Service Center (which handles most employer filed H 1B cases) have ranged from 2 to 6 months in recent years, with significant variation. Petitions involving unusual specialty occupation arguments, multiple worksites, or complex employer employee relationships tend to take longer because officers request additional evidence before adjudicating.

For H 1B petitions filed for cap subject workers with an October 1 start date, there is no practical disadvantage to premium processing if the employer is willing to pay the fee. Starting employment on October 1 is valuable, and premium processing ensures the petition is adjudicated before the fiscal year begins rather than leaving the worker in limbo.

H 1B Transfer to a New Employer

An H 1B worker can change employers through a process commonly called an H 1B transfer or H 1B portability under INA Section 214(n). The new employer files a new I 129 petition for the worker. Critically, if the petition is filed while the worker is in valid H 1B status (not out of status), the worker may begin employment with the new employer upon the filing of the new petition, before it is approved. This portability provision prevents workers from being trapped with abusive employers while a new petition is pending.

H 1B portability requires: (1) the worker was lawfully admitted as an H 1B nonimmigrant; (2) the worker has timely filed an application for an extension of stay (the new employer's petition serves this purpose); (3) the extension application was not frivolous; and (4) the worker has not been employed without authorization since admission. Under 8 CFR 214.2(h)(2)(i)(H), the worker may work for the new employer while the petition is pending.

The new employer must file a new LCA for the new position, obtain a specialty occupation analysis for the new job duties, and pay all applicable fees. If the worker has an I 140 immigrant petition approved with a priority date that has been held for more than 180 days, that priority date can be ported to a new employer under INA Section 204(j), but only if the new job is in the same or a similar occupational classification.

When changing employers, the worker should not resign from the current employer until the new I 129 receipt notice is in hand. The portability protection requires an actual pending petition, not a promise from the new employer that it will file one.

H 1B Extensions, the Six Year Limit, and AC21 Exceptions

H 1B status is granted in three year increments, with an initial maximum of six years under INA Section 214(g)(4). After six years, the worker must spend at least one year outside the United States before being eligible for another H 1B petition unless an exception applies.

The American Competitiveness in the Twenty First Century Act (AC21), codified at INA Section 214(g)(6) through (8), created important exceptions. If a worker has an approved I 140 immigrant petition and the worker's priority date is not current (no visa number is immediately available), they may obtain H 1B extensions in one year increments beyond the six year cap under INA Section 214(g)(6). Workers with a PERM application or I 140 pending for 365 days or more may receive one year extensions under INA Section 214(g)(7).

Workers from countries with long employment based visa backlogs, particularly India and China, routinely require multiple one year AC21 extensions because their priority dates do not become current within the six year window. An Indian national in the EB 2 or EB 3 category may wait 10 or more years for a visa number to become available, necessitating continuous H 1B extensions throughout that period.

Extension petitions are not subject to the lottery and may be filed 180 days before the current status expires. Timely filing of the extension petition extends the worker's authorized stay during the pendency of the petition even if the current status expires, under the cap gap provisions applicable to timely filed nonimmigrant status extension applications under 8 CFR 274a.12(b)(20).

H 1B to Green Card Pathway

Most H 1B workers pursue permanent residence through employment based categories, most commonly EB 2 (Advanced Degree or Exceptional Ability) or EB 3 (Skilled Workers and Professionals) under INA Section 203(b). The employer sponsored green card process involves three main stages: PERM labor certification through DOL, I 140 immigrant petition to USCIS, and either adjustment of status (Form I 485) or consular processing.

PERM labor certification under 20 CFR Part 656 requires the employer to conduct a supervised job search demonstrating that no qualified U.S. workers are available for the position. The recruitment process includes specific advertising requirements and takes approximately 2 to 3 months. DOL adjudicates PERM applications in 6 to 18 months under standard processing. Premium processing is not available for PERM.

Once PERM is certified, the employer files the I 140 petition with USCIS. I 140 premium processing is available for $2,805, with a 15 business day adjudication commitment. An approved I 140 establishes the worker's priority date, which determines their place in the visa queue.

For workers from countries without significant visa backlogs, adjustment of status can follow I 140 approval within months. For Indian and Chinese nationals in EB 2 or EB 3 categories, the wait may be decades. The Visa Bulletin published monthly by the State Department shows current priority date cutoffs. Working with an immigration attorney to file adjustment of status as soon as the priority date is current protects the worker from losing their place in the queue if they fall out of H 1B status.

H 4 EAD for Spouses and Dependent Children

The spouse and unmarried children under 21 of an H 1B visa holder are eligible for H 4 dependent status. Since May 2015, certain H 4 spouses have also been eligible for an Employment Authorization Document (EAD) under 8 CFR 214.2(h)(9)(iv) and DHS regulations at 8 CFR 274a.12(c)(26).

H 4 EAD eligibility requires that the H 1B principal worker: (1) is the beneficiary of an approved I 140 petition, or (2) has been granted H 1B status beyond the six year cap under AC21 INA Section 214(g)(6) or (7). As of 2024, the H 4 EAD program remains in effect following litigation, though its legal status has been challenged in federal courts.

The H 4 EAD provides work authorization incident to status rather than tied to a specific employer, meaning the H 4 spouse can work for any employer in any capacity. The EAD must be renewed when the underlying H 4 status is renewed. USCIS encourages concurrent filing of the I 539 (extension of H 4 status) and I 765 (H 4 EAD renewal) to minimize gaps in work authorization.

H 4 children under 21 are eligible for H 4 dependent status but not for work authorization. They may attend school in the U.S. on H 4 status but must change to another visa category (such as F 1) to work. As children approach age 21, families should plan to change the dependent's status to avoid aging out, which can happen rapidly when petitions are delayed.

H 1B Cost Breakdown for Employers and Workers

The total cost of H 1B sponsorship involves multiple mandatory government fees and professional fees. Employers bear most of the mandatory costs under DOL regulations, which prohibit passing certain fees to the worker.

Government fees paid by the employer include: I 129 base filing fee ($730), ACWIA Training Fee ($750 for employers with 1 to 25 full time equivalent employees, $1,500 for employers with 26 or more), Fraud Prevention and Detection Fee ($500), Asylum Program Fee ($600 effective April 2024 for most employers), and the additional $4,000 fee for employers with 50 or more employees who have over 50 percent H 1B or L 1 workers. Premium processing adds $2,805 if elected.

Legal fees for H 1B preparation vary by firm and case complexity. Straightforward initial petitions typically cost $1,500 to $3,500 in attorney fees. RFE responses add $1,500 to $5,000 depending on complexity. Annual extensions cost $1,000 to $2,500 in attorney fees. Total first year costs including government fees and professional fees typically range from $5,000 to $12,000 per worker.

Workers may pay the premium processing fee and attorney fees for personal benefit items such as H 4 extensions for their spouses. However, employers cannot recoup the mandatory filing fees from workers as a condition of employment. Doing so violates DOL regulations and can result in civil money penalties under INA Section 212(n)(2).

DOL Wage and Hour Division audits of H 1B employer compliance have increased since 2020. Employers should maintain LCA public access files, wage records, and payroll documentation for at least one year after the H 1B worker's employment ends.

Frequently Asked Questions

1. How long does H 1B employer sponsorship take from start to finish?

For cap subject workers, the timeline is largely fixed by the annual calendar. Registration opens in March, lottery selection occurs in mid March, and petitions may be filed beginning April 1 for an October 1 start date. Standard processing takes 2 to 6 months, so most cap subject workers have approval by September. Cap exempt petitions can be filed at any time and with premium processing can be approved in as few as 15 business days. Initial cap subject sponsorship from first contact to October 1 employment typically takes 7 to 8 months if registration is filed on time.

2. Can my H 1B employer refuse to pay the filing fees?

Most mandatory filing fees must be paid by the employer and cannot be passed to the worker as a condition of employment under DOL regulations implementing INA Section 212(n). The I 129 base filing fee, the ACWIA Training Fee, and the Fraud Prevention and Detection Fee are employer obligations. Premium processing fees may be paid by the worker or the employer depending on negotiation. If your employer conditions employment on your paying mandatory filing fees, that arrangement may violate DOL rules.

3. What are the most common reasons H 1B petitions receive RFEs?

USCIS most frequently requests additional evidence for three reasons: (1) failure to establish that the position qualifies as a specialty occupation requiring a specific degree in a related field, particularly for consulting and business analysis roles; (2) failure to demonstrate a valid employer employee relationship, particularly for staffing agency workers placed at third party client sites; and (3) insufficient source documentation for the prevailing wage determination, including mismatched wage levels and actual job duties. RFE rates for computer related occupations and consulting positions have been highest according to USCIS processing data published in fiscal years 2022 through 2024.

4. How does H 1B portability work when I change jobs?

Under INA Section 214(n), an H 1B worker may begin working for a new employer as soon as the new employer files an I 129 petition on their behalf, without waiting for approval, provided the worker was in valid H 1B status at the time of filing and the petition is not frivolous. The worker should retain proof of the filing receipt and not resign from the current employer until the receipt notice is received. If the new petition is denied, the worker must stop working for the new employer and either return to the prior employer or leave the U.S. unless another status is available.

5. What happens to my H 1B status if I am laid off?

H 1B status is employer specific. If your employer terminates your employment, your H 1B status is technically ended, though in practice USCIS does not immediately revoke status upon termination. Under informal agency guidance, you have a 60 day grace period to find a new employer, change status, or depart the U.S. under 8 CFR 214.1(l). During this period, the terminated employer is obligated to pay the reasonable cost of return transportation to your last place of foreign residence. If a new employer files an H 1B petition within the grace period, portability provisions apply.

6. Can my H 1B worker spouse get work authorization?

Yes, if you hold H 1B status and either have an approved I 140 immigrant petition or have been granted H 1B extensions beyond the six year cap under AC21, your spouse may apply for an H 4 EAD (Form I 765 with category C26). The H 4 EAD is tied to the principal worker's eligibility and must be renewed when the underlying H 4 status expires. H 4 EAD provides employer independent work authorization, meaning your spouse can work for any employer without restriction while the EAD is valid.

Disclaimer: This guide is provided for general informational purposes only and does not constitute legal advice. Every immigration case is unique. Consult a qualified immigration attorney for advice specific to your circumstances.

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