

H-1B Preparation: Staying Ahead of the Game

Table of Contents

1. What is the H-1B visa?
2. How many H-1B visas are available?
3. Who is not subject to this cap?
4. When can I file for cap-subject H-1B visas?
5. Will there be a lottery for H-1B visas?
6. How does the lottery work?
7. What happens if my petition is selected?
8. What is premium processing service?
9. Who should apply for an H-1B visa?
10. What are the filing fees?
11. Who is responsible for paying the H-1B related fees?
12. Can a person self-petition for an H-1B?
13. What is the validity period of an H-1B?
14. When can the employee begin working under the new H-1B?
15. How do students in OPT status transition to an H-1B?
16. What are some common H-1B visa alternatives?

*This material is not intended to substitute as legal advice.

The demand for cap-subject H-1Bs continues to be high. Therefore, it is imperative that employers, employees, and their immigration counsel start petition preparations early.

Job descriptions, salary, O*Net codes, Department of Labor (DOL) registration, the posting of required notices, and credential verification are only a few of the details that must be considered during preparation.

1. What is the H-1B visa?

The H-1B visa classification is designed for foreign workers who will be employed in a professional occupation that requires at least a bachelor's degree, or its equivalent, and specialized knowledge.

2. How many H-1B visas are available?

There is an annual limit of 85,000 cap-subject H-1B visas available, which includes 65,000 visas for foreign nationals holding a bachelor's degree or its equivalent (minus 6,800 carved out for Chile and Singapore H-1Bs and 20,000 for those holding U.S. advanced degrees, such as a master's). This is what is known as the H-1B visa cap, which is congressionally mandated. However, not all H-1B visas are subject to this annual cap.

3. Who is not subject to this cap?

Certain petitions are exempt from this annual cap, including current H-1B holders who need an extension, are filing for a change of employer, or are filing amendments to the terms of employment (such as part-time to full-time or other material job changes).

Past H-1B holders who were already counted against the cap but did not use the full six-year stay are also exempt and can apply to use the remainder of H-1B time.

Additionally, petitions filed by institutions of higher education, related or affiliated non-profit entities, non-profit research organizations, and governmental research organizations are exempt. USCIS recently published new rules which broaden these cap-exempt organizations.

4. When can I file for cap-subject H-1B visas?

USCIS' fiscal year (FY) runs from October 1st to September 30th. H-1B petitions can only be filed within six months of the employment start date.

Thus, the filing period begins the first Monday in April. USCIS typically accepts H-1B cap-subject petitions for the first five business days. Because of the very short filing period and the considerable work required before filing, it is very important to start early to prepare a properly completed H-1B.

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5. Will there be a lottery for H-1B visas?

Demand has far exceeded the H-1B cap for the past several years,.

In 2017, 199,000 new cap-subject H-1B petitions were filed. In 2016, 236,000 were filed. In 2015, 233,000 petitions were filed. And, in 2014, 172,500 petitions were filed.

6. How does the lottery work?

USCIS conducts an electronic random selection (lottery) of the 20,000 advanced-degree petitions. Unselected petitions from the advanced-degree lottery are added to the electronic random selection process for the 65,000 general H-1B visas. The selected petitions undergo a first screening to eliminate petitions that do not comply with the filing requirements. About two months after the lottery is completed, USCIS begins returning the unselected petitions along with the filing fees.

7. What happens if my petition is selected?

About two to three weeks after the completion of the lottery, USCIS will begin issuing receipt notices for the selected petitions. Those petitions filed using premium processing service will be processed first and receive the first notices.

The receipt notice has a 13-digit alphanumeric receipt number, such as EAC-17-010-34567. The three letters indicate the filing center: EAC for the Eastern Adjudication Center located in Vermont and WAC for the Western Adjudication Center located in California. The next two digits are the filing year. You can use this number to track the processing of the petition.

8. What is premium processing service?

Premium processing provides expedited handling for an additional \$1,225 fee. It allows you to know the status of your petition within fifteen calendar days from USCIS' acceptance of your filing. Traditional processing can take between five and six months.

9. Who should apply for an H-1B visa?

- Foreign students in the United States in F-1 status who have received their degree. Often these students are in F-1/OPT or CPT at the time of the H-1B visa filing.
- Professionals abroad seeking to come and work in the United States.
- Foreign nationals in the United States in other valid status, such as H-4, L-1, TN (Mexican and Canadian citizens), E-3 (Australian citizens), H-4 (H-1B dependents), E-1/E-2 (investors), and P-1 (athletes).

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10. What are the filing fees?

Filing fees vary depending on various factors, such as the size of the petitioning organization and the number of employees in H-1B status. Typical fees include:

- Base filing fee: \$460
- Anti-fraud fee: \$500
- Education and training fee: \$750 (twenty-five or less employees) or \$1,500 (twenty-six or more employees)

11. Who is responsible for paying the H-1B related fees?

Employers are responsible. The regulations provide that employers may not require an H-1B employee to pay for H-1B costs considered “employer’s business expense,” such as attorney fees and other costs connected to the H-1B filing and program functions.

12. Can a person self-petition for an H-1B?

Typically, no. The filing must show a valid employer-employee relationship.

13. What is the validity period of an H-1B?

H-1Bs are valid for three years. Extensions may be approved for an additional three years. Once an H-1B professional has been counted towards the H-1B cap, he or she can obtain H-1B extensions and change employers without regard to the cap.

For cases where H-1B beneficiaries have trouble getting a license for their petition due to a technical requirement, they may be approved for up to one year without the license. They may then file for an extension and show proof of their license to be approved for the remaining years.

H-1B professionals who are at certain stages of the permanent residence process can file to receive extensions beyond six years.

14. When can the employee begin working under the new H-1B?

Upon acceptance and approval of the H-1B petition, employees can start working in H-1B status October 1, the start of Fiscal Year.

15. How do students in OPT status transition to an H-1B?

F-1 students with degrees in science, technology, engineering, or mathematics (STEM) may apply for a twenty-four-month extension of their post-completion OPT employment authorization.

Additionally, F-1 students with a timely filed and approved H-1B petition and request for change of status benefit from an automatic extension of their F-1 status and current employment authorization until the first day of the new fiscal year (October 1st).

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16. What are some common H-1B visa alternatives?

Employers who have missed the H-1B cap filing period or whose petitions aren't selected during the lottery must wait until the next April to file again.

However, several alternatives remain, such as:

- O-1 for individuals with extraordinary abilities
- TN for nationals of Canada and Mexico and limited to certain professional occupations
- E-3 for Australian nationals
- H1-B1 for professional from Chile and Singapore
- L-1 for intra-company transferees
- E-1/E-2 for investors

You can read about alternative visas in my book, [*Beyond the H-1B: A Guide to Work Visa Options for Employers, Foreign Nationals, and Graduating Students*](#).

About the Author

Giselle Carson is a Shareholder at Marks Gray, P.A. in Jacksonville, Florida, where she leads the Business and Sports Immigration and I-9 Immigration Compliance Team. She works with employers and individuals to create immigration solutions to achieve their immigration goals.

Ms. Carson is a Martindale-Hubbell AV® Preeminent™ rated attorney and was awarded Lawyer of the Year by the *Jacksonville Business and Daily Record*. A sought-out speaker on business immigration matters and published author, her articles have appeared in the *Florida Bar Journal*, *Immigration Law Today*, *Jacksonville Business Journal*, and *Florida Times Union*.

Her book *Beyond the H-1B: A Guide to Work Visa Options for Employers, Foreign Nationals, and Graduating Students* is available on [Amazon](#).

Giselle is also an Ironman finisher and marathoner. She can be reached at immigrationteam@marksgray.com

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