

# LIVE & WORK IN THE U.S. *WITH AN H-1B VISA*

**A PRACTICAL GUIDE FOR INTERNATIONAL  
PROFESSIONALS & ENTREPRENEURS**



**#Ask an Immigration Lawyer™**

# Live & Work In The U.S. With An H-1B Visa

A Practical Guide For International Professionals & Entrepreneurs

Hi, I am Jacob Sapochnick, a practicing Immigration Attorney based in San Diego, California.

Every year we successfully help clients navigate through the complex application process for the H-1B Visa.

There are numerous steps involved, along with rules & criteria that must be followed.



The application process can be daunting. However, the aim of this guide is to explain and simplify the entire process, so you fully understand what is required and can make the best decisions on how to proceed, especially when choosing the right immigration attorney to assist you.

In this guide we cover:

- What is the H-1B Visa and who it is for

- The steps specific steps and requirements if

  - You have a U.S. employer willing to hire you

  - You're an entrepreneur (self-employed) / applying as a start-up

- What to expect after your visa petition is filed, accepted or denied

- How your family can also migrate with you after you've been granted and H1B visa

- And the recommended path for successfully acquiring an H-1B visa

Here's to your success!

Jacob Sapochnick

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## What Is The H-1B Visa?

The H-1B is the most common U.S. work visa. The H-1B is a non-immigrant visa in the United States under the Immigration and Nationality Act, section 101(a)(15)(H). It allows U.S. employers to temporarily employ foreign workers in “specialty occupations” - occupations that require highly specialized knowledge. Fields include, but not limited to biotechnology, chemistry, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, law, accounting, business specialties, theology, and the arts.



*Initial period of stay in the United States: Up to 3 years. Extensions possible in up to 3 year increments. Maximum period of stay: 6 years. Extensions beyond 6 years are possible in certain circumstances.*

### Numerical Cap

The H-1B visa has an annual numerical limit "cap" of 65,000 visas each fiscal year with the additional 20,000 visas allocated for the aliens with the Master's degree from a U.S. university. There are two important dates that you should keep in mind. **April 1** is the first day when you can file the cap-subject H-1B petition. However, the H-1B employee will not be available to start working for the employer until the beginning of the fiscal year, which is **October 1**. There are exceptions to this general rule for CAP-exempt H-1B petitions and current students under the Optional Practical Training (OPT) program, who may start working for the new employer before October 1.

### The Employer-Specific Visa



An H-1B worker **is allowed to work for more than one employer at a time**. However, it is important to note that the H-1B is an **employer-specific** visa. This means that H-1B nonimmigrants may only work for the petitioning U.S. employer. Your H-1B visa does not give you a right to start working for another concurrent employer or a completely different employer. Each new or concurrent employer must first file a **new H-1B petition** for the foreign worker.

The H-1B visa can be **full-time or part-time** depending upon the needs of the employer. You may also be on vacation, sick/maternity leave, without affecting your H-1B status. However, it is important to keep in mind that there is **no grace period** given to you to apply for another H-1B if you quit your job with the present employer and wish to switch to another company. In the situations when you plan to quit your job with the current employer and work for another employer, it is important to **prepare all the necessary H-1B paperwork before** you leave your current job.

## I Have A U.S. Employer Willing To Hire Me. What's The Next Step?

To answer this question, here's a step by step process for an H-1B Case:

1) At first, we request then **review and analyze the resume of the H-1B candidate** and his/her qualifications and consider the proposed job duties and the position within the hiring company. Then, we will provide several options for the job title that best fits the proposed duties, the qualifications of the employee, and the H-1B requirements. We will also determine the prevailing wage for the position in your geographic area based on the location of employment.



2) During the next step, we will determine whether the **H-1B candidate needs an evaluation of his/her education or work experience**. In order to qualify for the H-1B, you need to possess at least a bachelor's degree or equivalent work experience (12 years). Each year of college is counted for 3 years of work experience. So, if the H-1B candidate has an uncompleted education, the years of college work will be counted toward the satisfaction of the educational requirement and the H-1B candidate will need less years of work experience in the field.

If the H-1B candidate has a foreign degree, that degree will need to be evaluated by a professional credential evaluation agency to determine its equivalency to a U.S. degree. If you have a foreign degree, we will send your degree and transcripts for the evaluation and should receive the equivalency report within 7 days.

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Sometimes, foreign professionals have extensive work experience in the field but do not possess formal education. These professionals often come to the conclusion that they do not qualify for the H-1B visa because of the educational requirement. However, this is a common misconception. The H-1B candidate can still apply for the H-1B based on his/her **professional work experience in the field that is found to be equivalent to a bachelor's degree.**

If you do not have formal education in the field, but have extensive work experience, we will work with the University Professor who evaluates foreign/domestic work experience in order to determine equivalency of your work experience to a bachelor's degree. The equivalency report is usually obtained within 7 days.

3) Once the job title and general employment requirements are determined, we will **file a Labor Condition Application (LCA) with the Department of Labor (DOL).** The DOL will usually certify the LCA within 7 business days.

4) After the LCA is certified, we will put together the **H-1B documents, prepare the petitioner's cover letter and send the case to the employer for signatures.**

5) After we get the signed paperwork back from the employer, **we file the H-1B with USCIS.**

## What If I'm An Entrepreneur?

### Entrepreneur H-1B – Must Show Employer-Employee Relationship

Entrepreneurs with an ownership stake in their own companies, including sole employees, may be able to obtain an H-1B visa if they can demonstrate that the company has the independent right to control their employment.

In other words, in order to qualify for H-1B in your own company, you have to show that there is an employer-employee relationship between you and your business, as indicated by the fact that the company has the authority to supervise your work, fire, and otherwise treat you as a regular employee of the company.



### How to Prove a Valid Employer-Employee Relationship between Entrepreneur and Business

With a corporation, you can show employer-employee relationship if there **a separate Board of Directors** which has the ability to hire, fire, pay, supervise or otherwise control your employment.

Aside from showing a Board of Directors that controls your work, you can present evidence of preferred shareholders, investors or other factors establishing that the petitioning company has the right to control the terms of your employment.



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With an LLC, you may be able to show a valid employer-employee relationship if Manager of the LLC controls employment of workers as provided for in the Operating Agreement. That Manager may not be the H-1B beneficiary.

As evidence of the right to control your work, you may be able to present the following:

- Term Sheet
- Capitalization Table
- Stock purchase Agreement
- Investor rights Agreement
- Voting Agreement
- Organizational documents and operating agreements/bylaws

In addition to the documents listed above, you may submit a combination of any related documents that sufficiently establish that there is a valid employer-employee relationship.

**In our experience, we have found that it is also useful to present the documents below to show the right to control the beneficiary's work:**

- Employment Agreement between the petitioner and beneficiary or Employment Offer Letter detailing the terms and conditions of employment and explaining how the employer will exercise its right to control the beneficiary, how often the beneficiary will have to report on the progress of work and to whom, how the beneficiary will be supervised throughout H-1B employment, the extent of the employer's discretion over when and how long the beneficiary will work, the method of payment, the employer's role in paying and hiring assistants to be utilized by the beneficiary, the provision of employee benefits, and other relevant considerations



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- A description of the performance review process along with progress and performance evaluations
- Letters from the directors/investors/preferred shareholders explaining how the right to control the work of the beneficiary will be exercised on a day-to-day basis, who will supervise the beneficiary and evaluate the work product of the beneficiary, and explaining the management structure of the company
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain
- Other relevant documents.

## H-1B for Start-Up Companies

Aside from establishing employer-employee relationship, Entrepreneur in a start-up company needs to keep in mind other important considerations in order to qualify for H-1B.



**Below are the specific points to consider in a start-up H-1B:**

- **Bona Fide Job Offer**

One of the very important points looked at by USCIS in a start-up is whether the H-1B beneficiary has a bona fide job offer from the petitioning employer and whether the employer intends to pay the beneficiary the prevailing wage. USCIS wants to see that the company's business is viable and that the employer will not "bench" the employee, leaving the employee without pay.

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Thus, it is recommended to include bank statements of the company for the last several months or evidence of a wire transfer showing initial capitalization of the business and ability to cover initial operating expenses.

In addition, the H-1B petitioner needs to explain how it expects the business to take off and include any contracts, business plans, documentation on any preliminary negotiations, the projects the company is planning to engage in, etc.

- **The need for H-1B position and sufficiency of specialty occupation work**

Another point that USCIS considers is whether the petitioner has the need for the position of H-1B beneficiary. USCIS wants to see that there is enough specialty occupation work (that requires at least a bachelor's degree) available for the H-1B beneficiary and that H-1B beneficiary will not perform other non-specialty occupation tasks.

USCIS is concerned that H-1B employee in a start-up business will not be involved in the actual

H-1B-caliber duties but will be doing administrative, sales or clerical work that does not qualify for H-1B.

It is therefore recommended to include explanations as to why the business requires the services of the

H-1B employee and include any supporting documentation of what the H-1B employee is

expected to be doing, what projects he/she is supposed to work on, collaborated by contracts with customers/partners, etc.



- **Sufficiency of production space to accommodate the work of the beneficiary**

Another point that USCIS often looks at is whether the petitioning business has the facilities to accommodate the work of the beneficiary.

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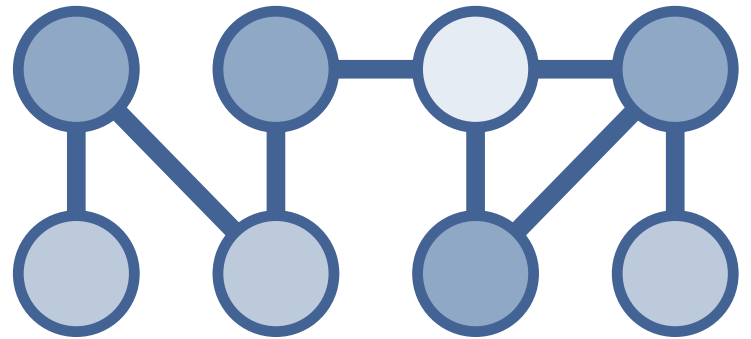
If the entrepreneur is going to work from an office, it is best to include a lease agreement with the floor plan and photographs of the facilities to show sufficient production space. If there is no office yet, USCIS may scrutinize the filing but you may be able to show that the employee will work from home and that the nature of the employee's work is such that telecommuting is possible.

There may be other important considerations in H-1B petition for a start-up that depend on the specifics of your case and that should be further discussed with an immigration attorney handling your case.



### **RECAP: Suggested Documentation for Entrepreneurs & Start-Ups Applying For The H-1B Visa:**

- Articles of Incorporation/Organization
- Statements of Information
- Bylaws/Operating Agreement
- EIN proof
- Organization/Incorporation Minutes
- Business Licenses
- Lease for business premises
- Bank statements showing startup funding, wire transfers or tax returns
- Photographs of the facilities to show sufficient production space to accommodate the work of H-1B employee
- Proposed Organizational Chart of the business with the list of positions the company is planning to recruit for and the educational requirements
- Business Plans, if any
- Contracts or other proof of projects the business is planning to engage in
- Marketing Plans, brochures and other documentation of the services to be performed/products to be distributed
- Explanations and any supporting documentation as to why the business requires the position of H-1B employee
- Other documents may also be provided to show the viability of the company's business model and its initial capitalization.



Remember, it is recommended to include as much evidence as possible showing the outside control over the beneficiary to prove a valid employment relationship between the petitioning entity and the H-1B worker.

## What To Expect After The H-1B Is Filed

The regular processing takes about 3 months. There is an option for Premium Processing which guarantees adjudication within 15 days.

Premium Processing guarantees that after 15 days of filing USCIS will approve the case or request additional documents. USCIS has an extra filing fee for Premium Processing, which is \$1225.



### After The Case Is Adjudicated - Extension/Change of Status vs. Consular Processing

When the case is approved:

- the H-1B employee will obtain change of status to H-1B or extension of their current H-1B stay while in the U.S.; or
- the H-1B employee will need to bring the H-1B's approval to the U.S. Embassy in the foreign worker's home country in order to obtain the H-1B visa and enter the U.S.

The first option is called **Change of Status/Extension** within the U.S. This option is good for those foreigners who are already in the United States on another visa or on H-1B visa with another employer. These foreigners can change their status to H-1B while inside the U.S. and start working for the petitioning employer without the need to travel abroad to pick up the visa. However, if you choose this option, the prospective H-1B worker may not travel outside the U.S. while the petition is pending.

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Please note that U.S. Citizenship and Immigration Service (USCIS) has the authority to approve the H-1B petition and issue I-94 (which is evidence of the H-1B employee's status), but does not have the authority to issue visas. The visas may only be issued by the U.S. Embassies abroad.

With the I-94, the H-1B employee may remain in the U.S. and work for the petitioning H-1B employer for the duration of the H-1B's approval. If the H-1B employee decides to later travel abroad, he/she will still need to obtain the H-1B visa at the Embassy in order to enter the U.S. and continue working for the H-1B employer.



The second option is called **Consular Processing**. It is good for foreign professionals:

- who are outside of the United States and who want to come to the U.S. to work for the H-1B employer or
- for those individuals who are in the U.S. at the time the H-1B petition is filed but who cannot stay in the U.S. while the petition is pending.

Under the Consular Processing option, once the H-1B approval is received from USCIS, the prospective H-1B worker who is outside the United States may apply with the U.S. Department of State (DOS) at a U.S. embassy or consulate abroad for an H-1B visa presenting the approval and other necessary documents.

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## If the decision is unfavorable:

There are several options available in case the decision is not favorable: filing a Motion to Reopen/Reconsider the decision, refiling the H-1B case, or switching to another visa category.

Determining the best alternative will depend on the circumstances of each particular case.



## Family of H-1B Visa Holders

Spouse and unmarried children under 21 years of age of the H-1B worker may seek admission in the H-4 nonimmigrant classification.

Family members in the H-4 nonimmigrant classification may undertake full-time studies, but may not engage in employment in the United States.

In order to be eligible to work in the U.S., the H-4 holders must change their status to nonimmigrant category for which work is authorized.





### **Don't Try To Do It Yourself Or Use Inexperienced Help!**

Our office has seen too many clients with previous unsuccessful attempts to file for H-1B when they tried doing it themselves or retained assistance of inexperienced attorneys or immigration consultants

Don't risk your career and ability to stay in the U.S. by relying on incompetent help!

As we see with many clients who come to our office after wasting their money and time in unsuccessful attempts to apply, cheap help can hurt!

Many immigration consultants and even attorneys do not take their time to understand the client's individual situation and submit just poorly drafted forms and brief letters that do not address the H-1B criteria, which unfortunately often times results in denials of H-1B petitions.

In these circumstances, appeals are unwarranted because the decision is correct based on the limited documentation and poorly designed explanations presented to USCIS with the H-1B petition. Remember, appealing the denial is time-consuming and expensive. It is important to do it right from the start.



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If you try to file H-1B yourself and miss something or if you use someone inexperienced, you will not only lose the filing fees and the opportunity to employ the H-1B worker, but it will simply be too late to apply again as H-1B visas are most likely going to run out fast.

With a few months left before the application deadline, it is very important to start collecting all the documents needed and choose an experienced immigration attorney that is right for you.

Your H-1B has to be ready in March for filing on April 1.

We don't know how long the visas will last, but looking at last year, the visas may run out within the first week, which means that only those petitions that are selected in the lottery will be adjudicated. Don't wait until the last minute! You don't want to miss the deadline as in that case you will have to wait until April of next year in order to apply!



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Our office has a track record of success in H-1B cases for a variety of industries with businesses ranging from start-ups to large multinational companies. We will be happy to assist you with your H-1B needs.

## LET US HELP YOU!

The pursuit of nonimmigrant or immigrant visas has tremendous ramifications in an individual's life, and the Law Offices of Jacob J. Sapochnick approaches every one of its cases with the full force of its expertise and commitment.

Our clients deserve a powerful guide in navigating the complexities of U.S. immigration law, and our firm is such a guide, obtaining visas and green cards with both expedience and professionalism.

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