H-1B Visa Holder Employment

Background

The H visa is generally used for temporary workers and trainees. There are various categories of H visas for different types of temporary workers. For more information on the different types of H visas, refer to the document, "Summary of Visa Types and Employability of Visa Holders."

The most common H category used for Research Foundation (RF) employment is H-1B, the specialty occupation category. The H-1B visa is for the temporary employment of noncitizens in specialty occupations. For a noncitizen to obtain an H-1B visa, the prospective employer must first submit a labor condition application to the Department of Labor (DOL) and then petition the U.S. Citizenship and Immigration Services (USCIS) to classify the person as a temporary worker.

Who Qualifies

The H-1B visa category is appropriate for faculty members, researchers, and many other kinds of temporary workersat the professional level. This category may not be used for graduate students. The RF uses this category to temporarily employ noncitizens who qualify as persons in "specialty occupations."

The Immigration Act of 1990 defines a "specialty occupation" as an occupation that requires:

- theoretical and practical application of a body of highly specialized knowledge, and
- attainment of a bachelor's or higher degree (or its equivalent) in the specific specialty.

  The regulations implementing the law further define specialty occupations to include such fields as architecture, engineering, mathematics, physical sciences, social sciences, medicine, health education, business specialties, accounting, law, theology, and the arts.

Employer Obtains the Visa

The prospective employer must initiate the process to obtain an H-1B visa on behalf of a noncitizen. There are two basic actions operating locations must take to obtain an H-1B visa for a noncitizen:

Submit to the U.S. Department of Labor (DOL) a labor condition application (LCA), which essentially affirms that employment of the noncitizen will not adversely affect other workers. For more information, refer to the guidance document, "Labor Condition Application (LCA) for H-1B and E-3 Nonimmigrants." The LCA and necessary supporting documentation must be made available for public examination within one working day after the date on which the LCA is filed with ETA.

Submit to the U.S. Citizenship and Immigration Services (USCIS) (after the LCA is certified by the DOL) a "Petition for a Nonimmigrant Worker" (Form I-129) and "H-1B Data Collection and Filing Fee Exemption Supplement to Form I-129." For more information, refer to the guidance

document, "H-1B Petition for a Nonimmigrant Worker."

DOL processing times vary greatly based upon agency workloads. The DOL charts processing times on their Web site at https://www.foreignlaborcert.doleta.gov/perm.cfm.

Duration of Stay

An H-1B visa holder may be admitted to the United States for an initial period of up to three years but may not remain in the U.S. for more than the employment period indicated in the labor condition application (LCA). Extensions of up to three more years may be requested by the employer. Any extension petition must be accompanied by a labor condition application certified by the DOL. Note: The H-1B visa is for temporary employment. Typically, the maximum total stay in H-1B status is six years. However, with the passage of the American Competitiveness in the Twenty-First Century Act of 2000, an extension of H-1B worker status may be granted in one-year increments if the applicant has filed for lawful permanent residence and is waiting adjudication of an application that has been on file for more than 365 days.

If employment for the H-1B visa holder ends before the end of the employment period indicated on the LCA, the visa holder must leave the U.S. unless he or she has filed or been approved for a change of status. Refer to the section, "When Employment Ends." The H-1B visa holder has a 10-day grace period after employment ends in which to depart the U.S. or change to a different visa status.

When Employment Ends

Current law limits the number of foreign workers who may be issued a visa or otherwise be provided H-1B status. Therefore, operating locations should ensure that the H-1B worker either maintains a relationship with the RF or is terminated. The following table describes under what circumstances an H-1B worker may have a relationship with the RF:

If an H-1B visa holder is not performing work because of . . .	Including, but not limited to . . .	Then . . .
A decision by the RF	• lack of work • lack of grant funding • lapse of permit • lapse of license • disciplinary action • mandatory vacation	Operating locations must do one of the following: • Pay the full wages due, or • Charge leave accruals in order to pay the full wages due, or • Terminate the employee from the RF payroll and notify the USCIS.
A voluntary request, unrelated to employment, by the H-1B visa holder	• request for personal leave • child care • disability • caring for an ill family member	Operating locations may put the H-1 visa holder on unpaid leave of absence status.

Guaranteeing Return Passage

Under the Immigration Act of 1990, the employer must promise to pay for the return trip of H-1B employees whose employment is terminated prior to the expiration of the authorized period of stay. Even when the cause for termination is beyond the employer's control (e.g., a government grant that had covered the noncitizen's salary unexpectedly ends) the employer is liable for the return transportation costs.

Only if the noncitizen terminates the employment relationship is the employer released from this obligation.

If the employer fails to comply with this provision, a noncitizen may advise the USCIS service center in writing. The complaint by the noncitizen will be placed in the employer's file for that

noncitizen. No penalties can be imposed on the employer, but the USCIS could consider the fact that the employer did not comply with this provision when reviewing future nonimmigrant petitions by the employer.

Payment and Taxation of the H-1B Worker

Paying an H-1B Worker

An employer must start paying the regular salary of an H-1B worker as soon as employment begins, unless the worker voluntarily requests unpaid time off or is unable to work because of personal reasons. The employer must pay a worker's full salary even if the H-1B worker is temporarily "benched" because he or she does not have the required permit, license, or training to do the job. Likewise, the employer must continue to pay H-1B workers who are not working because of disciplinary actions, mandatory vacations, holidays, summer recesses, or semester breaks. If an export license is required for the beneficiary they should be assigned to alternate duties while waiting (See Export Controls Section in H-1B Petition for a Nonimmigrant Worker document).

Taxation

- Income tax is paid on income derived from employment in H-1B status, unless tax exemption is specifically provided by an income
  tax treaty or convention.
- The employment of an H-1B noncitizen is not excluded from social security coverage and is therefore subject to social security employee tax.
  Note: If the noncitizen, while employed by the operating location, changed from a visa status in which the noncitizen was exempt from FICA, such as F-1 status, to H-1B status, then operating locations must begin to withhold FICA taxes.Noncitizens in H-1B status are residents for tax purposes if they meet the substantial presence test. Refer to the document, "Classification of Aliens as Residents or Nonresidents for Tax Purposes."

Summer Employees

A full-time SUNY employee holding a H-1B visa for work at SUNY must obtain a concurrent H-1B visa for Research Foundation work. The H-1B is an employment based petition. Because SUNY and the RF are separate employers, an H-1B obtained by SUNY does not authorize the person to work for any other employer, including the RF.

Under the H-1B portability provisions, the nonimmigrant alien previously issued an H-1B visa or otherwise accorded H-1B status can begin working for a new H-1B employer as soon as the new employer files an H-1B petition for the noncitizen. There is no need to wait for USCIS approval. Refer to "Portability" in the "Additional Regulations" section below for more information.

Additional Regulations

Temporary Employment

Employment in this category must be temporary. The position to be filled by the noncitizen can be permanent in nature, but the employer's intention must be to employ the noncitizen temporarily in that position.

When Work May Begin

The employer shall not allow the nonimmigrant worker to begin work until USCIS grants the worker authorization to work in the U.S. for that employer or, in the case of a nonimmigrant who is already in H-1B status and is changing employment, to another H-1B employer until the new employer files a petition supported by a certified LCA.

Maintaining Documentation

The employer shall maintain documentation to meet its burden of proof with respect to the validity of the statements made in its LCA and the accuracy of information provided, in the event that such statement or information is challenged. The employer shall also maintain such documentation at its principal place of business in the U.S. and shall make such documentation available to DOL for inspection and copying upon request.

The RF as Sponsor

H-1B status requires a sponsoring U.S. employer; an individual noncitizen cannot gain H-1B status on his or her own. An H-1B visa holder may be employed only by the employer that petitioned for the status. Therefore, the RF may employ an H-1B visa holder only when the RF is the petitioner. The Research Foundation and SUNY may each file a separate petition for concurrent employment of the same noncitizen, thereby enabling the visa holder to work for both organizations. If SUNY is the only petitioner, the Research Foundation cannot employ the noncitizen. Also, refer to the section, "Summer Employees."

H-1B Dependent Employer

If 15 percent of an employer's total workforce is composed of H-1B workers, the employer is considered to be a "H-1B Dependent Employer" subject to additional rules and regulations. Because the RF's total workforce comprises far less than this percentage of H-1B workers, the RF is not a H-1B Dependent Employer.

Portability

The portability provision of the American Competitiveness in the Twenty-First Century Act of 2000 allows a nonimmigrant alien with a H-1B visa, or otherwise accorded H-1B status, to begin working for a new H-1B employer as soon as the employer files an H-1B petition for the alien. An alien must have been lawfully admitted to the United States. The new employer must have filed a "nonfrivolous" petition while the alien was in a period of stay authorized by the Attorney General.

Spouse or Dependent

The spouse or child of a person holding an H visa is eligible for an H-4 visa. Persons holding an H-4 visa cannot work in the U.S., although they may attend school. H-4 students who must work as part of their program or assistantship must change their status to F-1 or J-1.

Change in Status

An H-1B visa holder who has spent six years in the U.S. in H-1B status may not be readmitted to the U.S. under the H or L visa classification unless the person has maintained a residence and been physically present outside the United States for one year immediately prior to re-admission.

Note: Time spent on any brief trips back to the U.S. for business or pleasure does not count towards fulfillment of the required time abroad.A noncitizen in H-1B status may petition for permanent residence without violating his or her H-1B status. The filing of a preference petition for permanent resident status for a noncitizen shall not be a basis for denying an H-1B petition, a request for extension, admission to the United States, or change of status from another visa category.

Procedure for Employing H-1B Workers

The Research Foundation may employ an H-1B visa holder only if the Research Foundation successfully petitioned the DOL and USCIS to have the person classified as eligible for the visa. Refer to the DOL's Web page at https://www.foreignlaborcert.doleta.gov/h-1b.cfm, which describes qualifying criteria and processes for filing when hiring a H-1B Specialty (Professional) Worker.

The following table contains the RF's procedure for employing H-1B visa holders:

Step	Action

1	Verify that the person has an appropriate visa.
2	Appoint the person to the payroll, following all Research Foundation appointment procedures (i.e., funds availability, completion of U.S. Government Form I-9, "Employment Eligibility Verification").
3	Mail or give a copy of the certified labor condition application to the employee on or before the beginning date of employment. **Note:** Because the employer must have proof of carrying out this step, send the LCA by certified mail or, if delivered in person, request that the employee sign a receipt.
4	If employment is terminated prior to the expiration of the authorized period of stay for any reason other than the employee's decision, agree to pay for the person's return trip to his or her home country. For more information, refer to the section "When Employment Ends."
5	Once the work authorization date expires, take one of the following steps to reappoint the person: • file a new LCA and a request for extension of H-1B status, if the person is eligible. (The maximum total stay in H-1B status is six years.) For more information, see the "Requesting Extension" section of the document "H-1B Petition for a Nonimmigrant Worker." • obtain documentation from the person that he or she has received an approved change of status to another visa type or has filed a timely application for a change of status. While waiting for a determination from USCIS, employment may continue for a period not to exceed 180 days from the date of expiration of the authorized period.

Forms

Noncitizen Employment Forms are available in the Noncitizen Employment section of the Personnel Administration business area on the RF Web site.

Labor Condition Application for H-1B Nonimmigrants (Form ETA 9035) is available from the Department of Labor Web site. No fee required. Refer to the DOL Web site at https://webapps.dol.gov/libraryforms/.

"Petition for a Nonimmigrant Worker" (Form I-129) and "H-1B Data Collection and Filing Fee Exemption Supplement to Form I-129" are available from the USCIS. Fee required. Forms are available by mail from USCIS Forms By Mail.

For More Information

U.S. Department of Labor Web site:

- DOL Employment and Training Administration home page.

  U.S. Citizenship and Immigration Services (USCIS) Web site: https://www.uscis.gov/

  Procedures and Guidance documents (Noncitizen Employment procedure group):

- Labor Condition Application (LCA) for H-1B and E-3 Nonimmigrants
- H-1B Petition for a Nonimmigrant Worker

Change History

- **December 23, 2010 -** Added reference to export controls in "Paying an H-1B Worker" section
- **February 24, 2006** - Changed Form I-129W requirements to reference the supplement name rather than the form name

(Form I-129W is obsolete).

- **November 25, 2005** - Updated portability provisions for the H-1B visa.
- **February 27, 2001** - Updated from 120 to 180 the number of days employment may continue while waiting for INS determination.
  Updated sections to reflect changes from the American Competitiveness in the Twenty-First Century Act of 2000.
- **March 19, 2002** - Incorporated "H Visa Overview" (hapro074.htm) into this document.

Feedback
Was this document clear and easy to follow? Please send your feedback to webfeedback@rfsuny.org.