

H-1B Nonimmigrant Status, Permanent Residency & Updates

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General overview

- H-1B process
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 - DOL update
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 - President Biden new immigration Bill

H-1B Basics

The H-1B is temporary nonimmigrant classification that allows U.S. employers to hire foreign national to work in a specialty occupation.

Requirements:

- The position must require a bachelor's degree or higher in a specific field and
- the offered salary must meet regulatory wage requirement:

What makes it a Specialty Occupation?

1. A bachelor degree or higher 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 are so specialized and complex that knowledge required to preform the duties is usually associated with the attainment of a bachelor's degree or higher

H-1B Basics

Employer sponsored: An employer must initiate the application process on behalf of the employee. The employee can not apply for H-1B status themselves.

specific to the sponsoring employer and to the terms/conditions filed in the original petition (Job title, job duties, salary, # of hours worked, work location)

Duration:

Can be up to 3 years initially

Renewable for 3 more years -6 year maximum

- Eligible for another 6 years after 1 year stay outside U.S.
- Eligible for extension beyond 6 years if employee is sponsored for PR process and receives approved I-140

No advertising or test of the U.S. labor market required like in Permanent Residency cases

Doctrine of Dual intent: the international employee can be in the U.S. as a non-immigrant and intent to pursue permanent residency.

Cost: the sponsoring department must cover all costs associated with the H-1B petition

Wage Requirement

Labor Condition Application (LCA) - first step of the H-1B petition

The employer attests to the DOL to pay the H-1B employee the higher of the actual wages or the prevailing wage.

- actual wages: the wage UT pays to other employees in similar positions with similar qualifications and experience (in-house wages)
- prevailing wages: wages in a particular occupational classification in our geographic location as determined by DOL.
UT utilizes the occupational employment statistics (OES) survey to calculate the prevailing wages as determined by the DOL

Employer sponsored Permanent residency

Most common employer sponsored PR EB-2 advanced degree (majority of UT employees who are sponsored for PR are filed under Eb-2 category): 3 step process

1 File Labor certification with Department of Labor (DOL)

- File Prevailing wage determination with DOL: employer is requesting the DOL to determine the prevailing wages based on the position description and position requirements and specific worksite locations.
- Complete a competitive recruitment and selection process (advertise in a national professional journal for 30 days, interview qualified candidates. Select the most qualified candidate)
- complete competitive recruitment report
- conduct notice of Filing & 30 day quiet period
- file Labor certification with Department of Labor

* if competitive and recruitment selection was completed initially, the PERM must be filed within 18 months of offer letter.

2 once the PERM is certified, file the I-140, immigrant petition with USCIS

3. File I-485 (the green card application) with USCIS. Starting March 2018 the employee is responsible for this step

* All PR applications are assigned to outside counsel by Ohio attorney General's Office

Updates

Department of Labor (DOL), prevailing wage increase rule:

- The previous administration published an Interim Final Rule (IFR) that significantly increased prevailing wages across all occupations for H-1Bs and Permanent Labor Certification Programs (employment based permanent residency).
- The DOL uses the Occupational Employment Statistics (OES) data to establish prevailing wage level for the LCAs (H-1Bs) and PERMs
- The four tier wage arrangement is planned to ensure the wages paid to the foreign national employee meet the industry's standards and do not compromise wages for similar U.S. employees
- This rule caused significant wage increases to all 4 wage levels of the OES survey across all occupations
- The DOL IFR become effective October 8, 2020

Wage Level	Percentile Starting 10/08/2020	Percentile Prior to 10/08/2020
Level I	45 th	17 th
Level II	62 nd	34 th
Level III	78 th	50 th
Level IV	95 th	67 th

DOL wage increase cont.

- In December Federal Courts set aside the DOL wage increase rule citing the agency bypassed the notice and comment process as required by the Administrative Procedures Act (APA)
- The previous administration tried to introduce the wage increase rule again in January 2021 (slightly modified from original version which contained phased -in implementation).
- After some delays, the rule was set to be effective May 14, 2021 with the applicability date as July 1st, 2021 (start of transition period)
- On March 22, 2021 the Department of Labor (DOL) proposed to further delay the prevailing wage increase rule for a period of 18 months
- Effective date Nov. 14, 2022 with the first transition period commencing Jan 1, 2023
 - Public will have opportunity to comment on or before April 21, 2021.

NEW WAGE LEVEL CALCULATION

If the DOL wage increase is implemented

Wage Level	Current Percentile	Final Rule Percentile
Level I	17%	35%
Level II	34%	53%
Level III	50%	72%
Level IV	67%	95%

DHS Interim Final Rule (IFR)

- The DHS IFR was published on October 8th and is effective on December 7, 2020 which would affect all petition filed after December 7th
- The DHS IFR focused on specialty occupation, employer/employee relationship and H-1B compliance through inspection
- Goal: make it more difficult for employers to hire foreign national employees
- Federal courts also set this Rule aside siting it violated Administration Procedure Act.
- Previous administration on January 15 tried to release similar rule again imposing more restrictions. Based on the new administrations memo since this rule was not officially published the rule was withdrawn.

PUBLIC CHARGE RULE TERMINATED

- In 2019, the previous administration expanded the definition of “public charge” and applied it to those who were considered likely to become dependent to government benefit. This affected individuals applying for Permanent Residency and H-1Bs.
- This new interpretation also impacted the H-1B petition we were preparing on behalf of UT employees. There were set of questions in the application UT had to answer on behalf of the employees.
- The case went up to Supreme court. In March 9th, the Biden administration requested the Supreme court to dismiss the “public charge” rule. According to the DHS secretary this rule was “not keeping with our national value.”

President Biden's new Immigration reform bill

Key provisions of the bill

- Employment-based PR: raise the worldwide level of employment based immigrant visas from 140,00 to 170,000 and add unused employment-based visas from previous fiscal years
 - This may fix the green card backlog issues in employment based categories
- International students with Ph.D. in STEM (science, technology, engineering and math) from U.S. universities eligible to get their green cards without numerical limits (fast track)
- Grant PR to anyone who has waited 10 years with an approved immigrant petition.
- More protections for dependents of H-1Bs who are in the PR process and permit employment authorization for H-1B dependents.

President Biden's new Immigration reform bill

Other provisions of the bill:

- DHS and DOL can establish regulation limiting employment based immigrants (PR) in geographic areas that experiencing high levels of un-employment (subjective/open to interoperation)
- Eliminate H-1B lottery system and replace it with wage-based system. Awarding H-1B to higher wage levels
 - Does not affect UT H-1B petitions (UT is cap exempt)
 - But will affect many international students who may start with entry level positions that may otherwise qualify for specialty occupation
- There will be many debates and proposed amendments – unclear if the bill will pass congress and become law

Sources

- Department of Labor
 - <https://www.dol.gov/>
- U.S. Citizenship and Immigration Services (USCIS)
 - <https://www.uscis.gov/>
- U.S. Department of State
 - <http://travel.state.gov/>

CISP

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