



THE EMPLOYER'S GUIDE TO H-1B CAP SEASON

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AN INTRODUCTION FROM SARA HERBEK

The H-1B is one of the most sought-after employment-based visas. However, with a cap of 85,000 visas annually, it's important for human resources professionals and hiring managers to understand the H-1B process and plan accordingly at their organizations.

Planning is especially important now because in recent years, we've seen considerable changes to the H-1B process, from selecting petitions in the regular cap first, to the introduction of electronic registration. Working with legal counsel ahead of time to develop a plan and determine next steps for both the company and the foreign nationals who will be entering the lottery helps ensure a seamless experience throughout the petition process.

I hope those who read this guide find it helpful. The fiscal year (FY) 2023 cap season is right around the corner. Despite continuing impacts from COVID-19, we anticipate FY 2023 cap season proceeding as normal. Please know that we are monitoring the situation closely and will provide updates if anything changes.

As such, always consult with legal counsel for more detailed information and help with any questions that come up along the way.

Sara Herbek, Managing Partner, Global Immigration Associates P.C.

AN INTRODUCTION TO THE H-1B



The H-1B visa is designated for individuals working in a specialty occupation, which is defined as a position requiring at least a bachelor's degree in a specific or related field (or its equivalent) and the foreign national being sponsored has at least a bachelor's degree in that specific or related field (or its equivalent).



New H-1B cap cases are generally for recent graduates of U.S. institutions. For human resources teams, it is important to communicate with the company's foreign national population to see who needs support throughout the H-1B process.



Employers look to hire professional foreign nationals on an H-1B because often times, they're seeking to fill roles that require knowledge in STEM-related fields, although this isn't always the case. According to USCIS data, 66.1% of all H-1Bs issued in Fiscal Year 2019 with known occupation data were for "computer-related occupations."¹



There are 85,000 H-1B visas available each year, and that number is broken down into two groups: the regular cap and master's cap. There are 65,000 visas set aside for the regular cap and the remaining 20,000 visas are reserved for individuals with a master's degree or higher from a U.S. institution.



The master's or advanced degree cap is meant for individuals with a qualifying U.S. master's degree or higher. The regular cap is meant for U.S. or foreign bachelor's degree or foreign master's degrees or higher.

1 <https://resources.envoyglobal.com/policy-and-news/dhs-proposes-new-rules-to-replace-h-1b-lottery-with-wage-based-selection-process>

WHAT IS H-1B ELECTRONIC REGISTRATION?

In late 2019, U.S. Citizenship and Immigration Services (USCIS) announced they would utilize a brand-new electronic registration system for the FY 2021 H-1B cap². In previous years, USCIS conducted the H-1B lottery after the submission of completed H-1B petitions. This system introduced major changes to the H-1B lottery process.

The H-1B lottery selection process begins with an online electronic registration of qualified H-1B beneficiaries. Employers or their designated attorneys input information about their company and each potential lottery recipient. Each H-1B beneficiary's information is entered into the online system and a nonrefundable, \$10 fee is required for each potential lottery recipient.

While the registration process is relatively straightforward, it requires a coordinated effort between an organization's immigration counsel and their immigration program manager.

USCIS then conducts the random H-1B lottery by selecting from the completed online registrations, although the random lottery could change. We will update this guide as needed if we need to. USCIS will first select petitions for the H-1B regular cap and will then select petitions toward the master's or advanced degree cap.

USCIS will then electronically notify petitioners, the designated company representative and the immigration provider of selections. Selections typically occur prior to April 1, and selected registrations must submit completed H-1B petitions within 90 days of lottery selection.

It is important to note that lottery selection does not guarantee approval of the H-1B petition, and all petitioners and their employees must demonstrate all mandatory qualifications, such as degree and salary, to be eligible for the H-1B visa. The LCA is needed as a supplemental document.

2 <https://resources.envoyglobal.com/policy-and-news/uscis-will-implement-h-1b-electronic-registration-for-fy-2021>

H-1B Requirements

Examples of Specialty Occupations

- Biotechnology
- Education
- Engineering
- Computer Sciences
- Management
- Medicine
- Many more

The position requires at least a bachelor's degree in a specific or related field (or its equivalent).

In addition, individuals must have completed a bachelor's degree or its equivalent in a field of study related to the position. If the individual obtained the degree overseas, or it is not a four-year bachelor's degree, an education evaluation must be completed to verify that through education or experience, the individual has the equivalent of a bachelor's degree.

Additionally, the salary for the position must meet minimum prevailing wage and actual requirements for the position offered at the worksite or city where the beneficiary will work.

H-1B Initial Period of Stay

The initial period of stay for an H-1B visa holder in the U.S. is typically three years.

H-1B Renewal

After the initial period of stay, employers may file a renewal or extension for the H-1B employee. This should extend the stay by up to three more years. H-1B visa holders may stay in the U.S. for six years in H-1B nonimmigrant status.

H-1B holders who have completed select portions of the green card application process may be able to extend their status beyond the six-year max-out date.

H-1B Petition and Filing Fees

As of September 2021³, these are the current H-1B fees:

- Petition filing fee: **\$1,710 - \$2,640**
- Premium Processing: Employers can choose to pay the **\$2,500 premium processing fee** when available. USCIS will then adjudicate the H-1B petition—meaning they are required to approve, issue a request for evidence or deny the petition—**within 15 calendar days**.

H-4 Dependents

The H-4 is a dependent visa available to dependent spouses and minor children (under 21) of H-1B visa holders.

H-4 visa holders can work, but they need to meet certain criteria to secure employment authorization. USCIS first started issuing employment authorization to H-4 visa holders in 2015.⁴

Thinking about the LCA

A Labor Condition Application (LCA), the ETA Form 9035, is submitted to the Department of Labor (DOL) and establishes that an employer is paying at least the prevailing wage or the actual wage to its foreign national employee in a given geographical area. The LCA also ensures fair working conditions, and an approved LCA is required for the H-1B.

This means that once the electronic registration is selected, employers or their designated representative will have to file an LCA and receive a certification by the DOL before moving forward with the petition process. Standard processing time is 7-10 days, but during cap season, processing may take longer.

Additionally, entities that have never filed an LCA must first be registered with the DOL. This step can add even more time to the process. Keep in mind that this can be done pre-electronic registration.

The LCA is a major compliance piece for employers. It's one piece of the H-1B and also one piece of the Public Access File. As such, it is essential to comply with the conditions certified in the LCA throughout the duration of the H-1B visa petition process, or there may be penalties.

These conditions include:



Every LCA filed is available for the public to search via the U.S. Department of Labor's FLAG system.

⁴ <https://resources.envoyglobal.com/hr-immigration-corner/ead-employment-authorization-document-information>

'PERFECTING' THE PETITION

Remember from earlier, only petitioners who have an electronic registration selected can submit the full H-1B petition.

If selected, collect the appropriate employer and employee documents. The Checklist section of this guide has a detailed breakdown on which documents to collect.

! Practice Pointers: Job Descriptions

Maximize the chance of success in the H-1B lottery by providing detailed job descriptions.

Provide specific, detailed job duties that describe the worker's day-to-day activities.

Descriptions should also emphasize advanced concepts and knowledge. Make it clear that the position requires a specific degree. Broad categories such as "Engineering" or "Business Administration" often trigger a request for evidence (RFE).

Let's look at a few examples:

Develop high-quality software for our business → Too vague.

! **Practice pointer:** Utilize technologies including Java, Ruby and Python. Develop software to automate Company's shipment tracking platform.

Communicate with other teams about business requirements → Too vague.

! **Practice pointer:** Collaborate with internal departments, including HR, Fulfillment and Accounting to identify software needs for shipment tracking platform.

Submitting the Petition

With the new H-1B cap process, USCIS adjudicates H-1B petitions on a first come, first served basis once the cap opens. USCIS will take some time to review cap-subject petitions. Lottery selection is completely random; there is no way to increase the odds of being accepted. However, this step is subject to change.

USCIS will review the cap-subject petition and send out a receipt number. Before a petition is approved, USCIS can submit a request for evidence, which we will discuss in more detail in the following section.

REQUESTS FOR EVIDENCE

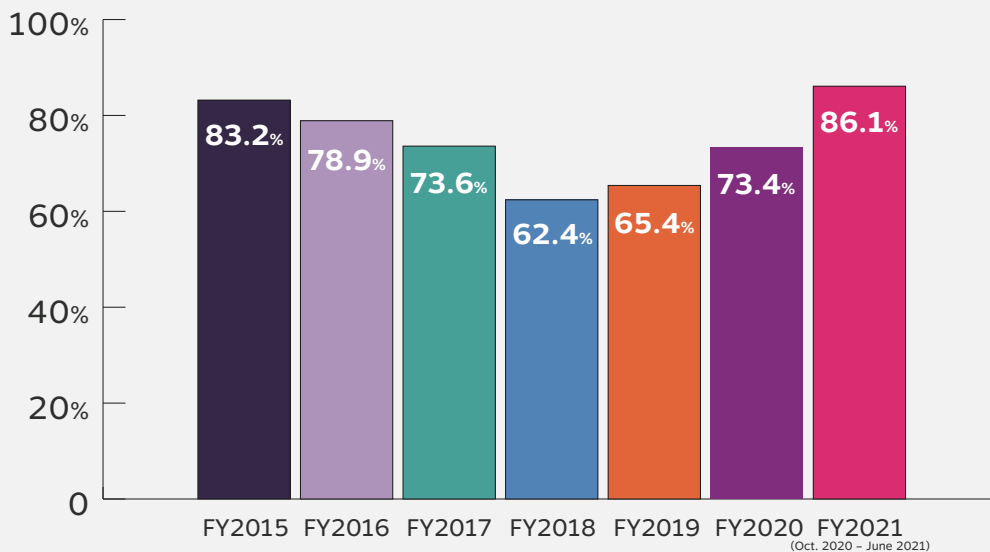
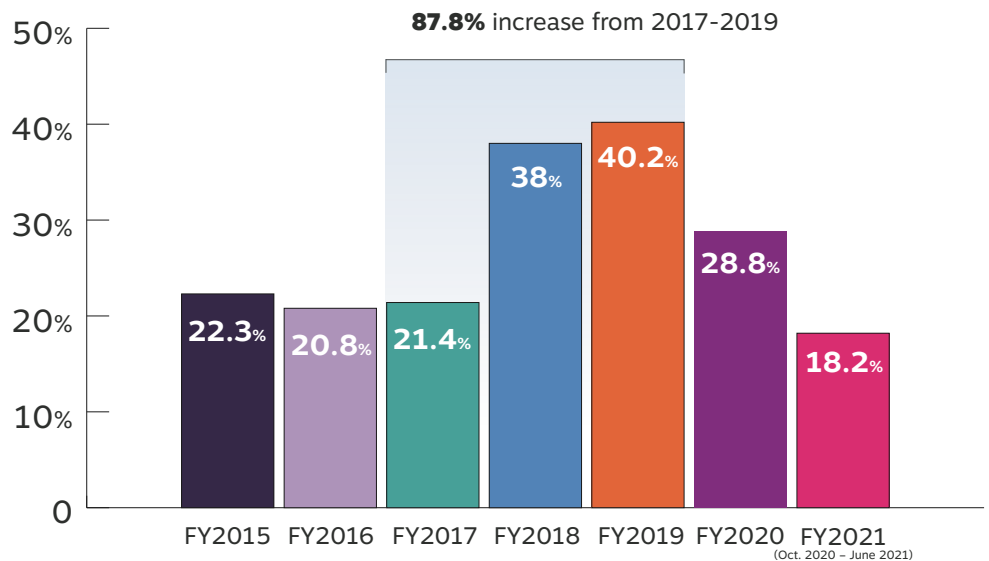
What is a Request for Evidence?

Requests for evidence (RFEs) are notices sent by USCIS, informing petitioners that, per USCIS, the petition needs to provide further information or that they need more clarification in the petition to make a determination.

Employers must work with their legal counsel to send the requested information to USCIS before their petition can be approved. Failure to do so may result in a denial.

Let's look at the numbers to see how often USCIS issues RFEs.

This graph shows the percentage of petitions submitted and completed that received an RFE. According to USCIS data, **28.8%** of petitions received an RFE in FY 2020.⁵



Once a petition receives an RFE and is re-submitted, USCIS approves it **73.4%** of the time, according to FY 2020 data.

5 https://www.uscis.gov/sites/default/files/document/data/I129_Quarterly_Request_for_Evidence_FY2015_FY2021_Q3.pdf

REQUESTS FOR EVIDENCE

Common RFEs

Four of the most common reasons for RFEs in FY 2018 were:

- Specialty Occupation
- Employer-Employee Relationship
- Evidence of the Beneficiary's Qualifications
- Maintenance of Status

Impacts of RFEs

There are many impacts of receiving RFEs on a petition. First, expect longer processing times. USCIS typically issues a response to an RFE within 60 days, though this is not a regulatory requirement. In some cases, responses can take longer than 60 days.

Also, prepare for higher costs as additional work must be completed with the petition. Finally, employers should anticipate increased uncertainty and apprehension about filings among foreign national employees.⁶



Conclusion

We hope you have found this guide informative and applicable to your role. The following sections include additional resources, such as an H-1B checklist and glossary of important terms.

For more detailed and case-specific questions, consult an attorney at one of the two U.S. Law Firms working with the Envoy Platform or another qualified professional. On non-U.S. immigration issues, consult an Envoy global immigration service provider or another qualified representative.

6 <https://resources.envoyglobal.com/blog/h-1b-cap-prep-how-to-support-your-employees-before-during-and-after-the-petition>

H-1B DOCUMENT CHECKLIST

An important step toward ‘perfecting’ the petition is to ensure you collect the necessary documentation. The following are examples of relevant supporting documentation.

Employer Documentation

- ✓ Corporate website content
- ✓ Catalogs
- ✓ Brochures
- ✓ Job description
- ✓ Terms of employment
- ✓ Offer of employment
- ✓ While not mandatory, financial documents help USCIS verify the legitimacy of your company
- ✓ Tax returns or an annual report
- ✓ Local business registration
- ✓ Business plan
- ✓ Client list

Employee Documentation

- ✓ Documentation of the employee’s current immigration status, if in the U.S.
- ✓ College diploma
- ✓ Transcripts
- ✓ Passport biographical page
- ✓ Resume or any curriculum vitae
- ✓ Education evaluation → If the employee’s degree was completed outside the U.S., an education evaluation is usually recommended to confirm the U.S. equivalency of the employee’s education.

GLOSSARY

Common terms you'll come across during the H-1B cap:



H-1B

Commonly used work visa that allows foreign nationals in specialty occupations to seek temporary employment in the U.S.



U.S. Citizenship and Immigration Services (USCIS)

A federal agency that oversees lawful immigration to the United States by issuing employment authorization documentation, maintaining Form I-9 and administering the E-Verify employment eligibility verification program. This agency will adjudicate most work authorization petitions.



U.S. Department of Labor (DOL)

A government agency that fosters and promotes the welfare of workers, job seekers and retirees by improving and maintaining working conditions and benefits. The DOL also regulates the LCA and PERM process in the interest of protecting the U.S. labor market.



Approval Notice

A notice mailed to the employer or an attorney establishing that an FN has been approved for the applicable employment authorization, work visa or green card.



Employment Eligibility Verification

Also known as Form I-9. A document created by DHS and USCIS to verify the identity and legal work authorization status of an employer's candidate.



Labor Condition Application (LCA) or ETA Form 9035

An application submitted to the DOL that establishes an employer is paying at least the prevailing wage to its FN worker in a given geographical area. An approved LCA is required for the H-1B, H-1B1 and E-3 visas.

COMMON IMMIGRATION TERMS



Applicant

Foreign nationals applying for a visa for their own benefit.



Cap

A limit on the number of visa applications processed for a particular category. A cap applies to H-1B visas, which limits the number of new applications processed annually to 85,000.



Cap-Gap Extension

An F-1 OPT status extension granted to student visa holders waiting for their H-1B transfer of status to begin. Due to the H-1B cap season, a status gap occurs when the student's F-1 OPT status ends on or after April 1st and the H-1B start date has yet to take effect.



Change of Status

A request filed with USCIS stating an individual would like to officially change the purpose of his or her visit to the United States. For example, foreign students on F-1 visas often transfer to H-1B statuses to gain work authorization.



Dependent Visa

A special visa classification offered to spouses and unmarried children 21 years old and younger to allow them to travel and stay in the United States with a work visa holder, such as the H-1B and its H-4 dependent status.



E-Verify

A Web-based system that compares information from an employee's Form I-9 to data from DHS and Social Security Administration records to confirm employment authorization.



Extension of Status

The act of renewing non-immigrant status to extend the length of stay in the current status. For example, H-1B visas can be renewed for up to three years at a time.



Foreign National (FN)

A person who is not a citizen of the host country in which he or she is temporarily residing. All nonimmigrant visa holders, such as L-1A or TN recipients, are FNs.

COMMON IMMIGRATION TERMS



Government Fees

Costs associated with the visa applications that are paid to government agencies such as USCIS or the DOS.



Immigrant Status

A term used for individuals living in the United States permanently. The majority of work visa holders have nonimmigrant status, denoting the temporary nature of their stay in the United States, while green card holders have immigrant status.



Nonimmigrant

An FN who is admitted to the United States for a specific, temporary period of time. Nonimmigrant visa categories include: H, L, O, P, J, F and TN.



Petition

A petition establishes that an employer wishes to sponsor an FN for a H-1B temporary work visa.



Petitioner

In the H-1B context, refers to the employer sponsoring a foreign national for work authorization.



Premium Processing

This is an expedited adjudication process for an additional fee requiring USCIS to take action within 15 calendar days of receiving a petition for certain visas or certain parts of the green card application process.



Prevailing Wage

The hourly wage or salary paid to the majority of workers within a particular area. This is used during the green card application's PERM requirement or in other non-immigrant work authorization categories to establish a fair working wage for the position offered, within the worksite location and for in a given industry.



Processing Time

The time it takes a visa or green card to complete processing. Once accepted for processing, a work visa may take months; however, green cards can span years due to backlogs.



ABOUT ENVOY

Founded in 1998, Envoy is a global immigration services provider offering the only immigration management platform that makes it seamless for companies to hire and manage an international workforce. By combining top-notch legal teams—for both inbound and non-U.S. immigration—and proprietary technology, Envoy empowers companies to acquire the best talent regardless of where they live, while simultaneously managing their entire global workforce and enabling employees to take advantage of business opportunities around the globe. Envoy serves over 1,000 customers ranging from high-growth startups to Fortune 50 corporations.

For more information please contact: insights@envoyglobal.com

Envoy is pleased to provide you this information, which was prepared in collaboration with Sara Herbek, who is the a Managing Partner at Global Immigration Associates (GIA), one of the two independent U.S. law firms Envoy exclusively works with on the Envoy Platform (the “U.S. Law Firms”).

Content in this publication is for informational purposes only and not intended as legal advice, nor should it be relied on as such. For additional information on the issues discussed, consult an attorney at one of the two U.S. Law Firms working with the Envoy Platform or another qualified professional. On non-U.S. immigration issues, consult an Envoy global immigration service provider or another qualified representative.

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