

H-1B ADVANCED

International Scholars Operations (ISO)

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AGENDA

- H-1B Overview
- Ineligibility for H-1B
- Troubleshooting with DOL
- Q&A Break 1
- Troubleshooting with USCIS
- After the Approval
- Ending H-1Bs
- H-4 Dependents
- Q&A Break 2

H-1B OVERVIEW

H-1B TEMPORARY WORKER

- Worker coming to U.S. to work in a “specialty occupation”
- Position must require at least a bachelor’s degree in a relevant field
- More compatible with application for permanent residence than J-1, F-1, TN, or E-3
- Filing fees of up to \$3,460
 - USCIS has proposed fee increases to \$3,780

UW LIMITS ON H-1B ELIGIBILITY

UW only sponsors for full-time, academic personnel titles listed on H-1B page

UW generally matches visa sponsorship to appointment dates:

- Multiyear-eligible appointments: Dates must match exactly
- Annual appointments: Dates must match UNLESS offer/reappointment letter states “Continued visa sponsorship is contingent upon successful reappointment.”

H-1BS ARE HIGHLY REGULATED

- Cap of 85,000 new H-1Bs per year for private employers (with exceptions)
- Limited to 6 years of total H-1B time (with exceptions)
- Changes must be reported to Department of Labor (DOL) and U.S. Citizenship and Immigration Services (USCIS)

INELIGIBILITY FOR H-1B

WAYS TO BE INELIGIBLE

- Out of status or significant lapse in status
- Subject to 212(e) two-year home residence requirement
- Inadequate credentials
- Already used up all available H-1B time

OUT OF STATUS

- If scholar's current immigration status in the U.S. has ended, they may be ineligible to change status to H-1B (or any other status)
- Depending on how long they've been out of status, they may be able to leave the U.S. and reenter on a new H-1B.

212(E) TWO-YEAR HOME RESIDENCE REQUIREMENT

- Applies to certain J-1 exchange visitors based on
 - Receipt of government funding
 - Applicability of home country “skills list”
 - Participation in graduate medical training as J-1
- Employee can get an [advisory opinion](#) from Department of State if uncertain whether this requirement applies
- Scholars can apply for waivers of this requirement, but:
 - Waivers can take a long time to get
 - Not everyone is eligible for a waiver

INADEQUATE CREDENTIALS

- Foreign medical graduates who will engage in patient care must
 - Have completed all three steps of the U.S. Medical Licensing Exam
 - Have a valid state license, if required
 - If graduate of medical school outside of U.S. and Canada, must also have certificate from Educational Commission of Foreign Medical Graduates (ECFMG)
- Foreign degree must be equivalent to required U.S. degree
 - Scholar must get a foreign educational equivalency evaluation for foreign degree from a [NACES member agency](#)
 - Some professional medical degrees are not entirely equivalent to M.D.

LIMITS ON H-1B TIME

- Scholars are limited to 6 years in H-1B status unless they leave the U.S. for one year
- Examples:
 - New hire who did 6 years in H-1B, then changed to an F-1, got a new degree, and is offered a new position at UW
 - Faculty hire who has already worked at UW or another employer in a different position for 4-5 years on H-1B

HOW TO GET MORE THAN SIX YEARS ON H-1B

- **Restart** after a year spent abroad
- **Recapture** time spent outside the U.S. during H-1B
- “AC21” extension based on green card process
 - 1-year extensions for scholars with an **approved or pending labor certification application or I-140 immigrant petition** that was filed 365+ days before the end of the sixth year
 - 3-year extensions for anyone with an **approved I-140** subject to a per-country backlog (usually India or China)

TROUBLESHOOTING WITH DOL

DOL PROCESSES

- Department of Labor (DOL) issues **Prevailing Wage Determinations** and certifies **Labor Condition Applications** (LCA)
- These processes are meant to protect U.S. workers and H-1B employees from exploitation by guaranteeing
 - Payment of “required wage” (the higher of the “prevailing wage” or “actual wage”) to H-1B employee
 - Equal working conditions to U.S. workers
 - Notice to U.S. workers of H-1B sponsorship
 - No strike, lockout, or work stoppage during H-1B sponsorship

FACTORS THAT DRIVE UP PREVAILING WAGE

- Extra degree requirements
Does it need a PhD **and** an MBA?
- Extra experience requirements
Does it really require 10 years of progressive experience?
- Managing/supervising
Even if “managing” a function or piece of equipment
- Combination of occupations
Does it combine two very different job functions, or two very different specializations?

PREVAILING WAGE ISSUES

What if DOL's Prevailing Wage Determination is higher than offered wage?

- (1) ISO will consider other visa options
- (2) OAP will review for pay equity to see if unit can pay higher wage

What if the Prevailing Wage Determination takes too long?

- (1) Employee may have to delay start date, stop work, or even leave country
- (2) ISO may consider whether forgoing “safe harbor” is an option

WHAT IS “SAFE HARBOR”?

- Safe harbor: Protection provided by DOL Prevailing Wage Determination
- If DOL’s Wage and Hour Division (WHD) audits UW for H-1B wage and hour violations, they will defer to DOL-issued Prevailing Wage Determination
- If no Prevailing Wage Determination on file, WHD will assign their own wage
 - If this wage is higher than what UW pays, WHD can assess back wages for the validity period of the H-1B

WHD AUDITS

- In the last five years, WHD has collected over \$24.5 million in back wages for H-1B violations
- WHD has audited other higher ed institutions for H-1B violations, including
 - The University of Kansas (\$100,000; 2015)
 - Five Branches University (\$60,000; 2013)
 - Indiana University, Bloomington (\$35,000; 2003)

FORGOING SAFE HARBOR

- UW always obtains a Prevailing Wage Determination for safe harbor.
 - In rare and exceptional situations, OAP may consider proceeding without a currently valid determination; for example:
 - Where a prior determination for the position is available
 - Where the offered salary is above the highest possible DOL wage data
- The decision to forgo safe harbor is OAP's. If OAP determines that forgoing safe harbor is appropriate, ISO will reach out to the relevant unit.

AVOIDING LCA POSTING ISSUES

- **Tell ISO how you want to post. Posting options include:**
 - Physical posting at the worksite(s)
 - Electronic posting via a listserv
 - Electronic posting via intranet
- **Read ISO's email regarding the LCA.** We will always send information needed to post correctly.

What happens if the posting isn't performed correctly?

If posting wasn't done for the requisite period or at two locations at all worksites, the **LCA may need to be withdrawn and refiled.**

TROUBLESHOOTING WITH USCIS

FILING WITH USCIS

- Once the LCA is certified, ISO prepares an I-129 petition to file with USCIS
- Normal USCIS processing can take anywhere from 15 days to 12 months, but can be expedited by payment of the \$2,500 premium processing fee
 - USCIS has proposed to change premium processing from 15 *calendar* days to 15 *business* days
- USCIS will review the petition and attached evidence and take action (meaning approval, denial, or request for evidence)

REQUEST FOR EVIDENCE

- USCIS may request additional evidence or information, for example:
 - Duties or requirements for the position
 - An itinerary or other documents for third-party worksites
 - The employee's current immigration status or eligibility for H-1B status
 - The employee's qualifications for the position
- ISO will contact the unit to gather evidence in response
- Preparing and submitting response may require additional time
- After UW response, USCIS gets more time to take final action

TRAVEL DURING CHANGE OF STATUS

To move an employee from one visa type (usually F-1 or J-1) to H-1B while in the U.S., UW usually requests a "change of status" on our petition to USCIS

What if the employee travels while change of status is pending with USCIS?

- USCIS will approve the H-1B petition but deny the change of status
- Employee must leave the U.S. when old status expires, apply for a new H-1B visa at a U.S. consulate, and reenter in H-1B status

Warn your employees about travel during this period and have them contact ISO at acadvisa@uw.edu with any questions.

H-1B EXTENSIONS & CHANGES OF EMPLOYER

H-1B extension or change of employer petitions must be filed with USCIS **while the employee is in the U.S. in valid H-1B status.**

USCIS may deny an extension or change of employer petition when:

- The employee is **outside the U.S.**
- The employee is **in violation of the terms of the H-1B**
- There is a **gap** between the end date of the previous H-1B employment and the start date of the extension/employment with new employer
 - There may be a 60-day grace period that allows a transfer in this case

REDUCED H-1B TIME

UW can request up to **three years** at a time on an H-1B petition.

However, sometimes USCIS grants less time.

Reasons may include:

- **Mismatch** between dates on employer letter, LCA, and USCIS forms
- **Professional license** expires before the requested end date
- Simple USCIS error

Always check approval notices when they arrive and contact ISO if dates don't match.

AFTER THE APPROVAL

EMPLOYMENT CHANGES IN H-1B STATUS

H-1B status is **employer- and job-specific**. The following changes may require new filings with DOL and USCIS:

- Title
- Employing unit
- Worksite(s)
- Job duties

UW does not reduce FTE for any H-1B employee.

[Contact ISO](#) early if you have questions about a prospective change in employment for an H-1B employee.

CAN I ADD WORKSITES LATER? MAYBE.

- For worksites in the same Metropolitan Statistical Area (MSA), inform ISO:
 - For non-CBA titles, we'll help you post notice at the new worksite for 10 days
 - For CBA titles, we'll send notice to the union
- For worksites outside the MSA:
 - Submit new visa request to ISO
 - But note [UW policies](#) may prevent these changes
- For short-term worksites (under 30 days), contact ISO

These steps must be taken **before** the employee starts working at the new worksite.

I-94 ARRIVAL/DEPARTURE RECORD

- Issued by DHS, either USCIS or Customs and Border Protection (CBP)
- Records who is admitted to U.S., for how long, and in what status
- USCIS H-1B approval notices for change or extension of status include an I-94 record at the bottom.
- CBP also issues a new I-94 record every time the H-1B employee enters the U.S.
 - The end date on the new I-94 normally matches their approval notice.

I-94 EXPIRATION DATE

Sometimes the I-94 expiration date will be **earlier** than the approval notice expiration date.

This may be because:

- The employee's passport will expire earlier
- The CBP officer used their discretion to admit for a shorter period
- CBP officer error

Make sure the employee uses the I-94 website to **print and *check* their new I-94 after *every* entry into the U.S.**

MISSED I-94 EXPIRATIONS

- Staying beyond the end date on the I-94 record is technically “unlawful presence” and the employee is not authorized to work
 - More than 180 days: 3-year bar on entry
 - More than one year: 10-year bar on entry
- Possible remedies for overstay include:
 - H-1B employee asks CBP for a correction
 - H-1B employee exits, applies for a new visa stamp, and reenters
 - UW files a new petition to correct the error
 - H-1B employee contacts a private immigration attorney for legal advice

ENDING THE H-1B

ENDING H-1B STATUS – TERMINATION / RESIGNATION

- **If the H-1B employee resigns or is terminated** before the H-1B end date, **let ISO know.**
 - ISO will withdraw the H-1B and the underlying LCA.
- **If the H-1B employee is terminated** before the end of the H-1B, unit must pay reasonable repatriation costs to the home country.
- Inform employee that resignation/termination date is the **last day of H-1B status** with UW
- Grace period of up to 60 days may be available.

THE 60-DAY “GRACE” PERIOD

- Available upon early termination/resignation
- H-1B employees may maintain status for up to 60 days after termination, or to end of H-1B approval, **whichever is earlier**
- Allows H-1B employee to change employers or apply for change of status
- DHS has discretion to grant or deny; if denied, H-1B employee may have to leave and reenter

ENDING H-1B STATUS – CHANGE OF STATUS

If the H-1B employee gets another immigration status, such as a permanent residence, let ISO know.

- Send us a copy of the employee's green card (or other status document)
- We will withdraw the H-1B and the underlying LCA

10-DAY DEPARTURE PERIOD

CBP or USCIS may grant **10-day departure period** when the employee enters the U.S. in H-1B status or has their status changed or extended.

If granted, this period will be noted on the I-94 record.

Things to remember about the departure period:

- **Does not apply automatically**
 - Applies only if granted on the I-94, and
 - Does NOT apply after an early resignation or termination.
- **Does not authorize employment.**

H-4 DEPENDENTS

H-4 DEPENDENTS

- A spouse or child under the age of 21
- Can get an H-4 visa at a consulate abroad
- Can change or extend H-4 status inside the U.S. using Form I-539
 - See our [H-1B Checklist](#) for more information
- If H-4 child will turn 21, they should see an immigration attorney to discuss options

WHAT CAN H-4 DEPENDENTS DO?

- H-4 dependents are allowed to study at U.S. schools
- H-4 dependents are not allowed to work, unless they have received an EAD based on
 - Pending I-485 permanent residence application
 - “AC21” eligibility of H-1B spouse
- If you want to employ an H-4 dependent, contact ISO

COMING CHANGES

PROPOSED RULE ON USCIS FEES

- [Published in the Federal Register](#) on 01/04/2023
- 60-day public comment period ends on 03/06/2023
- Proposed increase in I-129 filing fees (currently \$460):
 - H-1: \$780
 - E, TN, O: \$1,015
- Premium processing timeframe would change from 15 calendar days to 15 *business* days

UW FINANCIAL TRANSFORMATION ("FT")

- [FT](#) will be implemented 07/01/2023
- How ISO bills for visa requests will change
- There may be a blackout period of days or weeks for new visa requests through Lux while we transition
- We'll provide more information when we have it

Q&A

Q:Can H-1B employees travel while we are amending their H-1B for changes in job title or other employment changes? Does it require a change of status or does it allow for traveling when filing for changes?

A:International travel during validity of an approved H-1B shouldn't be a problem; if they travel after their current H-1B has already expired, they would need the amendment/extension to be approved before they can return to the U.S.



Q&A

Additional Resources:

- [ISO Landing Page](#)
- [H-1B Landing Page](#)
- [OAP Visa Blog Posts](#)
- [H-1B Visa Request Form](#)
- [Your H Visa Requests](#)
- [H1B Process Handout](#)