H-1B Visas

US employers frequently use the H-1B Visa category to quickly hire foreign nationals. A foreign national generally qualifies for H-1B status if he/she holds at least a US Bachelor's Degree (or equivalent) relevant to the field in which he/she will be working, and the position normally requires at least a Bachelor's Degree as an entry-level requirement to perform the job. The H-1B Visa must be sponsored by a US employer. The H-1B Visa is usually granted for three years, and extended up to a maximum of 6 years. Any time spent in the US working for another employer in H-1B or L-1 Visa status will count against the 6 year limit. Another 6 years of H-1B Visa time may be available once the foreign national spends one full year outside the US. Foreign nationals may seek US Immigrant Visa (“green card”) status while on an H-1B Visa.

A petition for H-1B status must be filed with the US Citizenship and Immigration Services (USCIS) Regional Service Center no more than 6 months before the requested start date. The USCIS may take several months to process an H-1B. However, for an additional $1,225.00 processing fee, the USCIS will review the petition in 15 days.

H-1B Extensions Beyond 6 Years
Extending H-1B Visas beyond the 6 year limit is possible in some circumstances. Specifically, if the first step in the green card process (Immigrant Worker petition or PERM Labor Certification) is filed before the end of the foreign national's 5th year in the US on an H-1B, then generally the H-1B can be extended one year at a time until the green card is approved or denied. Alternatively, if the H-1B employee cannot finalize his/her green card status because of priority date backlogs, then generally a 3 year extension can be secured, as long as the I-140 Immigrant Worker Petition (2nd stage of the green card process) is approved, and the green card case remains pending. For more on employment based green card processing see the Clark Hill website. Finally, time spent out of the US while on an H-1B, can be added to the time an H-1B employee can work in the US. This is referred to as recapture, and in general, any credible proof is accepted (passport stamps, copies of airline tickets, etc.

H-1B Cap
The US government limits the number of new H-1B Visas to 65,000 per year (the government’s fiscal year runs from October 1 to September 30). Once this limit, or “cap”, is reached, an employer cannot employ a foreign national in H-1B status until the next fiscal year begins. It is important to note that foreign nationals who currently hold H-1B status and are either extending and/or amending that H-1B status, or are seeking H-1B status with another employer, are generally not subject to the cap. Foreign nationals who will be employed at and in furtherance of the basic or applied research of a governmental or non-profit research organization, or an institution of higher learning (college or university), are not subject to the cap. Finally, J-1 physicians who have been granted a waiver to work in a medically undesired area are also exempt from the cap. For more on J-1 waivers, see the Clark Hill website.

20,000 additional H-1B's, beyond the 65,000 listed above, are available to foreign nationals who have a Master Degree, or other advanced degree, from a US college or university.

Wages
The employer must pay the H-1B worker the wage it pays similarly experienced US workers for the same job in the same location, or the wage as determined by a required wage survey, whichever is higher. H-1B workers generally must be paid from the sponsor’s US payroll. H-1B workers should not pay for any H-1B costs or attorney fees.

H-1B Portability
H-1B portability allows a foreign national, who currently holds H-1B status, to change employers more quickly. Once the new employer files an H-1B petition, and it has been received by the USCIS, employment with the new company may commence. This saves significant time, as the employer does not have to wait for approval of the H-1B, which could take several months. In some cases H-1B workers may travel internationally while utilizing H-1B portability.

H-1B Extensions
H-1B employees who have a timely filed extension of status filed and pending are allowed to work for up to 240 days, while the extension is pending. International travel is not permitted once the status expires, even though the H-1B employee can continue working.

Changing H-1B Status and International Travel
A foreign national in the US in a lawful immigration status (other than H-1B), who is applying for a change to H-1B status, generally should not travel outside the US while his/her H-1B petition is pending. The USCIS can deny a change of status petition if it determines that a foreign national has departed the US while the H-1B petition is pending. However, these international travel limitations may not necessarily apply for foreign nationals changing from one H-1B employer to another H-1B employer.

Family Members
The H-4 Visa is available to the spouse and children (under the age of 21) accompanying the H-1B applicant to the US. The H-4 Visa is generally granted for the same period as the H-1B employee, and must be extended accordingly. As with H-1B change of status petitions, international travel should be postponed for those filing a change to H-4 status. Time spent in the US on an H-4 does not count against that foreign national’s 6 year limit on an H-1B, as described above, if he/she obtains a separate H-1B. H-4s are not eligible for US social security numbers, but can apply for ITINs with the US Internal Revenue Service. H-4s cannot work, but can attend school or a university.
H-4 children are not eligible for US social security numbers, but can apply for ITINs with the US Internal Revenue Service. H-4 children cannot work, but can attend school or a university.

H-4 spouses also generally cannot work. If they cannot work, then they can apply for ITINs with the US Internal Revenue Service. However, on February 24, 2015, USCIS announced that H-4 spouses can apply for an employment authorization document (EAD) if their H-1B spouse has an H-1B approved for more than seven years based on a pending employment based green card; or if the I-140 Immigrant Worker Petition (2nd stage of the green card process) is approved, and the green card case remains pending. For more regarding the H-4 EAD announcement, see the Clark Hill Immigration Alert. If the H-4 spouse does receive an EAD card, he/she can then apply for a social security number.