



H-1B VISA PORTABILITY

The H-1B visa portability provisions benefit both employers and H-1B nonimmigrant workers. H-1B portability allows H-1B nonimmigrant worker(s) to change employers without delay.

H-1B portability means a person who is on H-1B status may change his or her employer if the new employer files a new H-1B petition on behalf of the employee. The employee need not wait for the H-1B petition to be approved by the U.S. Citizenship and Immigration Services (USCIS) to start working for the new employer. The employee may start the new job upon the filing of the H-1B petition by the new employer.

ELIGIBILITY REQUIREMENTS

- a. **Lawful admission into the US:** The nonimmigrant worker must have been lawfully admitted into the United States.
- b. **Non-frivolous petition:** The new employer must file a non-frivolous petition for employment before the date of expiration of the H-1B nonimmigrant worker's period of authorized stay in the U.S.
- c. **No unauthorized employment:** The nonimmigrant worker must not have accepted any unauthorized employment subsequent to his or her admission in H-1B status.
- d. **Previously issued H-1B:** The nonimmigrant worker must have been previously issued an H-1B visa or otherwise been provided H-1B status in the U.S.
- e. **Current status:** H-1B portability only applies to those currently in H-1B status.

QUALIFYING CRITERIA

Employer's responsibilities

- o The U.S. employer agrees to pay the foreign worker at least the prevailing wage set by the Department of Labor for the geographic area where he or she will be working.
- o The U.S. employer may not offer the foreign worker less favorable working conditions than the working conditions offered to the U.S. employees.
- o If the U.S. employer terminates the foreign worker before the expiration of the H-1B Visa, the U.S. employer will be liable for the costs of the return ticket for the foreign worker to his or her country of origin.

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Foreign worker's qualifications

- o The foreign worker must be sponsored for services in a specialty occupation, meaning at least the equivalent of a U.S. bachelor degree in the field is required for the position.
- o The foreign worker must have at least a U.S. bachelor degree or its equivalency, or significant work experience to compensate for the degree requirement.

APPLICATION PROCEDURE

If approved, the H-1B visa is valid for a period of three years, and may be valid for a total of six years. The U.S. employer may also sponsor the foreign worker for permanent residency in the United States (a "Green Card").

Overview of steps of H-1B portability process

Step 1: Determine the position title, job duties and minimum prevailing wage.

Step 2: Once the employer has agreed to the title and wage, then file a Labor Condition Application ("LCA"). The LCA is filed electronically and there are currently no government filing fees. It generally takes up to 7 business days to obtain a certified LCA. The employer must post a notice of filing of the LCA and information relating to the H-1B sponsorship needs to be placed in the employer personnel file.

Step 3: Once the LCA is approved, prepare the forms, employment support letter, and payment and submit the application package to the U.S. Citizenship and Immigration Services (USCIS). *The H-1B worker can begin employment at this time, before a receipt notice or approval notice is received.*

Step 4: If the USCIS issues a request for evidence ("RFE"), then the employer will need to respond to the request within the time provided.

Step 5: Assuming approval, there is no need for a new visa stamp, as the approval notice provides a new I-94 arrival/departure document, which controls the H-1B worker's status and employment eligibility. If travel outside of the U.S. is required, the worker should obtain a new H-1B stamp at the local U.S. Embassy or Consulate.

Step 6: The employer must complete a new Form I-9 for this newly hired employee. An H-1B employee's unexpired Form I-94 issued for employment with the previous employer, along with their foreign passport, qualifies as a List A document. The employer should write "AC-21" and enter the date the H-1B application package was submitted to USCIS in the Additional Information field in Section 2.

For more information, please visit www.uscis.gov.

Disclaimer: This publication serves to provide general guidance and is not intended to provide legal advice or solutions to individual problems. Readers are strongly advised to contact the LL.M. Law Group for an immigration consultation.

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