Seyfarth

Notwithstanding the presentation of visa-related information below, please note that in all U.S. visa and immigration matters internal hospital policies and procedures will apply.

H-1B Backgrounder for BILH Hospitals

The following are some basic guidelines in connection with the **H-1B** visa category.

What are the Basic Building Blocks?

- The position must be a "specialty occupation" (a job requiring at least a Bachelor's degree or equivalent in a specific field, or range of related fields).
- The FN (foreign national) must possess the minimum educational and other requirements for the position, including MA state licensure (for clinical/medical positions) if required to perform the duties of the position.
- A material change in the job duties, **or** a move to one or more work locations in a new Metropolitan Statistical Area (MSA), **or** a legal entity change will trigger the need for an H-1B amendment.
- The position must meet the minimum prevailing wage. This is determined by researching titles and job descriptions on the Foreign Labor Certification Data Center [www.flcdatacenter.com] before applying for the H-1B.

Is there a dependent version of this visa?
Yes. If an H-1B visa holder has a lawful spouse or dependent children under the age of 21, those family members are eligible for the H-4 dependent visa. H-4 dependents are permitted to accompany the H-1B employee during the employee's lawful stay in the U.S. H-4 dependents are not permitted to remain in the U.S. if the H-1B principal beneficiary is not maintaining a physical presence in the U.S.

H-4 dependents are permitted to attend either public or private school. College-aged H-4 dependents are permitted to attend public or private college or university (on either a full-time or part-time status) while in valid H-4 status. An H-4 visa for a spouse or child under 21 typically does not allow for employment authorization unless the H-1B employee is at an advanced stage in the Green Card process.

Can the H-4 spouse obtain work authorization?
Not in most cases. However, an H-4 spouse may apply for an Employment Authorization Document (EAD) if the sponsored H-1B spouse has an approved I-140, an Immigrant Visa petition filed as part of the Green Card process.

How is the H-1B adjudicated?
At a U.S. Citizenship and Immigration Services (USCIS) Service Center located in the U.S.

What is the Preparation and Processing time?
Once all requested documents are received, it typically takes 4 to 5 weeks for case preparation, including U.S. Department of Labor's issuance of the required Labor Condition Application

(LCA). Once case preparation is completed and the petition is filed with USCIS, case processing takes approximately 3 to 6 months under Regular Processing.

What is Premium Processing?

Premium Processing is an option that enables a sponsoring organization to "fast track" the processing of a work authorization petition or application. In exchange for an additional fee (as of this writing, $2500), the USCIS will respond within 15 calendar days. This response can either be an approval or an RFE (Request for Evidence).

Any party - -the sponsoring organization, the foreign national beneficiary, or a third party - - may provide the payment for the Premium Processing request. Petitions may be filed with a special request for Premium Processing and pending (already filed) petitions can also be "upgraded" or "converted" to Premium Processing through the submission of Form I-907 and payment of the requisite fee.

Is Premium Processing possible for the H-1B visa category?
Yes.

Because of the lengthy adjudication process, BIDMC often recommends Premium Processing for new H-1B matters, a Change of Status petition, and a Change of Employer petition. Those who already hold H-1B status are eligible for "portability", and may continue working once the H-1B extension petition is filed with USCIS.

What is an RFE?
A Request for Evidence (RFE), when issued, can add 2 to 4 months or more to the processing of the petition. When BILH's Immigration counsel prepares a response to an RFE, this response is billed as an additional charge.

What is the duration of approval for an H-1B?
3 years + 3 years, for a total of 6 years.

Is there a max-out date?
Yes. 6 years.
In some cases, additional time can be added to the six years through "recapturing" time that an individual was not in the United States while holding an H-1B visa (time spent outside of the U.S. does not count toward the 6 years).

Are extensions possible beyond the max-out date?
Yes, if the FN is involved in the Green Card process. For most employees, the Green Card process will consist of three (3) steps:

(1) The Labor Certification/PERM (labor market test) filed with U.S. Department of Labor
(2) The I-140 Immigrant Visa Petition filed with USCIS
(3) The I-485/Adjustment of Status filed with USCIS

For H-1B extensions to be possible beyond 6 years, one of the following conditions must be met:

- Green Card (either Labor Certification or I-140) application must be filed prior to the close of Year 5 in H-1B status **or**

- Labor Certification must be pending for at least one year **or**

- Form I-140 must be approved

Monitored re: work location and legal entity?
Yes -- see above. FDNS (Fraud Detection and National Security) agents may appear at a work site to request data from specific H-1B files.

Pay source
The employee must be attached to U.S. (not foreign) payroll and benefits.

Tax implications:
U.S. tax law does not apply consistently across the non-immigrant visa categories. It is important to consult the specific tax codes for information as to how employees under each specific visa category (F-1, J-1, H-1B, E-3, TN, and O-1, and others) are to be treated. The tax codes should be consulted also in connection with those who are employment authorized through EADs obtained as a result of a spouse's employment authorized status.

Other considerations:

- The H-1B category is highly monitored by both USCIS and U.S. DOL. If an amendment is required (due to material change in job, movement to a new MSA, or change of legal entity) BILH will file an amendment in order to be in compliance.

Medical Licensure: USCIS will require an active and up-to-date Massachusetts Medical License upon filing of the H-1B petition. It is important that applicants apply for their medical license with the Board of Registration in Medicine as early as possible. More information can be found at: https://www.mass.gov/orgs/board-of-registration-in-medicine

- An H-1B category is out of reach to foreign medical graduates who have entered the U.S. in J-1 status and who are subject to Section 212(e) of the Immigration and Nationality Act (INA), also known as the "two-year home residency requirement." Under this provision, an individual must return to his/her/their home country, or country of last residence, before that individual becomes eligible for an H-1B or L-1 non-immigrant visa, or for U.S. permanent residence (the "Green Card"). Another option for a foreign medical graduate in J-1 status would be to be granted an official U.S. government "I-612 waiver" in order to become eligible to apply for H-1B status.

- A foreign medical graduate in J-1 status who is "subject" to Section 212 (e) *is* eligible to apply for a TN/MCA work authorization if the individual is a citizen of Canada or México. However, the TN/MCA status does not permit clinical duties and is limited to medical research activities. Even in cases where the TN/MCA is granted, the foreign medical graduate will remain "subject" to Section 212(e) unless the graduate either obtains a waiver or returns to the home country, or country of last residence, for an aggregate period of 2 years.

- A foreign medical graduate in J-1 status who is "subject" to Section 212(e) *is* eligible to apply for a O-1 status. However, the legal standard for the O-1 category is quite high, and USCIS examiners are trained to scrutinize O-1 petitions in connection with J-1 medical graduates. The O-1 visa does permit clinical duties. Even in cases where the O-1 is granted, the foreign medical graduate will remain "subject" to Section 212(e) unless the graduate either obtains a waiver or returns to the home country, or country of last residence, for a period of 2 years.

- A foreign medical graduate in J-1 status who is "subject" to Section 212(e) *is* eligible to apply for E-3 status if the FN is from Australia. The legal standard for the E-3 is similar to an H-1B in that the position must be a specialty occupation and the FN must have the educational qualifications for the E-3. Clinical work is permitted under E-3 status. The foreign medical graduate will remain "subject" to Section 212(e) unless the graduate either obtains a waiver or returns to the home country, or country of last residence, for a period of 2 years.

  Not all individuals who hold J-1 status are subject to Section 212(e). Section 212(e) applies when:

  Your country of residence and particular skill appears on the State Department's "Skills List";

  You received government funding to participate in the J-1 Exchange Program

  You are a physician who has been sponsored by ECFMG to participate in a Graduate Medical Education program in the United States.