

PROCEDURAL OUTLINE OF HIRING FOREIGN NATIONALS AS FACULTY MEMBERS AT THE NAVAL POSTGRADUATE SCHOOL IN THE H-1B1 NONIMMIGRANT VISA CATEGORY

Initial Background and Security Screening

1. Department provides Faculty Hiring Package to Rumi Escobido of Academic Planning.
 - (a) All necessary security related forms and documentation should be completed and provided. These forms include:
 - (i) SF-86, Questionnaire for Sensitive Positions
 - (ii) SF-87, Fingerprint Card
 - (iii) OF-306, Declaration for Federal Employment
2. NPS Security Manager reviews for completeness.
3. Entire hiring and security package is transmitted (via fax, e-mail, or FEDEX) with foreign national's resume and a statement from the Department Chair that defines the foreign national's level of security access to Francine Stevens at CNO.
4. CNO reviews submission. **THE REVIEW PROCESS TAKES TWO TO THREE MONTHS BEFORE APPROVAL IS GRANTED.**
5. The Foreign National is notified by letter of CNO approval by Academic Planning.

Preparation of the H-1B Petition

1. Department provides a copy of the Faculty Hiring Package to Daniel R. Clark (DRC) of the NPS Staff Judge Advocate. (Concurrently with providing package to Academic Planning.)
2. Foreign National and Department completes the form "H-1B Temporary Worker Visa Checklist" (Enclosure #1) and submits to DRC.
3. Foreign National completes the form "General Questionnaire for Consultations" (Enclosure #2) and submits to DRC.

4. DRC prepares draft of H-1B Petition Package. The Petition Package includes a number of forms and documentation. A "Summary of the petition requirement" which summarizes the required components is provided as Enclosure (3).
5. After a final Petition Package is deemed acceptable by all parties and signed by the Provost, the Petition is filed with the United States Citizenship and Immigration Services (USCIS) California Service Center (CSC) in Laguna Niguel, California.
6. The Petition Package is mailed or expressed via a method that provides receipt documentation.
7. A sample of an H-1B petition for an assistant professor is provided as Enclosure (4).
8. The current filing fee for Form I-129 which is the "backbone" of the Petition is \$185.00. A chart of the USCIS application fees that became effective April 30, 2004 is provided as Enclosure (5).
9. Departments have an option to request "Premium Processing" of their H-1B Petitions. The filing fee for this service is \$1,000.00. USCIS guarantees a response to the Petition within 15 days of receipt. Premium Processing is highly recommended.
10. Once approved, the USCIS issues an approval notice with the I-94. The H-1B Visa is issued for three years. It can be extended for another three years, allowing the Foreign National six years of employment. Should the Department wish to offer tenure to the Foreign National, then the Department should consult with DRC to apply for employment based lawful permanent residence.
11. An article "H Nonimmigrants" published by the American Immigration Lawyers Association (AILA) is provided as Enclosure (6)
12. Should you have any questions about this process please contact DRC at extension 3388.

H-1B TEMPORARY WORKER VISA CHECKLIST

Client: _____

Date: _____

In order to properly document your petition, it is necessary for you to obtain the following items:

I. Provide Us With Required Information and INS Document

- _____ a. Please complete H-1B Questionnaire.
- _____ b. Original Arrival Departure Card (I-94).
- _____ c. Original Form I-20 ID (for F-1 or M-1 student).

II. Documentation of Professional Caliber

- _____ a. Curriculum Vitae or Résumé.
- _____ b. License or other authorization to practice profession.
- _____ c. Certified copies of degrees, diplomas, school records (if possible, dates of attendance).
- _____ d. Academic credential evaluation (if none, we can arrange to obtain one for you).
- _____ e. Evidence of membership in professional groups.
- _____ f. Letters of reference.

III. Documentation Regarding Petitioning Employer

- _____ a. Brochures or other promotional materials about the company, its products, or services.
- _____ b. Prospectus.
- _____ c. Newspaper or magazine articles about the company or its products or services.
- _____ d. Catalogue of products.

H-1B QUESTIONNAIRE

PLEASE ANSWER THE FOLLOWING QUESTIONS THE BEST YOU CAN:

PART A. Information About the Applicant (Alien for H-1B Status)

1. Family Name: _____ Given Name: _____ Middle Initial: _____

Or, if an entertainment group, give group name:

2. Date of Birth Month/day/year: ____/____/____ Country of Birth: _____

3. Social Security # (if any): ____/____/____ INS "A" Number (if any): _____

4. If in the United States, complete the following:

a. Date of Arrival (Month/day/year): ____/____/____

b. "I-94" Number: _____

c. Current Nonimmigrant Status: _____

d. Expiration (Month/day/year): _____

e. Current Address: _____

5. Describe the proposed duties:

6. Foreign Address:

7. Alien's present occupation and summary of prior work experience:

Enclosure (1)

PART B. Information About the Employer

1. If an individual:

Family Name: _____ Given Name: _____ Middle Initial: _____

If an organization or company:

Organization/Company Name: _____

2. Address: Attn.: _____
Street Number: _____
City: _____ State: _____ Country: _____ Zip: _____
3. IRS Tax #: _____

PART C. Basic Information About the Proposed Employment

1. Job Title: _____
2. Minimum Education Requirement: _____
3. Minimum Experience Requirement: _____
4. Special Requirements: _____
5. Address where the person(s) will work if different from above:

6. Is this a full time position? Yes _____ No _____
- If no, give number of hours per week: _____
7. Wages: \$ _____ per week _____ per year _____
8. Other Compensation: Value Per Week: \$ _____
- Explain: _____
9. Dates of Intended Employment: From ____/____/____ to ____/____/____

10. Type of Employer. Please check one:

_____ US. citizen or permanent resident
_____ Organization

Enclosure (1)

_____ Other—please explain: _____

11. Type of Business: _____
12. Year Established: _____
13. Current Number of Employees: _____
14. Gross Annual Income: _____
15. Net Annual Income: _____
16. Job Title of Alien's Supervisor: _____
17. Number of Workers Alien Will Supervise: _____

GENERAL QUESTIONNAIRE FOR CONSULTATIONS

Name _____
(Last) (First) (Middle) (Maiden)

Date of Birth _____ Nationality _____ citizen of _____
(Month/Day/Year) (Country)

Other names used (including maiden name) _____ Sex _____

Place of Birth _____
(Town/Village) (State/Province) (Country)

U.S. Social Security No. _____ Home Phone _____

E-mail address _____ Business Phone _____

Present U.S. Address _____ Zip _____
Permanent Address
Abroad _____

Phone Number Abroad _____

Name of Father _____
(Last) (First)

Father's Place of Birth _____
(City) (State) (Country)

Father's Date of Birth _____ Deceased? _____ Year _____

Father's Residence _____

Name of Mother _____
(Last) (Maiden) (First)

Mother's Place of Birth _____
(City) (State) (Country)

Mother's Date of Birth _____ Deceased? _____ Year _____

Mother's Residence _____

Were any of your grandparents born in the U.S.? Yes _____ No _____
If so, where _____

Marital Status (M/W/D/SP/S) _____ Date of Marriage _____

Number of times married, including this marriage _____

Spouse's Name _____
(Last) (First) (Middle) (Maiden)

Place of Birth _____

Spouse's Date of Birth _____ Citizenship _____
(Month/Day/Year)

Spouse's U.S. Social Security No. _____

Date/Place of Marriage _____

Former Spouse's Name

(Last) (First) (Middle) (Maiden)

Former Spouse's Date of Birth _____ Citizenship _____
(Month/Day/Year) (Country)

Date of Termination of Marriage or Death _____ Where? _____

Residences last five years. (Present address first)

Street Address/Apt.	#City/State/Zip	Country	From (Mo/Yr)	To (Mo/Yr)
---------------------	-----------------	---------	-----------------	---------------

_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Last address outside of U.S. of more than one year.

Employment last five years. (Present employment first)

Name/AddressOccupation

Salary

From
(Mo/Yr)

To
(Mo/Yr)

Current Employer's Tax Identification Number _____

Education: High School? _____ College? _____

Degrees Earned _____

Date/Place of last arrival in U.S. _____
(Month/Day/Year) (Place)

Has a prior visa petition ever been filed? _____ If YES, then answer the following:

Where _____ When _____ Approved? _____

Means of travel into U.S. _____ Inspected? _____

Status at entry (visitor, student) _____

Passport No. _____ Passport Issue Date _____

Passport Expiration Date _____

Consulate Visa Issued _____ Visa Number _____
Date Visa Issued _____ Visa Expiration Date _____ OR

Indefinite (yes/no) _____

Visa Classification _____

I-94 No. _____ I-94 Issue Date _____

I-94 Expiration Date _____ Duration of Stay _____

Name Exactly as it Appears on I-94 _____

List children, including stepchildren (use attachment if necessary):

(1) Name _____

Relationship _____

DOB _____

City, State of Birth _____

Country of Birth _____

Address (if different) _____

U.S. Soc. Sec. No. _____

(2) Name _____

Relationship _____

DOB _____

City, State of Birth _____

Country of Birth _____

Address (if different) _____

U.S. Soc. Sec. No. _____

List ALL present/past membership in groups of any kind:

Group Name	Location (City/State)	From (Mo/Yr)	To (Mo/Yr)
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Have you ever filed for Permanent Residence in the U.S.? _____

Enclosure (2)

If yes, give date and place of filing: _____

Have you ever committed a crime? _____ been arrested? _____ been granted pardon? _____
(include all traffic tickets)

If answered YES to any of the above, give the following information:

Date	Place (City/State/Country)	Nature of Offense	Outcome
------	----------------------------	-------------------	---------

_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Have you ever been given public assistance? _____

If YES, explain:

Have you ever:

Committed a crime of moral turpitude or drug-related offense for which you were not arrested?	(Y/N)
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Been arrested, cited, charged, indicted, fined or imprisoned for breaking a law, excluding traffic violations?	(Y/N)
--	-------

Been the recipient of an act of clemency or similar action?	(Y/N)
---	-------

Exercised diplomatic immunity to avoid prosecution in U.S.?	(Y/N)
---	-------

Received public assistance in U.S. from any source, or likely to in the future?	(Y/N)
---	-------

Engaged in prostitution in past 10 years, or likely to in future?	(Y/N)
---	-------

Engaged in unlawful commercialized vice such as illegal gambling?	(Y/N)
---	-------

Encouraged any alien to enter U.S. illegally?	(Y/N)
---	-------

Trafficked in any controlled substance?	(Y/N)
---	-------

Been in any way involved in any terrorist activity?	(Y/N)
---	-------

Engaged in espionage or intend to once in the U.S.? (Y/N)

Been a member of or affiliated with the Communist Party? (Y/N)

Engaged in genocide or persecuted any person because of race, religion,
national origin or political opinion? (Y/N)

Been deported or excluded from the U.S.? (Y/N)

Committed fraud in order to obtain entry into the U.S.? (Y/N)

Left the U.S. to avoid being drafted into the U.S. Army? (Y/N)

Been a J nonimmigrant visitor and not complied with the 2-year foreign
residence requirement or obtained a waiver? (Y/N)

Withheld custody of a U.S. citizen child from a person granted custody of
the child? (Y/N)

Been a polygamist or plan to practice polygamy in the U.S.? (Y/N)

Claimed to be a U.S. citizen? (Y/N)

If answered YES to any of the above, explain fully below:

Date _____

Signature

A. PREPARATION OF THE H-1B PETITION

§ 3:1 Summary of the petition requirement

The H-1B petition consists of several important components:

1.	Form I-129 and H Supplement , completed in duplicate (with original signatures on both copies).
2.	Form I-129W , in duplicate (submission of this form became mandatory on March 30, 2000).
3.	Copy of certified labor condition application (LCA) , DOL Form ETA 9035 or 9035E (or proof of LCA filing).
4.	Company letter , in duplicate (a second copy of the original is sufficient).
5.	Supporting documentation (in duplicate). Don't forget to submit certified translations of foreign language documents; copies of original documents may be submitted without certification. This documentation can include:
	a. Documentation that the occupation is a "specialty occupation".
	b. Documentation that the alien has the necessary credentials, including:
	(1) Copies of academic degrees.
	(2) Copies of academic transcripts, if relevant.
	(3) Degree equivalency evaluation for foreign degrees.
	(4) Copies of licenses to practice the "specialty occupation."
	(5) Letters from past employers documenting experience.
	(6) Documentation of experience equivalency, if necessary.
	(7) Copy of export license (allowing the release of controlled technology to H-1B worker), if necessary.
6.	Standard filing fee of \$130.00 plus special H-1B fee of \$1,000.00 in a single remittance of \$1,130.00. Payment of the \$1,130 sum must be made at the same time to constitute a single remittance. A petitioner may submit two checks, one in the amount of \$1,000 and the other in the amount of \$130. If the employer is not subject to the special H-1B fee or is otherwise exempt from the requirement, it must still pay the standard filing fee of \$130.00. Payments can be in the form of a personal or corporate check or money order made out to the "Bureau of Citizenship and Immigration Services."
7.	Form I-907 with premium processing fee of \$1,000 (if premium processing is sought).
8.	Cable request when expedited visa issuance is needed.
9.	Form G-28 , Notice of Appearance, if the employer is represented by an attorney or representative.

Each of these components is discussed in the following sections. The heart of the H-1B case is the supporting documentation. In some cases, it may be necessary to document that the occupation for which the foreign worker is sought is a "specialty occupation" or that the specific job to be filled by the worker has duties and requires skills usually associated with a specialty occupation. Usually, however, the nature of the job is not in question. Therefore, the supporting documentation may focus on the foreign worker's qualifications to fill a specialty

Enclosure (3)

submit Form I-129W)

- Form I-907 with premium processing fee of \$1,000 (if premium processing is sought)

Important Note: credentialing and licensing requirements for health care workers.

Under a ground for inadmissibility added by the 1996 legislation, health care workers seeking H-1B status must meet certain credentialing and licensing requirements. The provision renders inadmissible aliens seeking to enter the United States to perform labor as health care workers (other than a physician), unless the alien presents certification from a BCIS approved independent credentialing organization verifying that:

- the alien's education, training, license, and experience meet all applicable requirements for entry under the nonimmigrant category or employment-based preference category specified in the petition and are comparable with that required for a U.S. health-care worker of the same type;
- the alien is competent in oral and written English as demonstrated by passage of a nationally recognized exam; and
- the alien has passed a licensing examination which is recognized by a majority of states licensing the profession in which the alien intends to work (if such a licensing exam exists).

This inadmissibility ground applies to all nonimmigrants (including H-1B specialty occupation workers) and immigrants other than physicians seeking entry to perform health care services after September 30, 1996. The requirements are currently applicable only to nurses, physical and occupational therapists, speech-language pathologists, medical technologists and technicians, and physician assistants. Until recently, no health care workers subject to the provision were permitted to immigrate to the United States. Nonimmigrant health care workers, on the other hand, seeking temporary entry into the United States to engage in employment in one of the occupations listed above have been admitted pursuant to a blanket waiver of inadmissibility. The government later issued interim rules permitting health care workers to immigrate. The blanket waiver policy will continue for nonimmigrant health care workers, however. Therefore, nonimmigrant health care workers still do not need to obtain the certification established by the interim rules. This policy will continue until the publication of a final rule. Under this blanket waiver policy, consular officers and immigration inspectors at U.S. ports of entry and foreign pre-clearance sites may waive inadmissibility. Such nonimmigrant waivers are granted without the filing of a formal application or fee. Foreign health care workers who receive such waivers will be admitted for a period of one year. As a result, they will need to apply for an extension of stay prior to the end of the one-year period.

These conditions placed on the admission of H-1B health care workers and the blanket waiver policy are discussed in § 5:45.

C. TEACHER/PROFESSOR

§ 7:25 Sample case

Following is a sample H-1B petition for an assistant professor. Form I-129 and H Supplement, including rider to Form I-129 listing periods of stay in H or L status in last seven years (Sample Form 7-9), the LCA form (Sample Form 7-10), and the company support letter (Sample Letter 7-5), are illustrated in the following pages. Other evidence which must be submitted in connection with this H-1B

petition is discussed at the end of the illustrations. This case is illustrated as a change of employers and extension of stay within the H-1B category.

Enclosure (3)

§ 7:26 — Sample Form 7-9: H-1B petition for assistant professor

U.S. Department of Justice
Immigration and Naturalization Service

For sale by the Superintendent of Documents
U.S. Government Printing Office
Washington, DC 20402

OMB #1115-0155
Petition for a Nonimmigrant Worker

START HERE - Please Type or Print

Part 1. Information about the employer filing this petition.
If the employer is an individual, use the top name line. Organizations should use the second line.

Family Name	Given Name	Middle Initial
Company or Organization Name American University		
Address - Attn: Henry Haverstick, Dean		
Street Number and Name	City	State or Province
Alumni Hall, Room 105	New York	New York
Country	ZIP/Postal Code	
United States	10000	

IRS Tax # 00-0000000

Part 2. Information about this Petition.

(See instructions to determine the fee.)

1. Requested Nonimmigrant Classification:
(Write classification symbol at right) H-1B1
2. Basis for Classification (check one):
 - ☒ New employment
 - ☐ Continuation of previously approved employment without change
 - ☐ Change in previously approved employment
 - ☐ New concurrent employment
3. Prior petition. If you checked other than "New Employment" in item 2, (above) give the most recent prior petition number for the worker(s):
n/a
4. Requested Action: (check one)
 - ☐ Notify the office in Part 4 so the person(s) can obtain a visa or be admitted (NOTE: a petition is not required for an E-1, E-2, or R visa).
 - ☐ Change the person(s) status and extend their stay since they are still now in the U.S. in another status (see instructions for limitations). This is available only where you check "New Employment" in item 2, above.
 - ☒ Extend or amend the stay of the person(s) since they now hold this status.
5. Total number of workers in petition: one

(See instructions for where more than one worker can be included.)

Part 3. Information about the person(s) you are filing for.

Complete the blocks below. Use the continuation sheet to name each person included in this petition.

If an entertainment group, give their group name. <u>n/a</u>		
Family Name	Given Name	Middle Initial
Cheng	John	
Date of Birth (Month/Day/Year)	Country of Birth	
2/1/61	Hong Kong	
Social Security #	A #	
000-00-0000	none	
If in the United States, complete the following:		
Date of Arrival (Month/Day/Year)	I-94 #	
10/1/99	000000000 00	
Current Nonimmigrant Status	Expires (Month/Day/Year)	
H-1B1	10/1/02	

Form I-129 (Rev. 12/11/91) N

Continued on back.

FOR INS USE ONLY

Returned	Received
Resubmitted	
Refuse Sent	
Refuse Rec'd	
Interviewed	
<input type="checkbox"/> Petitioner	
<input type="checkbox"/> Beneficiary	
Class:	
# of Workers:	
Priority Number:	
Validity Dates: From	To
<input type="checkbox"/> Classification Approved	
<input type="checkbox"/> Consulate/POE/PP1 Notified	
At:	
<input type="checkbox"/> Extension Granted	
<input type="checkbox"/> COS/Extension Granted	
Partial Approval (explain):	
Action Block	
To Be Completed by Attorney or Representative, if any	
<input checked="" type="checkbox"/> Fill in box if G-25 is attached to represent the applicant	
VCLAG#	
ATTY State License #	
none	

Part 4. Processing Information.

2. If the person named in Part 3 is outside the U.S. or a requested extension of stay or change of status cannot be granted, give the U.S. consulate or inspection facility you want notified if the petition is approved.

Type of Office (check one): ☒ Consulate ☐ Pre-Site Inspection ☐ Port of Entry
Office Address (City) London, United Kingdom U.S. State or Foreign Country

Person's Foreign Address
50 Belcher Gardens, S/C, Hong Kong

- a. Does each person in this petition have a valid passport?
☐ Not required to have passport ☐ No - explain on separate paper ☐ Yes
- b. Are you filing any other petitions with this one? ☐ No ☐ Yes - How many? _____
- c. Are applications for replacement/initial I-94's being filed with this petition? ☐ No ☐ Yes - How many? _____
- d. Are applications by dependents being filed with this petition? ☐ No ☐ Yes - How many? _____
- e. Is any person in this petition in exclusion or deportation proceedings? ☐ No ☐ Yes - explain on separate paper
- f. Have you ever filed an immigrant petition for any person in this petition? ☐ No ☐ Yes - explain on separate paper
- g. If you indicated you were filing a new petition in Part 2, within the past 7 years has any person in this petition:
1) ever been given the classification you are now requesting? ☐ No ☐ Yes - explain on separate paper
2) ever been denied the classification you are now requesting? ☐ No ☐ Yes - explain on separate paper
- h. If you are filing for an entertainment group, has any person in this petition not been with the group for at least 1 year? ☐ No ☐ Yes - explain on separate paper

Part 5. Basic Information about the proposed employment and employer.

Attach the supplement relating to the classification you are requesting.

Job Title Assistant Professor Nonacademic Description Teach graduate and undergraduate students in Chinese history.

Address where the person(s) will work if different from the address in Part 1. Department of East Asian History & Cultures, Boerum Hall, NY, NY 10000

Is this a full-time position?

☐ No - Hours per week

☒ Yes

Wages per week or per year 50,000/yr

Other Compensation

(Explain) Usual benefits

Value per week or per year n/a

Dates of intended employment

From 8/1/01 To 8/31/02

Type of Petitioner - check one:

☐ U.S. citizen or permanent resident

☒ Organization

☐ Other - explain on separate paper

Type of business:

Academic Teaching & Research

Year

established 1800

Current Number

of Employees 10,000

Gross Annual

Income \$20 million budget

Net Annual

Income n/a

Part 6. Signature.

Read the information on penalties in the instructions before completing this section.

I certify, under penalty of perjury under the laws of the United States of America, that this petition, and the evidence submitted with it, is all true and correct. If filing this on behalf of an organization, I certify that I am empowered to do so by that organization. If this petition is to extend a prior petition, I certify that the proposed employment is under the same terms and conditions as in the prior approved petition. I authorize the release of any information from my records, or from the petitioning organization's records, which the Immigration and Naturalization Service needs to determine eligibility for the benefit being sought.

Signature and title

/s/

Print Name

Henry Haverstick

Date

7/1/01

Please Note: If you do not completely fill out this form and the required supplement, or fail to submit required documents listed in the instructions, then the person(s) filed for may not be found eligible for the requested benefit, and the petition may be denied.

Part 7. Signature of person preparing form if other than above.

I declare that I prepared this petition at the request of the above person and it is based on all information of which I have any knowledge.

Signature

Print Name

Date

/s/

John Smith

07/1/01

Firm Name

and Address Smith & Brynn, PC, 60 Madison Ave., New York, NY 10100

U.S. Department of Justice
Immigration and Naturalization Service

OMB #1115-0158
H Classification
Supplement to Form I-129

Name of person or organization filing petition: American University	Name of person or total number of workers or trainees you are filing for: John Cheng
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List the alien's and any dependent family members' prior periods of stay in H classification in the U.S. for the last six years. Be sure to list only those periods in which the alien and/or family members were actually in the U.S. in an H classification. If more space is needed, attach an additional sheet.
10/31/99-present. Employed with Foreign Studies University, Washington, D.C., in H-1B status.
10/1/98-8/31/99. Employed with University of New York, New York, NY, in H-1B status.

Classification sought (check one):

<input type="checkbox"/> H-1A Registered Professional nurse	<input type="checkbox"/> H-1B-4 Artist or entertainer in unique or traditional art form
<input checked="" type="checkbox"/> H-1B1 Specialty occupation	<input type="checkbox"/> H-1B-5 Athlete
<input type="checkbox"/> H-1B2 Exceptional services relating to a cooperative research and development project administered by the U.S. Department of Defense	<input type="checkbox"/> H-1B-6 Essential Support Personnel for H-1B entertainer or athlete
<input type="checkbox"/> H-1B3 Artist, entertainer or fashion model of national or international acclaim	<input type="checkbox"/> H-2A Agricultural worker
	<input type="checkbox"/> H-2B Nonagricultural worker
	<input type="checkbox"/> H-3 Trainee
	<input type="checkbox"/> H-3 Special education exchange visitor program

Section 1. Complete this section if filing for H-1A or H-1B classification.

Describe the proposed duties: Responsible for teaching undergraduate and graduate courses on Modern Chinese history; also present, review, and grade assignments and exams, and conduct academic research

Alien's present occupation and summary of prior work experience: For 1999-2000 academic year, Mr. Cheng served as an Assistant Professor in the Department of History of Foreign Studies University. For 1998-1999 academic year, Mr. Cheng was Assistant Professor in Department of History of the University of New York.

Statement for H-1B specialty occupations only:
By filing this petition, I agree to the terms of the labor condition application for the duration of the alien's authorized period of stay for H-1B employment.
Petitioner's Signature: /s/ Date: 7/1/01

Statement for H-1B specialty occupations and DOD projects:
As an authorized official of the employer, I certify that the employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized stay.
Signature of authorized official of employer: /s/ Date: 7/1/01

Statement for H-1B DOD projects only:
I certify that the alien will be working on a cooperative research and development project or a production project under a reciprocal Government-to-Government agreement administered by the Department of Defense.
DOD project manager's signature: _____ Date: _____

Section 2. Complete this section if filing for H-2A or H-2B classification.


Employment is: (check one)	<input type="checkbox"/> Seasonal <input type="checkbox"/> Peakload <input type="checkbox"/> Intermittent <input type="checkbox"/> One-time occurrence	Temporary need is: (check one)	<input type="checkbox"/> Unpredictable <input type="checkbox"/> Periodic <input type="checkbox"/> Recurrent annually
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Explain your temporary need for the alien's services (attach a separate paper if additional space is needed).

U.S. immigration status during seven (7) year period preceding this application:

Enclosure (4)

§ 7:27 — Sample Form 7-10: LCA for assistant professor

	Labor Condition Application for H-1B Nonimmigrants	U.S. Department of Labor Employment and Training Administration	Form ETA 9035 OMB Approval: 1205-0310 Expiration Date: 19 JAN 2004
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A. Employer's Information

1. If you want the application returned by mail, leave the Return Fax Number blank. (2 1 2) 5 5 5 - 6 2 6 2

2. Employer's Full Legal Name
A M E R I C A N U N I V E R S I T Y

3. Employer's Address (Number and Street)
A L U M N I H A L L R O O M 1 0 5

4. Employer's City
N E W Y O R K State: N Y Zip/Postal Code: 1 0 0 0 0

5. Employer's EIN Number: 0 0 - 0 0 0 0 0 0 0 0 6. Employer's Phone Number: (2 1 2) 2 8 7 - 7 2 7 2 Extension: 8 7 0

B. Rate of Pay

1. Wage Rate (or Rate From) (Required): \$ 5 0 0 0 0 . 0 0

2. Rate Up To (Optional): \$. 0 0

3. Rate is Per:
☒ Year ☐ Week
☐ Month ☐ Hour
☐ 2 Weeks

4. Is this position part-time?
☐ Yes ☒ No

Please Note: Part-time hours worked by nonimmigrant(s) will be in the range of hours stated on the INS Form(s) I-129.

C. Period Of Employment and Occupation Information

1. Begin Date: 0 8 / 0 1 / 2 0 0 1

2. End Date: 0 8 / 3 1 / 2 0 0 4

3. Occupational Code: 0 9 0

4. Number of H-1B Nonimmigrants: 3

5. Job Title: A S S I S T A N T P R O F E S S O R

Please Note: The Date Information MUST be in MM/DD/YYYY format

D. Information relating to Work Location for the H-1B Nonimmigrants

This section is REQUIRED

1. City: N E W Y O R K State: N Y

2. Prevailing Wage: \$ 4 5 0 0 0 . 0 0

3. Wage is Per:
☒ Year ☐ Week
☐ Month ☐ Hour
☐ 2 Weeks

4. Wage Source:
☒ SESA
☐ Collective Bargaining Agreement
☐ Other

5. Year Source Published:

6. Other Wage Source:

Do NOT write "Same As Above". This section MUST be filled out.

Please Note: If OTHER is chosen as the Wage Source, Numbers 5 and 6 in this section MUST be filled out.

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If filing the form electronically, the Page Link field will be automatically created for you upon printing. If filing the form manually, please ensure that the Page Link field contains a 6 digit number that is repeated on all 3 pages.

Form ETA 9035 - Page 1 of 3

	U.S. Department of Labor Application for H-1B Nonimmigrants Employment and Training Administration	Form ETA 9035 OMB Approval: 1205-0310 Expiration Date: 19 JAN 2004
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D. Subsection A Information For Additional or Subsequent Work Location

This Section should be completed only if filing for more than 1 work location.

1. City		State
2. Prevailing Wage	3. Wage is Per:	4. Wage Source
\$	<input type="radio"/> Year <input type="radio"/> Week <input type="radio"/> Month <input type="radio"/> Hour <input type="radio"/> 2 Weeks	<input type="radio"/> SSA <input type="radio"/> Collective Bargaining Agreement <input type="radio"/> Other
5. Year Source Published	IF OTHER is chosen as the Wage Source Numbers 5 and 6 in this section MUST be filled out.	
6. Other Wage Source		

E. Employer Labor Condition Statements

Please Note: In order for your application to be processed, you MUST read section E of the Labor Condition Application cover pages under the heading "Employer Labor Condition Statements" and agree to all 4 labor condition statements summarized below:

- (1) Wages: Pay nonimmigrants at least the local prevailing wage or the employer's actual wage, whichever is higher, and pay for non-productive time. Offer nonimmigrants benefits on the same basis as U.S. workers.
- (2) Working Conditions: Provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed.
- (3) Strike, Lockout, or Work Stoppage: No strike or lockout in the occupational classification at the place of employment.
- (4) Notice: Notice to union or to workers at the place of employment. A copy of this form to H-1B workers.

I have read and agree to Employer Labor Condition Statements 1, 2, 3, and 4 as set forth in Section E of the Labor Condition Application Cover Pages. ☒ Yes ☐ No

F. Additional Employer Labor Condition Statments

Please Note: In order for your application to be processed, you MUST read Section F - Subsections 1 and 2 of the Labor Condition Application cover pages under the heading "Additional Employer Labor Condition Statements" and choose one of the 3 alternatives (A, B, or C) listed below in Subsection 1. If you mark Alternative B, you MUST read Section F - Subsection 2 of the cover pages under the heading "Additional Employer Labor Condition Statements" and indicate your agreement to all 3 additional statements summarized below in Subsection 2.

1. Subsection 1

Choose ONE of the following 3 alternatives:

A ☒ Employer is not H-1B dependent and is not a willful violator.

B ☐ Employer is H-1B dependent and/or a willful violator.

C ☐ Employer is H-1B dependent and/or a willful violator BUT will use this application ONLY to support H-1B petitions for exempt nonimmigrants.

2. Subsection 2

If Alternative B in Subsection 1 is marked, the following Additional Labor Condition Statements are applicable:

A. Displacement: Non-displacement of the U.S. workers in employer's work force;

B. Secondary Displacement: Non-displacement of U.S. workers in another employer's work force; and

C. Recruitment and Hiring: Recruitment of U.S. workers and hiring of U.S. worker applicant(s) who are equally or better qualified than the H-1B nonimmigrant(s).

I have read and agree to Additional Labor Conditional Statements 2 A, B, and C. ☐ Yes ☐ No

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If filing the form electronically, the Page Link field will be automatically created for you upon printing. If filing the form manually, please ensure that the Page Link field contains a 6 digit number that is repeated on all 3 pages.

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Form ETA 9035 - Page 2 of 3



Labor Condition
Application for H-1B
Nonimmigrants

U.S. Department of Labor
Employment and Training Administration

Form ETA 9035
OMB Approval: 1205-0310
Expiration Date: 19 JAN 2004

G. Public Disclosure Information

Public disclosure information will be kept at:

- ☒ Employer's principal place of business
☐ Place of employment

! You must choose one of the two options listed in this Section.

H. Declaration of Employer

! By signing this form, I, on behalf of the employer, attest that the information and labor condition statements provided are true and accurate; that I have read the sections E and F of the cover pages (Form ETA 9035CP), and that I agree to comply with the Labor Condition Statements as set forth in the cover pages and with the Department of Labor regulations (20 CFR part 655, Subparts H and I). I agree to make this application, supporting documentation, and other records, available to officials of the Department of Labor upon request during any investigation under the Immigration and Nationality Act.

1. First Name of Hiring or Other Designated Official MI
H E N R Y P

2. Last Name of Hiring or Other Designated Official
H A V E R S T I C K

3. Hiring or Other Designated Official Title
D E A N

4. Signature - Do NOT let signature extend beyond the box Date
0 6 / 1 5 / 2 0 0 1

I. Contact Information

1. Contact First Name MI
J O H N P

2. Contact Last Name
S M I T H

3. Contact Phone Number Extension
(2 1 2) 5 5 5 - 6 2 0 0 5 1 2

J. U.S. Government Agency Use Only

By virtue of my signature below, I hereby acknowledge this application certified for

Date Starting _____ and Date Ending _____

Signature and Title of Authorized DOL Official

ETA Case Number _____ Date _____

The Department of Labor is not the guarantor of the accuracy, truthfulness, or adequacy of a certified labor condition application.

K. Complaints

Complaints alleging misrepresentation of material facts in the labor condition application and/or failure to comply with the terms of the labor condition application may be filed with any office of the Wage and Hour Division of the United States Department of Labor. Complaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with: U.S. Department of Justice * 10th Street and Constitution Avenue, NW * Washington, DC * 20530.

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! If filing the form electronically, the Page Link field will be automatically created for you upon printing. If filing the form manually, please ensure that the Page Link field contains a 6 digit number that is repeated on all 3 pages.

Reset

Form ETA 9035 - Page 3 of 3



§ 7:28 — Sample Letter 7-5: Support letter for assistant professor

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services
Vermont Service Center
St. Albans, VT

RE: H-1B Visa Petition on behalf of John Cheng

Dear Sir/Madam:

We write this letter in support of our petition to confer H-1B1 status on Dr. John Cheng to serve as Assistant Professor in the Department of East Asian History and Cultures.

Established in 1800, American University is a nonprofit academic and research institution and is recognized as one of the foremost academic institutions in the world. In order to maintain this level of excellence, it is essential that our staff members be of the highest merit and ability.

At this time, the University wishes to temporarily employ Dr. John Cheng in H-1B status in the specialty occupation of Assistant Professor in the Department of East Asian History and Cultures. The minimum requirement for this professional position is a Ph.D. degree in History with a concentration in Modern Chinese History. As an Assistant Professor, Dr. Cheng will be responsible for teaching undergraduate and graduate courses in Modern Chinese History and his duties will include preparing, reviewing and grading assignments and examinations and conducting academic research in Modern Chinese History for publication in scholarly journals.

Dr. Michael Cheng is eminently qualified to fill this professional position of Assistant Professor. Dr. Cheng was awarded a Bachelor of Arts degree in Comparative European History with First Class Honors from the University of Bristol, England in 1991. In 1992, he was awarded a Master of Arts degree in Oriental History from the School of Oriental Studies of the University of Bristol. In 1998, he received a Master of Arts degree and Ph.D. degree in History with a concentration in Modern Chinese History from Foreign Studies University in Washington, D.C. Further, he was an Assistant Professor in the Department of History first at The University of Manhattan in New York City for the 1998/99 academic year and at Foreign Studies University for the 1999/00 academic year. In addition, he is the recipient of the Howard Robbins Honorary Fellowship, Kennedy Grant, Eisenhower Prize and Nixon Prize, all at Foreign Studies University.

Based on Dr. Cheng's professional credentials, we wish to employ him for a temporary period of three years as Assistant Professor, for which he will receive an annual salary of \$50,000. We understand the temporary nature of the H-1B status we seek for Dr. Cheng and assuming our H-1B petition is approved, we fully intend to comply with all of the regulations regarding employment of individuals in H-1B status. Submitted with this H-1B petition is an approved Labor Condition Application. We confirm that in the event that Dr. Cheng is dismissed before the end of her period of authorized employment, we will be responsible for the reasonable cost of her return abroad.

Thank you for your courtesy and attention to this matter.

Sincerely,
[Signature and title]

§ 7:29 — Supporting documentation

In addition to the documents illustrated above, it is recommended that the following documentation and papers also be included in the H-1B package for this case:

- copies of actual degrees and transcripts (no evaluation of degrees required)

Enclosure (4)

since obtained in educational institution accredited in the United States)

- copy of Form I-797, approval notice, showing present H-1B status
- copy of Form I-94, arrival-departure record, previously issued to beneficiary
- Form I-129W
- Form G-28, notice of appearance, for the I-129 filing (if applicable)
- standard filing fee of \$130.00 (exempt from special H-1B fee of \$1,000.00 as a non-profit academic and research institution)
- Form I-907 with premium processing fee of \$1,000 if premium processing is sought (in lieu of utilizing the premium processing program, non-profit petitioners may request expedited processing using the Service Center's informal procedures described in Ch 3)
- Form I-539 for family members who will extend their stay at the same time
- copies of the Form I-94 for each family member
- filing fee of \$140.00 for Form I-539
- Form G-28, notice of appearance, for the I-539 filing (if applicable)

D. ENGINEER

§ 7:30 Sample case

Following is a sample H-1B petition for an engineering representative. Form I-129 and H Supplement (Sample Form 7-11), the LCA form (Sample Form 7-12), the company support letter (Sample Letter 7-6), and an evaluation of the alien's foreign degree (Sample Evaluation 7-5), are illustrated in the following pages. Other evidence which must be submitted in connection with this H-1B petition is discussed at the end of the illustrations.

New USCIS Immigration Benefit Application Fees

Form No.	Title	Current Fee	Revised Fee	Notes
I-90	Application to Replace Permanent Resident Card	\$130	\$185	To renew an expiring or expired green card or replace a lost or damaged card.
I-102	Application for Replacement/Initial Non-immigrant Arrival-Departure Record (I-94)	\$100	\$155	For replacement of lost, mutilated, or destroyed I-94 (e.g., required for B-1, B-2 visa holders.)
I-129	Petitions for a Nonimmigrant Worker	\$130	\$185	For employers to petition for a nonimmigrant to come to the United States temporarily to perform services or labor, or to receive training.
I-129F	Petition for Alien Fiancé(e)	\$110	\$165	To classify nonimmigrant as fiancé(e) of a U.S. citizen. Petition for spouse of USC to obtain a K-3/K-4 nonimmigrant visa.
I-130	Petition for Alien Relative	\$130	\$185	To classify status of alien relative for issuance of immigrant visa.
I-131	Application for Travel Document	\$110	\$165	To apply for a USCIS Travel Document – re-entry permit, refugee travel document, or advance parole.
I-140	Immigrant Petition for Alien Worker	\$135	\$190	To classify status on the basis of profession or occupation for an immigrant visa.
I-191	Application for Advance Permission to Return to Unrelinquished Domicile	\$195	\$250	For advance permission for otherwise inadmissible applicants to reenter the United States.
I-192	Application for Advance Permission to Enter As a Nonimmigrant	\$195	\$250	For discretionary relief of inadmissible applicants, except in an emergency case and/or where approval benefits the U.S. government.
I-193	Application for Waiver of Passport and/or Visa	\$195	\$250	Request for waiver of passport or visa for persons applying for entry to the U.S. (e.g. expired.)
I-212	Application for Permission to Reapply for Admission into the United States After Deportation or Removal	\$195	\$250	Applicant was removed from the United States and applies for reentry.

New USCIS Immigration Benefit Application Fees

Form No.	Title	Current Fee	Revised Fee	Notes
I-360	Petition for Amerasian, Widow(er), or Special Immigrant	\$130	\$185	For certain benefits granted to Amerasians, widow(er)s, battered spouses or children of United States citizens and lawful permanent residents, or other special immigrants, except there is no fee for a petition seeking classification as an Amerasian.
I-485	Application to Register Permanent Residence or Adjust Status	\$225	\$315	For filing an application for permanent resident status or creation of a record of lawful permanent residence commonly known as the "Green Card" --\$315 for an applicant 14 years of age or older; \$215 for an applicant under the age of 14 years; no fee for an applicant filing as a refugee under section 209(a) of the Act.
I-526	Immigrant Petition by Alien Entrepreneur	\$400	\$465	Application for Investor Visa.
I-539	Application to Extend/Change Nonimmigrant Status	\$140	\$195	Form used by some nonimmigrants to request extensions of stay or changes from one nonimmigrant category to another.
I-600 I-600A	Petition to Classify Orphan as an Immediate Relative/Application for Advance Processing or Orphan Petition	\$460	\$525	Applications for international adoption. For filing a petition to classify an orphan as an immediate relative for issuance of an immigrant visa under section 204(a) of the Act. (When more than one petition is submitted by the same petitioner on behalf of orphans who are brothers or sisters, only one fee will be required.)/ For filing an application for advance processing of orphan petition. (When more than one petition is submitted by the same petitioner on behalf of orphans who are brothers or sisters, only one fee will be required).
I-601	Application for Waiver of Grounds of Inadmissibility	\$195	\$250	For waiver of ground of inadmissibility under sections 212(h) or (i) of the Act. (Only a single application and fee shall be required when the alien is applying simultaneously for a waiver under both those subsections.)

New USCIS Immigration Benefit Application Fees

Form No.	Title	Current Fee	Revised Fee	Notes
I-612	Application for Waiver of the Foreign Residence Requirement	\$195	\$250	Waiver of two-year residence requirement for exchange visitors.
I-687	For Filing Application for Status as a Temporary Resident	\$185	\$240	For filing an application for status as a temporary resident under section 245A(a) of the Act. A fee of \$240 for each application or \$105 for each application for a minor child (under 18 years of age) is required at the time of filing with the Department of Homeland Security. The maximum amount payable by a family (husband, wife, and any minor children) shall be \$585.
I-690	Application for Waiver of Excludability	\$35	\$90	For filing an application for waiver of a ground of inadmissibility under section 212(a) of the Act as amended, in conjunction with the application under sections 210 or 245A of the Act, or a petition under section 210A of the Act.
I-694	Notice of Appeal of Decision	\$50	\$105	For appealing the denial of an applications under sections 210 or 245A of the Act, or a petition under section 210A of the Act.
I-695	Application for Replacement Employment Authorization or Temporary Residence Card	\$15	\$65	For filing an application for replacement of temporary resident card.
I-698	Application to Adjust Status from Temporary to Permanent Resident	\$120	\$175	For filing an application for adjustment from temporary resident status to that of lawful permanent resident under section 245A(b)(1) of the Act. For applicants filing within 31 months from the date of adjustment to temporary resident status, a fee of \$135 for each application is required at the time of filing with the Department of Homeland Security. The maximum amount payable by a family (husband, wife, and any minor children (under 18 years of age living at home)) shall be \$405. For applicants filing after thirty-one months from the date of approval of temporary resident status, who file their applications on or after July 9, 1991, a fee of \$175 (a maximum of \$525 per family) is required. The adjustment date is the date of filing of the application for permanent residence or the applicant's eligibility date, whichever is later.
I-751	Petition to Remove Conditions on Residence	\$145	\$200	To remove the conditions on lawful permanent residence when residence is based on marriage to a U.S. citizen/LPR.

New USCIS Immigration Benefit Application Fees

Form No.	Title	Current Fee	Revised Fee	Notes
I-765	Application for Employment Authorization	\$120	\$175	Application for a work permit.
I-817	Application for Family Unity Benefits	\$140	\$195	For requesting initial benefits under the Family Unity Program, or to request extension of benefits.
I-824	Application for Action on an Approved Application or Petition	\$140	\$195	To request a duplicate approval notice, to request approval notice to another U.S. consulate, and to request notice to a U.S. consulate for derivative visas to family members.
I-829	Petition by Entrepreneur to Remove Conditions on Residence	\$395	\$455	To make permanent the conditional residence given to an alien entrepreneur.
I-881	NACARA – Suspension of Deportation or Application for Special Rule Cancellation of Removal	\$215	\$275	For filing an application for suspension of deportation or special rule cancellation of removal (pursuant to section 203 of Public Law 105-100): -- \$275 for adjudication by the Department of Homeland Security, except that the maximum amount payable by family members (related as husband, wife, unmarried child under 21, unmarried son, or unmarried daughter) who submit applications at the same time shall be \$550. -- \$155 for adjudication by the Immigration Court (a single fee of \$155 will be charged whenever applications are filed by two or more aliens in the same proceedings). The \$155 fee is not required if the Form I-881 is referred to the Immigration Court by the Department of Homeland Security.
I-914	Application for T Nonimmigrant Status	\$200	\$255	For filing an application to classify an alien as a nonimmigrant under section 101(a)(15)(T) of the Act (victims of a severe form of trafficking in persons and their immediate family members). For each immediate family member included on the same application, an additional fee of \$105 per person, up to a maximum amount payable per application of \$510.
N-300	Application to File Declaration of Intention	\$60	\$115	For a permanent resident to apply for a Declaration of Intention to become a U.S. citizen. This is not required for naturalization.
N-336	Request for Hearing on a Decision in Naturalization Procedures	\$195	\$250	To request a hearing on an unfavorable naturalization decision.

New USCIS Immigration Benefit Application Fees

Form No.	Title	Current Fee	Revised Fee	Notes
N-400	Application for Naturalization	\$260	\$320	Application for permanent resident to become a US citizen (other than such application filed on or after October 1, 2004, by an applicant who meets the requirements of sections 328 or 329 of the Act with respect to military service, for which no fee is charged).
N-470	Application to Preserve Residence for Naturalization Purposes	\$95	\$150	For a permanent resident who must leave the United States for certain employment purposes and wishes to preserve immigrant status in order to pursue naturalization.
N-565	Application for Replacement of Naturalization Citizenship Document	\$155	\$210	For filing an application for a certificate of naturalization or declaration of intention in lieu of a certificate or declaration alleged to have been lost, mutilated, or destroyed; for a certificate of citizenship in a changed name under section 343(c) of the Act; or for a special certificate of naturalization to obtain recognition as a citizen of the United States by a foreign state under section 343(b) of the Act.
N-600	Application for Certification of Citizenship	\$185	\$240	Application for a person to claim US citizenship based on parentage or marriage.
N-600K	Application for Citizenship and Issuance of Certificate under Section 322	\$185	\$240	For filing an application for citizenship and issuance of certificate under section 322 of the Act--\$240, for an application filed on behalf of a biological child and \$200 for an application filed on behalf of an adopted child. This is a new form previously fee'd under N-600.
	Biometric Services	\$50	\$70	Additional fee for those applications that require the capturing of biometric information (also known as fingerprinting service fee).

Employment-Based Nonimmigrant Visas

H Nonimmigrants

ⁱ
updated by Jonathan S. Greene

Cite as: 2 *Immigration & Nationality Law Handbook* 1 (2003-04 ed.)

Introduction

U.S. employers seeking to employ foreign nationals temporarily in the United States may choose from several H nonimmigrant visa categories encompassing professional workers, temporary workers in shortage occupations, nurses, and trainees. Significant amendments have been made to H visa procedures by the Immigration Act of 1990 ⁱⁱ2 (IMMACT90), the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) and implementing regulations, ⁱⁱⁱ3 the Nursing Relief for Disadvantaged Areas Act of 1999, ^{iv}4 the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), ^v5 and the 21st Century Department of Justice Appropriations Authorization Act of 2002. ^{vi}6 Furthermore, the Homeland Security Act of 2002 ^{vii}7 abolished the INS and transferred the INS functions to the newly created Department of Homeland Security as of March 1, 2003. Adjudication of H Petitions is now handled by the Bureau of Citizenship and Immigration Services (BCIS) within the Department of Homeland Security.

H Temporary Worker Categories in General

Statutory authority for the H nonimmigrant visa categories is found in the Immigration and Nationality Act of 1952 (INA). ^{viii}8 **There are several H visa categories including: (a) H-1B professionals; (b) H-1C nurses in shortage areas; (c) H-2A temporary or seasonal agricultural workers in short supply; (d) H-2B temporary nonagricultural workers in short supply; and (e) H-3 trainees. Spouses and minor children accompanying a principal H worker or trainee may secure derivative H-4 nonimmigrant status, which does not permit employment.**

The INA imposes an annual limit on the number of nonimmigrants who may be issued visas or given status in the H-1B, H-1C, and H-2B classifications. The periods of admission in the various H visa categories are discussed below.

H Petition Procedure in General

BCIS processing of an H visa petition commences when an employer files Form I-129, Petition for a Nonimmigrant Worker, and an H Classification Supplement. Except for petitions in the H-3 category, the petitioner must first, prior to filing

Form I-129, file a prerequisite application with the U.S. Department of Labor (DOL). For H-1B cases, the petitioner must file a Labor Condition Application (LCA), Form ETA-9035, with the DOL. The LCA must be certified by the DOL and then filed with the H-1B petition. For H-2 cases, the petitioner must file a temporary Application for Alien Employment Certification, Form ETA-750 Part A, with the DOL. The temporary labor certification must be approved by the DOL and then filed with the H-2 petition. ^{ix9}

For the principal alien to qualify in one of the H categories, a Form I-129 must be filed by a "United States employer" at the BCIS service center with jurisdiction over the place of employment. ^{x10} **The petition may request a change of the alien's nonimmigrant status to H if the alien is lawfully inside the United States in another nonimmigrant status, ^{xi11} or may request that BCIS notify a U.S. consul abroad of approval of the visa petition if the alien is outside the United States. In either case, the BCIS service center will issue a Form I-797 Notice of Action approving the visa petition. If the alien is in the United States, and a change or extension of status is granted, BCIS will issue Form I-797A with a tear-off I-94 card designating the new status. If the alien is outside the United States, BCIS will issue Form I-797B with a tear-off consular notification card.**

An employer may also choose to utilize "premium processing service" to expedite BCIS's handling of the I-129 Petition. The employer pays an additional \$1,000 premium processing fee and files Form I-907. BCIS will then issue an approval notice, notice of intent to deny, request for evidence, or notice of an investigation for fraud or misrepresentation within 15 calendar days, or else refund the fee automatically. ^{xii12} **A request for premium processing can either be filed concurrently with the initial H-1B petition, or later while the H-1B petition is pending. The 15 calendar day period commences on the day the premium processing request is received by BCIS. However, should BCIS issue a request for evidence, the 15 day period starts over again when the response is submitted.**

If the alien is outside the United States at the time of approval, he or she will use the H approval notice (Form I-797B) to apply for the corresponding H visa from the U.S. consulate. Most U.S. consulates will issue the visa upon presentation of the original Form I-797 approval notice. At times the consulate may require BCIS to cable notice of the approval of the H petition. In either case, the alien will also be required to submit a Form DS-156, Nonimmigrant Visa Application, to obtain the visa from the consul. (The DS-156 is the generic two-page form that all nonimmigrant visa applicants must submit at the time they apply for a nonimmigrant visa at the consulate.) All male nonimmigrant visa applicants between the ages of 16 and 45, regardless of nationality, must also file Form DS-157, Supplemental Nonimmigrant Visa Application. ^{xiii13} **The consulate should issue a visa that is valid for the duration of the underlying petition unless a reciprocity agreement exists for a visa for a lesser period. ^{xiv14} The alien must enter the United States during the period of the visa validity. Although a visa petition need not be filed for derivative beneficiaries who are outside**

the United States, the derivative beneficiaries will need to apply for the H-4 visa stamp with the Form DS-156 and the principal's original Form I-797, or the principal's Form I-94 (see discussion below) showing lawful admission to the United States in H status.

If the alien is visa exempt, ^{xv}**15 he or she presents the original Form I-797 at the port of entry into the United States and does not need to present the Form I-797 to the U.S. consul.**

Upon admission to the United States, the alien will be issued a Form I-94 Arrival/Departure Record in H status by an inspector from the Bureau of Customs and Border Protection (BCBP) of the Department of Homeland Security. The BCBP inspector will note the period of admission on the Form I-94. The Form I-94 card, which is typically stapled into the alien's passport at the time of entry into the United States, records the alien's date and place of admission, visa status, and date of authorized stay. The I-94 should be issued for the duration of the visa petition. Even if reciprocity limits the validity of the visa, a BCBP inspector "shall admit the beneficiary...to the date until which the petition is valid." ^{xvi}**16 However, if the individual's passport expires prior to the petition's expiry date, some BCBP officers will only issue the I-94 until the date of the passport expiration.**

If the alien is already in the United States when the H petition is filed, the procedure is different. The Form I-94 may be issued as part of the Form I-797A approval notice. The form I-94 is issued in the status and for the duration requested on the petition. The Form I-94 shows that the alien is permitted to engage in the work or training specified in the I-129 petition. When a change of status has been granted, the alien does not need to obtain the corresponding H visa to pursue the authorized H employment or training. However, if the alien departs the United States, he or she will need to take the original Form I-797 and apply for an H visa stamp at the U.S. consulate in order to return to the United States following a trip abroad. ^{xvii}**17 An exception to this rule exists for trips shorter than 30 days to Canada or Mexico.** ^{xviii}**18**

The procedure is similar for H extensions. To extend the H status, the employer files a Form I-129 and an H Supplement, accompanied by the petitioner's statement showing that the basis for the classification continues to exist. ^{xix}**19 If the original petition required preliminary filing with the DOL, that process must be repeated for the extension. For H-1B cases, if the employer's corresponding LCA is also about to expire, an extension of the H-1B petition will require filing a new LCA. Extension of the Forms I-94 of H-4 derivative beneficiaries requires filing Form I-539. This may be filed together with the principal alien's H extension application.**

If the extension request is submitted to BCIS before the alien's initial status expires, the alien is authorized to continue employment with the same employer for up to 240 days while awaiting a decision from BCIS. ^{xx}**20 Portability rules established by AC21 allow certain aliens (who have previously had an H-1B visa or H-1B status) to "port" and begin working for a new employer as soon as the new employer files the H-1B petition with BCIS.** ^{xxi}**21 These portability**

rules are discussed in detail below.

The denial of an H petition is appealable to the Administrative Appeals Office (AAO) ^{xxii}22 while the denial of a beneficiary's extension of stay request is not appealable. ^{xxiii}23 However, federal courts have recognized the beneficiary's standing to appeal. ^{xxiv}24

H-1B Workers in Specialty Occupations

Generally

The H-1B classification was once a relatively straightforward mechanism for employers to gain authorization for temporary employment of professional workers. Processing has become more complicated in recent years, in large part due to procedures intended to protect U.S. workers. Many of these complicated procedures revolve around the Labor Condition Application or LCA, which is required to support each H-1B petition. The LCA requirement is discussed in detail later in this article.

The key issues in determining eligibility for H-1B classification are: (a) whether the position is a specialty occupation, and (b) whether the beneficiary meets the requirements for the specialty occupation.

The Specialty Occupation

"Specialty occupation" is defined in the statute as "an occupation that requires (a) theoretical and practical application of a body of highly specialized knowledge, and (b) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."

^{xxv}30 This definition closely tracks the concept of an H-1 "profession" long ago developed by the INS in its decisions and regulations. ^{xxvi}31

To establish that the job qualifies as a specialty occupation under the BCIS regulations, one or more of the following criteria must be met:

- * A bachelor's or higher degree or its equivalent is normally the minimum entry requirement for the position;
 - * The degree requirement is common to the industry or, in the alternative, the position is so complex or unique that it can be performed only by an individual with a degree;
 - * The employer normally requires a degree or its equivalent for the position;
- or
- * The nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree. ^{xxvii}32

The required degree must be in a specialty field. Occupations staffed with personnel having degrees in a variety of liberal arts fields may be denied H-1B status. ^{xxviii}33 Similarly, positions normally staffed by persons with a degree in

a general field, such as business administration, may be challenged by BCIS. The basic idea is that the focused curriculum of the degree should supply the knowledge and skill necessary to perform a specific job. For example, a degree in computer science prepares an individual for a job in software engineering. In the business field, jobs in accounting, marketing, and finance are specialty occupations.

Where an occupation is new, unusual, or rapidly changing, BCIS questions whether the occupation is truly a specialty occupation and whether the degree is appropriate for the occupation. BCIS recognition of educational requirements for an occupation can also change over time. Precedent decisions have recognized as professions some occupations previously viewed as lacking the need for a specific college degree. ^{xxix}34

Qualifying for the Specialty Occupation

Generally

To meet the requirements of performing in a specialty occupation, the beneficiary will need:

- * Full state licensure, if that is required for practice in the state;
- * Completion of a U.S. bachelor's or higher degree (or its foreign equivalent) in the specific specialty or a related field; or
- * Education, training, or experience in the specialty equivalent to the completion of such degree. ^{xxx}35

College or University Degree

The requirement of a college or university degree ordinarily defines the specialty occupation; the most common means of qualifying for H-1B classification is through evidence of a bachelor's or higher degree. The type and level of degree required will depend on the specialty occupation. ^{xxxi}39

Level of Degree—Some positions, such as research scientists, may require an advanced degree as a minimum entry requirement. ^{xxxii}40 **For other occupations, a bachelor's degree will suffice.** ^{xxxiii}41

Specialty Field of Degree—The major or concentration of the bachelor's degree program usually identifies the specialty. Universities typically specify a certain number of credit hours in courses within a given field to satisfy the degree requirements for an academic major. ^{xxxiv}42 **Although an individual may not have completed all requirements for a major in a formal sense, an aggregate of courses at the university level equivalent to a major in the appropriate field may meet the "specialty (or its equivalent)" requirement of the statute. There may also be an assortment of related disciplines acceptable for entry into the specialty. For example, software development may require a degree in computer science, engineering, math, or a related field.**

Foreign Degree—The degree may be awarded by an accredited U.S. college or university or it may be a foreign degree that is equivalent to a U.S. degree.
^{xxxv} **43 BCIS will accept a foreign university degree if it has been evaluated as equal to a U.S. degree. Foreign degrees normally should be evaluated by a competent, independent credentials evaluator to certify their U.S. degree equivalence.** ^{xxxvi} **44**

Equivalency to Degree

The statute permits a beneficiary to qualify for the specialty occupation based on experience that is equivalent to the baccalaureate degree. This requires a showing of recognition of the person's expertise gained through
“progressively responsible positions relating to the specialty.” ^{xxxvii} **45**

Documentation of recognition, according to the House committee, could include “letters from peers and special honors recognition, or authorship of textbooks.” ^{xxxviii} **46**

The H-1B regulations permit a showing of equivalency through: (a) an evaluation by a college official authorized to grant credit for training and/or experience in the specialty; (b) the results of college-level equivalency examinations or special credit programs; or (c) certification or registration from nationally recognized professional associations for the specialty. ^{xxxix} **47**
Equivalency may also be determined by BCIS through application of the “three-for-one” rule by which three years of specialized training and/or work experience can be substituted for each year of college-level education that the beneficiary lacks. ^{xl} **48**

Although specialized training and/or work experience may wholly substitute for a bachelor's degree, experience alone will not substitute for a master's degree, or for a doctorate degree. The regulations state that demonstrating equivalence to an advanced or master's degree may only be accomplished by possessing a bachelor's degree followed by at least five years of experience in the specialty. Further, if the specialty requires a doctorate, the alien must hold a doctorate degree or its foreign equivalent. ^{xli} **49**

Labor Condition Application in General

The Labor Condition Application, or LCA, is a prerequisite to H-1B approval. The LCA, Form ETA-9035, contains basic information about the proposed H-1B employment such as rate of pay, period of employment, and work location. It also contains four standard attestations or promises that the employer must make. The employer must document compliance with the LCA requirements in a public access file. Employers who are H-1B dependent or willful violators must make additional attestations and retain additional documentation.

The LCA must be certified by the DOL before the H-1B petition may be approved by BCIS. ^{xlii} **54 The DOL is charged with reviewing the application “only for completeness and obvious inaccuracies” and, where sufficient, shall provide the certification within seven working days of the filing of the application.**

A single LCA may be filed for multiple positions. Each LCA is limited to one occupation with specified job duties. If the employer places an H-1B nonimmigrant outside the areas of employment listed on the LCA, the employer must consider whether to file a new LCA and an amended I-129 petition with BCIS. ^{xliv}**56 (See discussion below regarding roving employees.)**

Internet Filing—H-1B employers may take advantage of Internet filing by using Form ETA-9035E. ^{xlvi}**57 Electronic filing of the LCA results in nearly instantaneous DOL certification and is recommended over other methods of filing.**

Direct or Fax Filing—An H-1B petitioning employer not using Internet filing must file the LCA on Form ETA-9035 directly or by fax with the DOL. ^{xlvi}**58 Since the LCA is designed to be machine-readable, the instructions must be followed precisely or the LCA will be rejected.**

As of January 19, 2001, the DOL centralized LCA processing at one ETA Application Processing Center. ^{xlvii}**59 The LCA may be electronically scanned, certified, and returned by fax to the return fax number listed on the LCA.**

Employer Attestations—By signing and filing the LCA, an employer makes four attestations or promises. ^{xlviii}**60 The employer attests:**

* It is paying (and will continue to pay) the H-1B employee wages that are at least:

- the actual wages paid to others with similar experience and qualifications for the specific job; or
- the prevailing wage for the occupational classification in the area (whichever is greater, based on the best information at the time of filing).

^{xliv}**61**

* It will provide working conditions for the H-1B employee that will not adversely affect the working conditions of workers similarly employed in the area. ^{li}**62**

* There is no strike or labor dispute at the place of employment. ^{lii}**63**

* It has:

- provided notice of this filing to the bargaining representative (if any); or
- if there is no such bargaining representative, it has posted notice of filing in at least two conspicuous locations at the place of employment for a period of 10 business days (see further explanation below). ^{liii}**64**

Each of these attestations is explained in detail in the LCA cover pages and regulations. The key issues are mentioned below.

Prevailing and Actual Wage—This attestation means that the employer will pay the H-1B employee the prevailing wage or actual wage, whichever is higher. The method the employer uses to determine both the prevailing wage and the actual wage must comply with the procedures set forth in the DOL regulations. ^{liii}**65 Determination of the prevailing wage should rely upon the best information**

available, either from a prevailing wage determination from the local state workforce agency (SWA) (formerly called state employment security agencies, or SESAs), a published wage survey for the occupation in the area of intended employment, or reliance on another legitimate source of wage data. The LCA must contain the specific source of the determination of the prevailing wage. Determining the prevailing wage has long been controversial, particularly in a rapidly changing labor market.^{liv}66

In order to meet the prevailing wage, the employer has only been required to pay at least 95 percent of the determined wage.^{lv}67 **The rationale for this provision is that DOL has not been able to determine an average rate of wages with exact precision. However, under the proposed PERM rule, the DOL now believes that it can determine wage rates with statistical accuracy and it has indicated that it intends to abolish the 95 percent rule.**^{lvi}68

For academic or research jobs, the H-1B regulations (20 CFR 655.731 (2000)) have codified what is called the Hathaway Rule. This states that for jobs at institutions of higher education or their affiliated or related nonprofits, or jobs at a nonprofit research organization or governmental research organization, the prevailing wage determination will only take into account the wages at similar institutions. This protects academic institutions from having to match salaries in private industry, particularly for H-1B research professionals.

To determine the actual wage, the employer must identify any other employees who are similarly employed and possess similar experience and qualifications. The H-1B employee must be paid at least as much as any such employee or the prevailing wage, whichever is higher.

For example, assume an employer intends to hire an H-1B employee as a computer programmer. If the prevailing wage for computer programmers is \$45,000, but the employer pays other computer programmers with similar experience and qualifications \$50,000, then \$50,000 would be the actual wage. The employer would be required to pay the H-1B employee \$50,000. If the actual wage increases during the H-1B employment, then the required wage also increases.

The employer needs to document the system it used to set the actual wage (for example, an internal memorandum to the file explaining the legitimate business factors the employer used to set the actual wage). This documentation should be included in the public access file.

This attestation also includes the promise that the H-1B employee will be offered the same benefits as those offered to similarly situated U.S. workers. A copy of the benefits plan should also be included in the public access file.

Strike—The employer attests that there is no strike, lockout, or work stoppage in the course of a labor dispute at the place of employment on the date the LCA is filed. Moreover, the employer agrees to notify the Employment and Training Administration (ETA) within three days if any such labor dispute occurs. The employer also agrees not to use the LCA to place any H-1B worker at such a place of employment until the ETA determines that the strike or stoppage has

ceased. ^{lvii}69

Posting—The final attestation is the notice or posting requirement. An employer is required to provide notice of the filing of the LCA to the collective bargaining representative, if any. If there is none, the employer must post notices of filing the LCA at each place of employment where H-1B nonimmigrants will be employed.

^{lviii}70 In either case, the notice shall include the following information: that H-1B nonimmigrants are sought; the number of nonimmigrants the employer is seeking to employ; the occupational classification in which the H-1B nonimmigrants will be employed; the wage or wage range offered; the period of employment; the location(s) at which the H-1B nonimmigrants will be employed; and that the LCA is available for public inspection. ^{lix}71 The notice must also include a specific statement explaining that complaints regarding the LCA can be filed with any office of the Wage and Hour Division of the DOL. The notice must be of sufficient size and visibility and shall be posted in two or more conspicuous places, which would include, but not be limited to, locations in the immediate proximity of wage and hour notices or occupational safety and health notices. ^{lx}72 The hard copy notices must be posted within 30 days on or before the date the LCA is filed with the DOL and remain posted for a total of 10 days.

Alternatively, the employer may satisfy the notice requirement by sending a one-time electronic notice. ^{lxi}73 The employer may either post such notice on an electronic bulletin board or intranet subject to the same time requirements as the hard copy postings, or the employer may provide direct individual notice, such as by sending a one-time e-mail to affected employees.

If the employer places the H-1B employee at a new worksite not contemplated at the time the original LCA was filed, the employer is required to re-post either by hard copy notices or electronically. ^{lxii}74 As noted below, such placement may also require obtaining approval of a new LCA and approval of a new H-1B petition.

This attestation also includes the employer's promise that it will give the H-1B employee a copy of the certified LCA (Form ETA-9035) and the LCA cover pages, if requested, no later than the day the H-1B employee reports to work.

Public Disclosure/Public Access File—The employer must make available at its offices for public examination a copy of the LCA and necessary supporting documentation regarding the H-1B worker and other similarly situated employees.

^{lxiii}75 Specifically, the employer must create and maintain a public access file to document compliance in each H-1B case. The public access file must include:

- * Copy of the LCA (with employer's original signature and cover pages);
- * Documentation of the wage to be paid to the H-1B employee (offer letter or other);
- * Explanation of system used to set the actual wage;
- * Copy of prevailing wage determination from SWA or description of survey

or other source used;

- * Copy of notice to union (if applicable) or postings; and
- * Summary of benefits plan offered to the H-1B employee showing that it is the same as that offered to similarly employed U.S. workers (and H-1B employee's elections, if any).

Document to be added to file on or before H-1B employee's first day of work:

- * Copy of certified LCA with signature of H-1B employee as proof he or she received copy.

Documents that may need to be added in the future:

- * Documentation regarding any adjustment to the wage (*e.g.*, annual raise or cost of living increase);

- * Where the employer undergoes a change in corporate structure, and does not choose to file amended petitions for each H-1B worker it acquires, a sworn statement from the new employer that it accepts all obligations under the LCAs filed by the predecessor employer and a list of the affected LCAs;

^{lxiv}76

- * Where the employer uses a definition of single employer to determine H-1B dependency, a list of entities included;

- * Where an employer is H-1B dependent or a willful violator, evidence of recruitment of U.S. workers; and

- * Where an employer is H-1B dependent or a willful violator, but indicates that the LCA is for "exempt" nonimmigrants, a list of the "exempt" employees. (See below for discussion of exempt H-1Bs.)

Fee of \$1,000

ACWIA created a user fee of \$500 over and above the regular INS/BCIS filing fee as a condition for the approval of an H-1B visa petition filed on or after December 1, 1998. ^{lxv}120 This fee was increased to \$1,000 in October 2000 effective December 17, 2000. ^{lxvi}121 Some employers are exempt from the \$1,000 user fee, including institutions of higher education and related or affiliated nonprofit entities; nonprofit research organizations; and government research organizations. ^{lxvii}122 Other schools (elementary and secondary) were also added as exempt employers in October 2000 by the H-1B Fee Increase Bill. ^{lxviii}123 Employers claim this exemption by filing Form I-129W with the H visa petition. Additionally, no \$1,000 fee is required where an amendment but no extension is requested, for example on certain corporate restructurings.

The user fees are in place to fund a scholarship and training account for U.S. workers, and to fund enforcement of the H-1B program. ^{lxix}124 The user fee is \$1,000 for an initial H-1B petition, the first extension of stay (with the same employer), or for a change of employers. This \$1,000 fee applies to H-1B petitions filed before October 1, 2003. ^{lxx}125

An employer may not require the alien to pay the user fee or part of the user fee or reimburse the employer for payment of the user fee. If the employer does require the alien to compensate the employer for the user fee, the employer will be subject to a \$1,000 fine and an order of restitution to the H-1B nonimmigrant or to the U.S. Treasury. ^{lxxi}**126**

What to File—When an employer is ready to file an H-1B petition with BCIS, the complete package should include the following:

- * Form G-28, Notice of Entry of Appearance;
- * Form I-129 and H Supplement;
- * Form I-129W—Regarding the beneficiary's education and employer's exemption from the \$1,000 user fee, if applicable;
- * Certified LCA (Form ETA-9035 or ETA-9035e);
- * Petitioner's supporting letter—detailing the specialty nature of the occupation and how the beneficiary meets those requirements;
- * Copies of the beneficiary's educational credentials (degrees, transcripts, training certificates, and letters of experience if lacking bachelor's degree);
- * Credential evaluation—if foreign degree;
- * Proof of beneficiary's current immigration status if in the United States or copy of passport if outside the United States;
- * Documentation regarding the Petitioning Employer (annual report, copy of Web site, proof of ability to pay the wage, etc.);
- * \$1,000 user fee (unless exempt) plus \$130 filing fee;
- * Form I-539 (if dependents) and copies of dependents' immigration documents;
- * \$140 filing fee for I-539, if applicable; and
- * Optional premium processing fee of \$1,000 and Form I-907 if the employer wants BCIS to adjudicate the petition within 15 days.

Limit on Period of Authorized H-1B Admission

Ordinarily, an alien is permitted to be physically present in the United States in H-1B status for six years. Initial admissions may be for a maximum of three years, with extensions of up to three years. ^{lxxii}**130 H-1B petitions may be approved for the period of time requested by the petitioner, notwithstanding the validity period of the alien's license.** ^{lxxiii}**131 To be approved, the petition or extension request must be accompanied by an LCA valid for the period of time sought.** ^{lxxiv}**132 However, under some circumstances the H-1B petition may be filed initially without the LCA to allow the alien to take advantage of the AC21 portability rules. (See Portability above). An alien is eligible for a new six-year period in H-1B status after living outside the United States for at least one year.** ^{lxxv}**133**

There is no durational limitation on aliens whose H-1B presence is only intermittent or for no more than an aggregate of six months per year, or who

commute to the United States to work.^{lxxvi} **134 On the other hand, time spent in either H or L status is charged against the allowable time in the other status.**
^{lxxvii} **135**

AC21 created two pertinent exceptions to the six-year limitation on H-1B stay. First, H-1B nonimmigrants who are beneficiaries of pending or approved immigrant visa petitions, but who are running out of time due to per-country immigration quotas, may receive extensions until their adjustment of status applications are adjudicated. This particularly helps Chinese and Indian nationals who have been subject to lengthy waits in the backlogged employment-based preference categories in the past.^{lxxviii} **136**

The second exception to the six-year limitation on H-1B stay created by AC21 failed to resolve the problem it intended to fix. AC21 provided that an H-1B nonimmigrant could extend beyond the six years if he or she had a pending I-140 visa petition and more than 365 days had elapsed since the labor certification was filed. Because of the tremendous backlogs in processing labor certifications, many H-1B nonimmigrants facing the six-year limit could not file I-140 visa petitions and take advantage of the exception to the limit. Those H-1B nonimmigrants who did qualify could receive extensions in one-year increments.^{lxxix} **137**

The 21st Century Department of Justice Appropriations Authorization Act of 2002 fixed the problem created in AC21.^{lxxx} **138 The new law permits H-1B workers who filed labor certifications prior to the end of their fifth year and who had their labor certifications pending more than 365 days to have a new H-1B petition approved in one year increments without regard to whether they filed I-140 petitions. Moreover, it is even possible to use this provision to extend an H-1B beyond the six year cap based on a labor certification application or I-140 petition filed by a different employer.**^{lxxxi} **139**

ⁱ Updated from an article published at 2 *Immigration & Nationality Law Handbook* 54 (2002-03 ed.). Jonathan S. Greene is a founding member of Howanski & Greene, LLC in Towson, Maryland. He is an executive committee member of the AILA Washington, D.C., Chapter. He graduated from the University of Maryland Law School with a J.D. in 1996 and has practiced immigration law since then. He has written numerous articles on immigration and family law, and has been a speaker at seminars and conferences. He is also a contributing editor to the American Bar Association Student Lawyer Magazine.

Ed. note: 8 CFR was reorganized on Feb. 28, 2003. (See 68 Fed. Reg. 9828, posted on AILA InfoNet at Doc. No. 03022840.) This regulation created a new 8 CFR Chapter V. EOIR (8 CFR §1001 et seq.), redesignated certain sections of Chapter I by adding 1000 to those sections, duplicated other sections from Chapter I in Chapter V, and added some new parts in Chapter V.

To aid readers, AILA is adopting a style of indicating the duplicated sections by citing them with a bracketed "1". Thus, for example, 8 CFR §11212.1 connotes the section that appears as both §212.1 (coming within the ambit of the DHS/BCIS) and §1212.1 (coming within the ambit of EOIR).

ⁱⁱ Pub. L. No. 101-649, 104 Stat. 4978 (hereinafter IMMACT90).

ⁱⁱⁱ Pub. L. No. 105-277, Title IV, 112 Stat. 2681 (hereinafter ACWIA); 65 Fed. Reg. 80110-239 (Dec. 20, 2000).

^{iv} Pub. L. No. 106-95, 113 Stat. 1312.

^v Pub. L. No. 106-313, 114 Stat. 1251 (hereinafter AC21).

^{vi} Pub. L. No. 107-273, 116 Stat. 1758 (hereinafter DOJ Appropriations Authorization Act).

^{vii} Pub. L. No. 107-296, 116 Stat. 2135.

^{viii} Pub. L. No. 82-414, §§101(a)(15)(H), 212(m), 212(n), and 214(g), (h), and (i), 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*) (hereinafter INA).

^{ix} 8 CFR §214.2(h)(6)(iii).

^{x8} 8 CFR §214.2(h)(2)(i) ("United States employer" is defined at 8 CFR §214.2(h)(4)(ii)).

^{xi} However, J-1 or J-2 exchange visitors subject to the 2-year foreign residence requirement of INA §212(e), and persons admitted under INA §217, the Visa Waiver Pilot Program, may not change nonimmigrant status under INA §248, 8 CFR §248.

^{xii} 66 Fed. Reg. 29682-86 (June 1, 2001) (Interim Rule), *posted on AILA InfoNet at Doc. No. 01060102* (June 1, 2001).

^{xiii} In the aftermath of the September 11th terrorist attacks, the DS-157 is intended to elicit information that, in some cases, will lead to a security advisory opinion (SAO). *See* DOS Cable P110032Z Jan 02 (Jan. 11, 2002), *posted on AILA InfoNet at Doc. No. 02011134* (Jan. 24, 2002). Consular posts also have discretion to require the form for others. *See* "Update on Visa Revalidation and Security Checks," *posted on AILA InfoNet at Doc. No. 02072306* (July 23, 2002). *See also* "Clarifications on Use," *posted on AILA InfoNet at Doc. No. 02011531* (Jan. 15, 2002).

^{xiv} *See* 9 U.S. Dep't of State, *Foreign Affairs Manual* (FAM), Appendix C.

^{xv} Canadian citizens, Canadian landed immigrants eligible to participate in the Visa Waiver Program, and certain other arriving aliens are visa exempt. 8 CFR §[1]212.1. *See also* AILA InfoNet Doc. No. 03022041.

^{xvi} INS Operations Instructions (hereinafter OI) §214.2h(9).

^{xvii} The State Department has stated that a change in employer does not require a new visa to be obtained. To be readmitted to the United States, an H-1B worker may present an original INS Form I-797 approval notice for the new employer and a passport that contains an unexpired H-1B visa issued in connection with the first employer's H-1B petition. 74 *Interpreter Releases* 592-93 (Apr. 7, 1997); Letter from H. Edward Odom, Chief, Advisory Opinions Division of Department of State's Directorate for Visa Services, to Martin L. Rothstein (Feb. 12, 1997).

^{xviii} 22 CFR §41.112(d). This "automatic revalidation" no longer permits return to the United States if a nonimmigrant visa is applied for and denied. 67 Fed. Reg. 10322 (Mar. 7, 2002), *posted on AILA InfoNet at Doc. No. 02031172* (Mar. 11, 2002).

^{xix} 8 CFR §214.2(h)(15)(i).

^{xx} 8 CFR §[1]274a.12(b)(20). Previous inconsistencies between the automatic 240-day extension of work authorization for aliens with pending timely filed extension applications and INA §212(a)(9)(B)(iv) (stating that a period of "unlawful presence" for purposes of the three-year bar will commence 120 days after filing a timely extension or change of status application) were addressed in a memo from the INS. *See* Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations (March 3, 2000), *posted on AILA InfoNet at Doc. No. 00030774* (Mar. 7, 2000) (stating that "unlawful presence" will not accrue beyond the 120-day tolling period for purposes of the three-year bar of INA §212(a)(9)(B)(i) where an application for extension or change of status has been timely filed, and the alien has not worked without authorization either before the application was filed or while it is pending). A companion memo by Pearson (March 3, 2000), *posted on AILA InfoNet at Doc. No. 00030773* (Mar. 3, 2000), provides for similar relief of

INA §222(g) (requiring the automatic cancellation of a nonimmigrant visa following an alien's departure from the United States after expiration of the alien's authorized period of stay, and in most instances requiring the alien to apply for all subsequent visas in his or her country of nationality).

^{xxi} See AC21 §105 amending INA §214(m)(1).

^{xxii} 8 CFR §214.2(h)(12).

^{xxiii} 8 CFR §214.2(h)(10)(iii).

^{xxiv} See *Tapis v. INS*, CV No. 98-11807, 2000 WL 620180 (D. Mass. Apr. 24, 2000).

^{xxv} INA §214(i)(1). For a more detailed discussion of specialty occupation, see R. Bacon and L. Kurtz, "An Overview of Specialty Occupation in the H-1B Context," 2 *Immigration & Nationality Law Handbook* 65 (2001-02 ed.).

^{xxvi} See, e.g., *Matter of Shin*, 11 I&N Dec. 686, 687 (D.D. 1966); *Matter of Essex Cryogenics Industries, Inc.*, 14 I&N Dec. 196, 197 (Dep. Assoc. Comm. 1972); *Matter of General Atomic Company*, 17 I&N Dec. 532, 533 (Comm. 1980); and INS regulations, at 8 CFR §214.2(h)(4)(ii), as amended, 55 Fed. Reg. 2623 (Jan. 26, 1990), and renumbered, 55 Fed. Reg. 34895, 34897 (Aug. 27, 1990).

^{xxvii} 8 CFR §214.2(h)(4)(iii)(A).

^{xxviii} See, e.g., *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Caron Int'l Inc.*, 19 I&N Dec. 791, 794 (Comm. 1988). See generally, 1 C. Gordon, S. Mailman & S. Yale-Loehr, *Immigration Law and Procedure* (hereinafter Gordon, Mailman & Yale-Loehr).

^{xxix} See, e.g., *Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558 (Comm. 1988) (industrial design), superseding *Matter of Huckenbeck*, 13 I&N Dec. 118 (R.C. 1969); and *Matter of Panganiban*, 13 I&N Dec. 581 (Dep. Assoc. Comm. 1970) (medical technology), superseding *Matter of Asuncion*, 11 I&N Dec. 660 (R.C. 1966).

^{xxx} INA §214(i)(2); 8 CFR §214.2(h)(4)(iii)(C).

^{xxxi} H.R. Rep. No. 723, 101st Cong., 2d Sess. 67 (1990) reprinted in 1990 United States Code Cong. & Admin. News 6710 (baccalaureate not sufficient for occupations normally requiring more).

^{xxxii} See, e.g., *Matter of Yen*, 11 I&N Dec. 694 (D.D. 1966) (research geneticist); *Matter of Nakatsugawa*, 11 I&N Dec. 843 (D.D. 1966) (research entomologist).

^{xxxiii} See 1 Gordon, Mailman & Yale-Loehr §20.08[3](c)(ii) (1995).

^{xxxiv} See *Matter of Katigbak*, 14 I&N Dec. 45 (R.C. 1971) (24-hour-units required for a major in accounting).

^{xxxv} 8 CFR §214.2(h)(4)(iii)(C)(2).

^{xxxvi} INS OI 204.4(d)(5).

^{xxxvii} INA §214(i)(2)(C)(ii).

^{xxxviii} H.R. Rep. No. 723, *supra* note 38 at 67-68.

^{xxxix} 8 CFR §214.2(h)(4)(iii)(D).

^{xl} 8 CFR §214.2(h)(4)(iii)(D)(5).

^{xli} *Id.*

^{xlii} 8 CFR §214.2(h)(4)(B)(1).

^{xliii} INA §212(n)(1); 20 CFR §655.740(a)(1).

^{xliv} The INS rules regarding “roving” employees and the need for new LCA and H-1B filings are subject to varying interpretations. *See, e.g.,* Letter from Denyse Sabagh, AILA/INS Enforcement Liaison Committee, to Michael Pearson, Executive Associate Commissioner for Field Operations, INS (February 1, 2000), discussing LCA requirements following *National Association of Manufacturers (NAM) v. U.S. Dep’t of Labor*, 1996 WL 420868 (D.D.C. July 22, 1996) (No. Civ. A. 95-0715) (reported in 73 *Interpreter Releases* 999–1003 (July 29, 1996)). This issue was further confused in the DOL NPRM, published at 64 Fed. Reg. 628 (Jan. 5, 1999). Final regulations that are now controlling and undo the injunctions set by the court in the NAM lawsuit have been issued to implement ACWIA, 65 Fed. Reg. 80110–239 (Dec. 20, 2000).

^{xlvi} The forms and instructions can be accessed at www.lca.doleta.gov. The Web site includes detailed instructions, prompts, and checks to help employers fill out and submit the ETA-9035E form.

^{xlvi} INA §§101(a)(15)(H)(i)(b), 212(n)(1); 20 CFR Part 655.730 *et seq.*

^{xlvi} The LCA may be submitted by FAX to 1-800-397-0478 or by mail to P.O. Box 13640, Philadelphia, PA 19101. 66 Fed. Reg. 63297 (Dec. 5, 2001).

^{xlvi} When using the LCA electronic filing system, the employer must print the new LCA form and immediately sign one copy to keep in the public access file and sign another copy for BCIS to support the I-129 Petition.

^{xlvi} 20 CFR §655.73.

^{lvi} 20 CFR §655.732.

^{lvii} 20 CFR §655.733.

^{lviii} 20 CFR §655.734.

^{lviii} 20 CFR §655.731.

^{lv} The regulations make a SWA prevailing wage determination the only safe harbor in the event of a challenge or complaint. In other words, if the employer has relied upon a SWA determination of the prevailing wage and has retained a copy of that determination in its public access file, then the DOL will not investigate any complaint alleging inaccuracy of the prevailing wage determination. (20 CFR §655.731). If on the other hand, the employer has relied upon a published wage survey or other legitimate source of wage information, those determinations are subject to challenge and if found inaccurate, the employer could be required to pay back wages (20 CFR §655.810) and assessed other penalties, if the violation is willful. The controversy concerns the accuracy of the SWA determination. For example, the employer may feel that the SWA wage information is too general, or lumps together intermediate and advanced workers, or combines dissimilar jobs, with the result that the SWA skews the perceived prevailing wage. The employer may challenge the SWA determination through the employment service complaint system, but only before filing an LCA supported by that SWA determination. Once such an LCA is filed, the employer is deemed to have accepted the validity of the SWA determination. (20 CFR §655.731). For a more detailed discussion of the Prevailing Wage problem, *see* Linda Rose and Ester Greenfield, “You’ll Take the High Road and I’ll Take the Low Road and Never the Twain Shall Meet: A Practice

Advisory on Prevailing Wage Levels,” *posted on AILA InfoNet at Doc. No. 02051001* (May 10, 2002).

Also the SWA may determine that the wage rate is controlled by the McNamara-O’Hara Service Contract Act. (41 USC §351 *et seq.*) Such determinations can yield rigid requirements, which the employer may feel should not apply to the particular H-1B occupation. For more detailed background on this issue, see D. Notkin “The Application (or Misapplication) of the Service Contract Act to Labor Certifications,” 2 *Immigration & Nationality Law Handbook* 342–52 (1998-99 ed.), and H. Sheinfeld “Prevailing Wage Determinations under GAL 2-98,” 2 *Immigration & Nationality Law Handbook* 333–41 (1998-99 ed.).

lv 20 CFR §655.731(a)(2)(iii) and 655.731(d)(4).

lvi 67 Fed. Reg. 30465–521 (May 6, 2002), *posted on AILA InfoNet at Doc. No. 02050740* (May 7, 2002).

lvii 20 CFR §655.733.

lviii 20 CFR §655.734.

lix *Id.*

lx 20 CFR §655.734(a)(1)(ii)(A).

lxi INA §212(n)(1)(C)(ii), 20 CFR §655.734(a)(1)(ii)(B).

lxii 20 CFR §655.734(a)(2).

lxiii 59 Fed. Reg. 646–80 (Dec. 20, 1994); 20 CFR §655.760 (2000).

lxiv The need for this additional documentation is described in the H-1B regulation at 20 CFR §655.760 (a)(7)–(10). The requirements are discussed further in this article under changes made by ACWIA.

lxv INA §214(c)(9); 8 CFR §214.2(h)(19)(i), [1]103.7(b). *See also* 65 Fed. Reg. 10678–85 (Feb. 29, 2000).

lxvi H.R. 5362, H-1B Fee Increase Bill, *posted on AILA InfoNet at Doc. No. 00101201* (Oct. 12, 2000).

lxvii *Supra* note 118. The INS published final regulations that provide more detailed guidance on how to recognize each of these types of employers. 65 Fed. Reg. 10678–85 (Feb. 29, 2000), amending 8 CFR §214.2(h)(19)(iii)(C), (iv).

lxviii *Supra* note 120.

lix INA §286(s).

lxx *Supra* note 120.

lxxi INA §212(n)(2)(C)(vi).

lxxii INA §214(g)(4); 8 CFR §214.2(h)(9)(iii)(B)(1), (h)(13)(iii)(A), (h)(15)(ii)(B)(1).

lxxiii 72 *Interpreter Releases* 1094 (Aug. 14, 1995).

lxxiv 8 CFR §214.2(h)(15)(ii)(B)(1).

lxxv 8 CFR §214.2(h)(13)(i)(B), (h)(13)(iii)(A).

lxxvi 8 CFR §214.2(h)(13)(iii)(A), (13)(v).

lxxvii 8 CFR §214.2(h)(13)(iii)(A).

lxxviii AC21 §104(c) amending INA §§202(a)(5) and 214(g)(4).

lxxix AC21 §106 amending INA §214(g)(4).

lxxx Pub. L. No 107-273, 116 Stat. 1758 (Nov. 2, 2002).

^{lxxxi} ***See* Letter from Efren Hernandez, Director, Business and Trade Services, INS, to Naomi Schorr (Apr. 24, 2002).**