

OUR PRACTICE

Temporary Professionals

Three of the temporary visa categories lend themselves well to the employment of professionals even when the employer is not owned by a foreign investor or connected to an international business:

- H-1B for "specialty occupations,"
- TN (Trade NAFTA) for Canadian citizens in certain listed professions, and
- O-1 for aliens of "extraordinary ability."

Each has different eligibility rules and procedures discussed below. Sometimes more than one option is used for the same worker at the same time even for the same employer.

H-1B, H-1B1, and E-3 for "Specialty Occupations"

Requirements. The H-1B nonimmigrant (temporary) classification is available for any company to use to employ an alien to work in the U.S. in a "specialty occupation." Citizens of Chile and Singapore may use the related H-1B1, and Australians may use E-3. In essence, there are five requirements that make the H-1B possible:

1. The job must reasonably require at least a bachelor's degree or equivalent in a specific field.
2. The alien worker must possess at least a bachelor's degree or equivalent in a specific field.
3. The employer must pay the alien worker at least the "prevailing wage" for that type of work in the geographical area or areas where the alien will be working.
4. The employer must be willing post a notice in two conspicuous places at the work site identifying the position title and the salary (or a range, the bottom of which must be at least the prevailing wage).
5. The limit on approvals of first-time H-1B status for the present federal government's fiscal year (October 1 to September 30), where applicable, must not have been reached.

There are plenty of nuances to these five requirements, and there are a host of other substantive and procedural requirements involved in H-1B visas and status, but if these five are met, it can usually be worked out.

Process. The process of getting H-1B status is probably the most complicated of any nonimmigrant classification. You can't skip any of the steps. Generally, it works like this:

6. Define the position's duties and requirements and confirm the alien worker's credentials.
7. Determine the prevailing wage(s) for the position for the work site location(s), either through a request to the applicable state's workforce agency (SWA), through an existing published survey that meets the U.S. Department of Labor's requirements, or through a private survey conducted or commissioned by the employer.
8. Post a two notices containing required information, or provide the notice to an applicable union (rare).
9. File a "Labor Condition Application" ("LCA," Form ETA 9035) with the U.S. Department of Labor (not to be confused with the "Labor *Certification* Application" toward *permanent* residence filed with the same agency) for each area where the alien will work.

10. Maintain a "public access file" of key information about the LCA that can be reviewed by anyone who asks.
11. File a petition for nonimmigrant worker (Form I-129) and related forms, fees and supporting papers with USCIS. Applicants for H-1B1 and E-3 visas may skip this step.
12. If the alien worker has been already in H-1B status with another employer, the alien may begin work upon filing an H-1B (not H-1B1 or E-3) petition (more prudently, after receiving USCIS' receipt notice). Otherwise, the alien may begin work only after USCIS approval of the H-1B petition. A worker outside the U.S. uses the USCIS' notice of approval to apply for the worker's visa at a consulate outside the U.S.
13. Make sure not to materially change the terms and conditions of the alien's employment (especially including relocation to a geographical area not already approved) without filing an amended USCIS petition (which may also require amended LCA(s)).

Other requirements and limitations. Work Arrangements. Part time H-1B work can be approved, but special rules must be observed. An alien can change from one H-1B employer to another if the new employer files a petition (often unbeknownst to the first employer until the second is approved). An alien can work for more than one employer in H-1B status at one time as long as each employer has an approved USCIS petition for that worker. More than one H-1B worker can be employed by an employer at a time, but a separate petition must be filed for each worker.

Obligations to the Alien. The employer must meet the following obligations to the H-1B worker:

14. Give the worker a copy of the LCA by the time it is filed.
15. Pay the worker at least 100% of the "prevailing wage" and as much as any similarly qualified worker in the same occupation at that work site for that employer ("actual wage"). The worker's payment of certain H-1B fees is prohibited, and the worker's payment of certain other fees reduces the amount to be compared to the prevailing and actual wages.
16. Continue to pay the worker at least the rate of pay shown in the LCA and petition regardless of availability of work for the alien (i.e., no "benching" allowed).
17. Do not contract for payment of a "penalty" by the alien if he or she leaves the job (but "liquidated damages" are allowed-very murky area).
18. Pay the alien's cost of return travel if the work is terminated before the petition approval expires unless the alien quits or is fired for cause. Notify USCIS of the termination.

Duration of Stay. H-1B visa status is usually granted for 3 years initially and can be extended for another three years for a total maximum of 6 years. An H-1B visa may be obtained for no longer than the validity of the underlying USCIS petition. H-1B1 labor attestations can be valid for 3 years, but visas only for 18 months, and stay only for one year. After 5 years the worker is subject to the normal H-1B cap. E-3 labor certifications, visas, and stays are limited to 2 years with no total maximum.

Once the alien has reached the 6-year total maximum H-1B stay, he can only return in H or L status after a year outside the U.S., but he or she can avoid that by changing to some other nonimmigrant classification or filing for [adjustment of status](#) to permanent residence (the last of two or three steps toward permanent residence). Unlike some other classifications, H-1B can be obtained or extended even after the alien begins pursuing permanent residence, and technically the alien does not need to keep a home abroad. Many H-1B workers from the beginning plan on obtaining permanent residence and expect their H-1B employer to take prompt steps toward [employment based permanent residence](#). An employer who fails to take those steps often loses the worker to an employer who will.

Family participation. The "principal alien" H-1B worker's spouse or unmarried children under age 21 may receive H-4 status to accompany the "principal alien" H-1B worker. The H-4 dependent is not allowed to work in the U.S. H-4 visa or status can never be obtained for any longer than the "principal alien" already has H-1B visa or status approved, and the same 6-year maximum as for H-1B applies. Other family members or "significant others" may apply for [B visitor status](#) to accompany the H-1B alien.

BS requirement. Whether a position offered by the employer requires at least a bachelor's degree or equivalent can be a complicated subject giving rise to important strategies in presentation. Usually the employer must show, in essence, that a bachelor's degree or equivalent is a standard requirement for the employer or for the applicable industry. Government manuals may play a role in this strategy, namely the Dictionary of Occupational Titles (DOT), which normally should show at least a Specific Vocational Preparation (SVP) value of 7 or higher, and the Occupational Outlook Handbook (OOH), which may mention a bachelor's degree as a typical requirement. As a practical matter, the less clear it is that the alien is a professional (see below), the more carefully the professional nature of the position should be demonstrated.

Prevailing Wage. The requirement that the H-1B alien be paid at least the "prevailing wage" is the means by which U.S. employers are prohibited from using the H-1B classification to obtain cheap foreign professional labor. The safest way is to ask the State Workforce Agency (SWA) to determine the wage, but that can take time. Also, the government survey information provided to the SWAs for the specific purpose of alien applications contains information for such broad collections of job classifications and complexity levels that often it is truly inaccurate (i.e., too high). People have access to the SWA's survey information through the Department of Labor's Online Wage Library. A private published survey is often used instead, but to avoid possible penalties the employer must make sure the survey complies with complex DOL methodology. The employer may also commission its own survey, but careful compliance with DOL-required methodology is necessary.

Alien's credentials. The alien should be able to prove he or she has the required degree in a relevant field. This should be either a U.S. degree showing the major or concentration; a U.S. transcript; a foreign degree and/or transcript with an equivalency confirmation by a U.S. credentials evaluation service; or detailed proof that the alien's combination of education and experience is equivalent to a bachelor's degree (according to a rule equating one year of study to 3 years of progressive experience) plus evidence of official recognition of the alien's bachelor's degree equivalency. Cases involving experience equivalencies are particularly tricky.

Annual Cap. The annual cap for the federal government's fiscal year is 65,000, a limit that in some years has been reached on the first day of the fiscal year but in others has not been reached until much later. There is a capped exemption of 20,000 extra slots for workers who obtained at least a masters degree at a U.S. institution. Occasionally Congress has passed laws to raise the cap temporarily for certain years. Certain employers are exempt: universities, non-profit or governmental research institutions, and nonprofit entities that are "related to or affiliated with" universities. Someone who has not "ceased" worked for an exempt employer is exempt for a cap-subject concurrent employer. Some workers can be considered exempt if they are working "at" an exempt institution, even if they are technically employed by an otherwise non-exempt institution. Doctors who have obtained a J-1 waiver are exempt for any employer. Fortunately, the cap does not apply to aliens already in H-1B status seeking to amend their petition, extend stay, or change or add employers. Someone who will be subject to the cap should get an H-1B petition filed as soon as possible. Students in J or F status hoping to "squeeze out" as much "practical training" as possible before digging into their 6-year maximum in H-1B status should reconsider that strategy in light of the H-1B cap's impact.

Chile and Singapore H-1B1 visas have a sub-cap of 1,400 and 5,400, respectively, within the H-1B cap. Australian E-3 visas are capped at 10,500. None of those caps have come close to being reached.

LCA penalties. Upon receipt of a complaint, the U.S. Department of Labor (DOL) may investigate employers' compliance with the many complex requirements associated with the LCA process, most problematic of which is the "prevailing wage" requirement. If DOL decides to investigate further, it may do so (subject to some statutory limitations on self-initiated or open-ended investigations), issue a written determination, and impose appropriate penalties on the employer. Penalties may include back pay for the alien(s), one- to three-year debarment from other alien petitions, civil penalties of \$1,000 to \$35,000 per violation, and other unspecified remedies. This does not happen often, but it can be particularly onerous when numerous alien workers are involved.

H-1B Dependent Employers. Certain employers who are deemed by statute and regulation to be "H-1B dependent" are subject to additional requirements and possible penalties. An employer is deemed H-1B dependent if the employer:

- Has 1-25 full-time equivalent employees in the U.S. and more than 7 H-1B workers;
- Has 26-50 full-time equivalent employees in the U.S. and more than 12 H-1B workers; or
- Has more than 50 full-time equivalent employees in the U.S. and at least 15 percent of the employer's workforce is made up of full-time H-1B workers.

The extra requirements do not apply to a petition for a position that requires a master's or higher degree (or its equivalent) in a field related to the intended employment or a beneficiary who receives cash wages at an annual rate of at least \$60,000. An employer who is even arguably "H-1B dependent" should take particular care with expert advice in the H-1B process.

Further Information or Assistance. The above information is a relatively brief summary of the complex rules and procedures applicable to H-1B specialty occupations.

TN (Trade NAFTA) for Canadian Citizens in Listed Professions

Under Annex 1603.D.1 of the North American Free Trade Agreement (NAFTA), Canadian and Mexican citizens who are among a list of professionals may enter and work in the U.S. in the "TN" (Trade NAFTA) classification. Canadian citizens benefit more than Mexican citizens.

Benefits for Canadians and Mexicans. Some aspects of the TN program under NAFTA benefit Canadians and Mexicans alike. For instance, the educational requirements for TN status in some professions are lower than for H-1B in particular, for computer analysts, disaster relief insurance claims adjusters, graphic, industrial or interior designers, hotel managers, management consultants, scientific technicians/technologists, technical publications writers, medical laboratory technologist, and registered nurses. The annual worldwide cap on H-1B petition approvals does not affect the number of TN entries allowed, and the maximum stays between five and seven years for H and L status do not apply.

Benefits for Canadians. Canadian professionals listed avoid the cumbersome procedural requirements of the H-1B classifications ("labor condition application" and USCIS petition) that citizens of other countries must face. A Canadian citizen may appear with no visa at a U.S. port or border inspection point and present a simple package of documents for entry in TN status. If approved, the immigration inspector issues an I-94 card valid for multiple entries for up to three years. Extensions of up to three years may be obtained either by appearing at the border/port with another package of documents, or by filing an I-129 petition with USCIS.

Benefits for Mexicans. Mexican professionals are not subject to many H-1B restrictions (see above), but they must obtain a visa to enter from outside the U.S. if they are not changing status within the U.S. Petition and visa approval may not exceed three years in duration.

Nonimmigrant Intent. A TN alien need not maintain a foreign residence but must be coming "temporarily." This is why a TN applicant should be prepared to convince a USCIS inspector or consular officer that he or she does not intend to establish permanent residence, that he has continuing ties to his home country and that the U.S. assignment has some objective, reasonable, predictable, finite end. It may be best to maintain Canadian or Mexican automobile registration and driver's license to avoid problems at the border. This is also why many Canadians and Mexicans who will seek employment based permanent residence first change to H-1B status for protection from the possibility of being turned away at the border while awaiting permanent residence. Interestingly, unlike the H-1B and L-1 classifications, there is no maximum total limit in TN status. In fact, a Mexican or Canadian citizen who has reached the maximum stay in H or L status may change to TN status, although USCIS will still evaluate whether the alien's entry or stay is "temporary."

Family Members. The spouse and children under age 21 of a TN alien from Canada or Mexico may be admitted in "TD" (Trade Dependent) status with an I-94 card indicating "multiple entries" for similar use and for equal periods of stay as the TN principal alien. Unless they are themselves Canadian citizens generally exempt from the normal visa requirement, or unless they are from any country changing nonimmigrant status within the U.S., TD aliens must first obtain TD visas from a U.S. consulate before entering the U.S.. They may not work in such status, but they may attend school.

List of Professionals. In order to qualify for TN status, a Canadian or Mexican citizen must be coming to the U.S. to perform one of the types of services listed in the treaty and must possess the minimum qualifications for that profession as shown in the list. Although not clarified in the treaty, USCIS policy is that "self-employed" professionals may not qualify for TN status. A TN professional may perform training functions relating to the profession, including conducting seminars. The listed professions and their corresponding credential requirements are as follows:

Miscellaneous

- Accountant – Baccalaureate or Licenciatura Degree; or C.P.A., C.A., C.G.A. or C.M.A.
- Architect – Baccalaureate or Licenciatura Degree; or state/provincial license.
- Computer Systems Analyst – Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post Secondary Certificate and three years' experience
- Disaster relief insurance claims adjuster (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster) – Baccalaureate or Licenciatura Degree and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims.
- Economist – Baccalaureate or Licenciatura Degree.
- Engineer – Baccalaureate or Licenciatura Degree; or state/provincial license.
- Forester – Baccalaureate or Licenciatura Degree; or state/provincial license.
- Graphic Designer – Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate and three years experience.
- Hotel Manager – Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post-Secondary Certificate in hotel/restaurant management and three years experience in hotel/restaurant management.
- Industrial Designer – Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.
- Interior Designer – Baccalaureate or Licenciatura Degree or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.
- Land Surveyor – Baccalaureate or Licenciatura Degree or state/provincial/federal license.
- Landscape Architect – Baccalaureate or Licenciatura Degree.

- Lawyer – (including Notary in the province of Quebec) – L.L.B., J.D., L.L.L., B.C.I., or Licenciatura degree (five years); or membership in a state/provincial bar.
- Librarian – M.L.S., or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite).
- Management Consultant – Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant, or five years experience in a field of specialty related to the consulting agreement. (USCIS limits this to temporary observation and problem-solving by a "supernumerary" person for normal companies, or to temporary filling of a permanent position in a U.S. management consulting firm.)
- Mathematician (including Statistician) – Baccalaureate or Licenciatura Degree.
- Range Manager/Range Conservationist – Baccalaureate or Licenciatura Degree.
- Research Assistant (working in a post-secondary educational institution) – Baccalaureate or Licenciatura Degree.
- Scientific Technician/Technologist – Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research. The alien's work must be in direct support of professionals in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, and meteorology or physics. (computer programmers working in support of computer engineers might qualify)
- Social Worker – Baccalaureate or Licenciatura Degree.
- Sylviculturist (including Forestry Specialist) – Baccalaureate or Licenciatura Degree.
- Technical Publications Writer – Baccalaureate or Licenciatura Degree, or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.
- Urban Planner (including Geographer) – Baccalaureate or Licenciatura Degree. Vocational Counselor – Baccalaureate or Licenciatura Degree.

Medical/Allied Professionals

- Dentist – D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental or state/provincial license.
- Dietitian – Baccalaureate or Licenciatura Degree; or state/provincial license.
- Medical Laboratory Technologist (Mexico and the United States) – Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience. [Laboratory chemical, biological, hematological, immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment, or prevention of diseases.]
- Nutritionist – Baccalaureate or Licenciatura Degree.
- Occupational Therapist – Baccalaureate or Licenciatura Degree; or state/provincial license.
- Pharmacist – Baccalaureate or Licenciatura Degree; or state/provincial license.
- Physician (teaching or research only) – M.D. Doctor en Medicina; or state/provincial license.
- Physiotherapist/Physical Therapist – Baccalaureate or Licenciatura Degree; or state/provincial license.
- Psychologist – state/provincial license; or Licenciatura Degree.
- Recreational Therapist – Baccalaureate or Licenciatura Degree.
- Registered nurse – state/provincial license or Licenciatura Degree.
- Veterinarian – D.V.M., D.M.V., or Doctor en Veterinaria; or state/provincial license.

Scientists

- Agriculturist (including Agronomist) – Baccalaureate or Licenciatura Degree.
- Animal Breeder – Baccalaureate or Licenciatura Degree.
- Animal Scientist – Baccalaureate or Licenciatura Degree.
- Apiculturist – Baccalaureate or Licenciatura Degree.
- Astronomer – Baccalaureate or Licenciatura Degree.
- Biochemist – Baccalaureate or Licenciatura Degree.
- Biologist – Baccalaureate or Licenciatura Degree.
- Chemist – Baccalaureate or Licenciatura Degree.
- Dairy Scientist – Baccalaureate or Licenciatura Degree.
- Entomologist – Baccalaureate or Licenciatura Degree.
- Epidemiologist – Baccalaureate or Licenciatura Degree.
- Geneticist – Baccalaureate or Licenciatura Degree.
- Geochemist – Baccalaureate or Licenciatura Degree.
- Geologist – Baccalaureate or Licenciatura Degree.
- Geophysicist (including Oceanographer in Mexico and the United States) – Baccalaureate or Licenciatura Degree.
- Horticulturist – Baccalaureate or Licenciatura Degree.
- Meteorologist – Baccalaureate or Licenciatura Degree.
- Pharmacologist – Baccalaureate or Licenciatura Degree.
- Physicist (including Oceanographer in Canada) – Baccalaureate or Licenciatura Degree.
- Plant Breeder – Baccalaureate or Licenciatura Degree.
- Poultry Scientist – Baccalaureate or Licenciatura Degree.
- Soil Scientist – Baccalaureate or Licenciatura Degree.
- Zoologist – Baccalaureate or Licenciatura Degree.

Teachers

- College – Baccalaureate or Licenciatura Degree.
- Seminary – Baccalaureate or Licenciatura Degree.
- University – Baccalaureate or Licenciatura Degree.

O-1 for Aliens of "Extraordinary Ability"

Temporary O-1 status is available to persons from any country who are "among the handful of people at the top" of any particular field of endeavor. (O-1 rules for athletes and performers are slightly different). Normally, the alien must be sponsored by an employer or at least an agent requiring the alien's extraordinary ability, although some self-petitions have been approved.

Eligibility. To qualify for general O-1 classification, the alien must present either:

19. Receipt of a major, internationally recognized award, such as the Nobel Prize; or
20. Evidence of at least three of the following with direct relation to the field of endeavor for which classification is sought:
 - Receipt of nationally or internationally recognized prizes or awards for excellence;
 - Membership in associations that require outstanding achievements of their members, as judged by recognized national or international experts;
 - Discussion about the alien's work appearing in professional or major trade publications or other major media (must show title, date, and author of material, with any necessary translation);
 - Participation, either individually or on a panel, as a judge of the work of others in the same or an allied field;

- Original scientific, scholarly, or business-related contributions of major significance;
- Authorship of scholarly articles in professional or major trade publications or other major media;
- Employment in a critical or essential role for organizations or establishments that have a distinguished reputation;
- Command of a high salary or other significantly high remuneration for services, evidenced by contracts or other reliable evidence.

21. Comparable evidence to show extraordinary ability and the inapplicability of the above standards to the occupation.

In fields of endeavor where there is an appropriate union or "peer group," that group must provide an "advisory opinion" concerning the petition.

Procedures.

A petition to the USCIS is always required. The petition is filed in the U.S. demonstrating eligibility, and USCIS usually acts on the petition within 60-90 days. If the alien was in the U.S. in a nonimmigrant visa status (not visa waiver) at time of filing, the approval can itself accomplish change of status with no further action. If the alien is outside the U.S. or ineligible to change status, the approval is used by the alien to obtain an O-1 visa at a U.S. consulate outside the U.S. with a perfunctory application. An alien who changes status to O-1 and then travels outside the U.S. (other than only to Canada or Mexico for less than 30 days) must obtain an O-1 visa before re-entry.

Duration of Stay.

An O-1 petition is usually granted for the duration of the event or employment for which permission is requested with a maximum of three years in the first instance. Extensions are usually granted in one-year increments, and there is no maximum limit on the number of extensions. Visas and admissions to the U.S. are limited to the duration of the most recently approved petition or extension. An O-1 visa can be renewed either at a U.S. consulate abroad or by mail to the State Department in Washington, D.C.

Family Members.

The "principal alien" O-1 worker's spouse or unmarried children under age 21 may receive O-3 status to accompany or follow to join the worker. The duration of the family member's status or visa can never exceed the duration of the principal alien's O-1 petition approval. The O-3 dependent is not allowed to work in the U.S. Other family members or "significant others" may apply for B visitor status to accompany the H-1B alien.

How We Can Help

Baker Donelson's Immigration Team can pick the classification that is best suited for a particular worker's credentials, duties, location, employer, and other factors, and then prepare expeditiously the papers necessary to pursue that status, in a manner least burdensome to the clients but most likely to result in a speedy approval. We know the twists and turns and the seemingly infinite variables involved and can lead the employer and international worker confidently through the maze of procedures, providing written guidance at each step and providing real-time status information to each worker and to the employer representative via internet. We coordinate cases for volumes of workers for a single employer or conglomerate. We keep in mind the prospect of permanent residence from the beginning and avoid missteps that would prejudice speed and success in the ultimate goal. We take care of the status of family members of the principal workers.

Important Links:

- [USCIS: How do I Hire a Foreign National for Short-Term Employment in the U.S.?](#)
- [State Dept: Temporary Workers](#)
- [H-1B: DOL Explanation](#)
- [DOL Occupational Outlook Handbook](#)

- State Workforce Agency Contacts
- USCIS: Current Cap Count for Nonimmigrant Worker Visas
- Chile Free Trade Agreement (FTA) Professional
- Singapore Free Trade Agreement (FTA) Professional
- Australian (E-3) in Specialty Occupation