

The ABC's of the US Immigration



The United States is the most sought-after destination for people spread across all segments such as students, professionals, skilled workers, etc. Still there is a lack of clarity on visa requirements and other related issues. Greg Siskind answers the fundamental issues relating to residency and naturalization, H-1B, H-2A and H-2B visas and adopting foreign nationals from the perspective of the United States.

Greg Siskind*

RESIDENCY AND NATURALIZATION

What is meant by "residence" in the naturalization requirements?

Residence is defined as a person's place of general abode. In other words, the place a person makes "their principle, actual dwelling place in fact, without regard to intent."

In general, what are the physical requirements for naturalization?

As a general rule, an applicant for naturalization must have been a permanent resident of the US for at least five years and also meet certain requirements dealing with the time actually physically spent in the US.

During the five years immediately preceding the application, the person must have resided in the US, with half of that time physically spent in the US.

Is an applicant required to physically reside in the US when applying for naturalization?

During the three months preceding the application, the person must have resided in the USCIS district where the application will be filed. Between the filing of the naturalization application and the granting of citizenship, the applicant must continue to reside in

the US. This does not mean travel is forbidden, however. But one must not change their place of residence during this time and the requirement of spending half of one's time in the US continues to apply at the time of naturalization as well as the time of application.

Is there a residence requirement after the applicant has submitted an application for citizenship?

After filing the naturalization application, the applicant must continue to reside in the US, but absences may be allowed.

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Will an applicant be denied naturalization if absent for six months to a year from the US during the five year period prior to the application?

Simply being absent from the US during brief periods, even for six months up to a year in the five years prior to a citizenship application, does not terminate the period of physical presence. However, such absences need to be dealt with carefully. They are presumed to break the period of continuous residence if they last over six months, but this presumption can be overcome by demonstrating that the applicant did not abandon the US residence. Evidence that could be used in this regard includes evidence of continuing US employment, family in the US, maintaining a home in the US, and evidence that no employment abroad has been obtained.

Will an applicant be denied naturalization if absent for more than a year from the US during the five year period prior to the application?

Absences of more than one year will terminate continuous residence unless the applicant complies with the certain requirements. First, the applicant must have been physically present in the US for one continuous year following admission as a permanent resident. Any absence from the US, however brief, is not allowed during this period. Additionally, the applicant must be employed by one of the following:

- The US government
- A US research institution recognized by the Attorney General
- A US business engaged in the development of foreign trade and commerce
- A public international organization of which the US is a member.

Before the one-year period outside the US is up, the applicant must file an application to preserve residency with USCIS and must demonstrate employment by one of the organizations listed above. The applicant must then prove again that the absence from the US was because of employment. Even when these requirements are met, it is important to remember that the requirement that half of the five years prior to filing the naturalization application be spent in the US still applies.

What absences will be considered as "constructive presence" in the US?

The only exception to this requirement is for time outside of the US during which a person is considered to be "constructively present" in the US. The most common example of this is overseas military service.

In which cases are the residence requirements waived?

Residence requirements are waived if an applicant is the spouse of a U.S. citizen and meets one of the following classifications:

- A member of the U.S. Armed Forces;
- An employee or an individual under contract to the U.S. Government;
- An employee of an American institution of research recognized by the Attorney General;
- An employee of an American-owned firm or corporation

engaged in the development of foreign trade and commerce for the United States;

- An employee of a public international organization of which the United States is a member by law or treaty; or
- A person who performs ministerial or priestly functions for a religious denomination or an interdenominational organization with a valid presence in the United States

AND

The citizen spouse is working overseas for at least one year according to an employment contract or order, then the residency requirements are actually waived.

In addition, during war times, soldiers being deployed overseas are eligible for citizenship without meeting the normal residency requirements.

Which residence requirements apply when a spouse of a US citizen applies for citizenship?

One of the most important benefits spouses of US citizens have with regard to naturalization is that they may seek US citizenship after only three years as a permanent resident, rather than five, as is generally the case. As is the case under the general rule, one half of this time must be spent physically in the US, or 18 months. The couple must have been living in marriage for the entire three years, and the citizen member of the couple must have been a citizen for the entire three-year period. Should the couple no longer be living together as husband and wife, the residency requirement for naturalization will revert to the normal five years.

If the US citizen spouse of a permanent resident applying for citizenship is employed abroad, are residence requirements still applied?

As previously mentioned, under section 319(b) of the Immigration and Nationality Act, spouses of US citizens who are employed abroad also benefit from an expedited naturalization process. The US citizen must be employed by a qualifying organization, which can be:

- The US government,
- A recognized US research institution,
- A US business engaged in foreign trade,
- An international organization of which the US is a member or participant, or
- A religious denomination, for the purpose of performing religious work.

The regulations specify that the citizen spouse's employment

abroad must be for a period of at least one year, but if this requirement is met, the naturalization application can be filed before the employment abroad begins. Also, there is no minimum required residence in the US, nor a minimum period for which the applicant must have been a permanent resident. The applicant must, however, declare their intention to reside permanently in the US upon the termination of their spouse's foreign employment.

H-1B VISAS

For thousands of American employers, the H-1B visa program is the primary method for bringing in professional level foreign employees. The visa has been the subject of considerable media attention in recent years because Congress has set limits on the numbers of workers allowed in on H-1B visas.

What is an H-1B visa?

The H-1B is a non-immigrant classification used by an alien who will be employed temporarily in a specialty occupation or as a fashion model of distinguished merit and ability.

What is a specialty occupation?

A specialty occupation requires theoretical and practical application of a body of specialized knowledge along with at least a bachelor's degree or its equivalent. For example, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts are specialty occupations.

Is there a limit on the number of H-1B aliens?

Yes. Under current law, there is an annual limit of 65,000 aliens who may be issued a visa or otherwise provided H-1B status. Under the "L-1 Visa and H-1B Visa Reform Act of 2004", beginning March 8, 2005, up to 20,000 additional H-1B slots are available to graduates of US masters degree (or higher) programs. There are some types of jobs that are exempt from the H-1B cap and these are discussed below.

Who is actually subject to the cap?

Not every H-1B applicant is subject to the cap. Visas will still be available for applicants filing for amendments, extensions, and transfers. The cap also does not apply to applicants filing H-1B visas through institutions of higher education, nonprofit research organizations, and government research organizations. Physicians taking jobs under State 30 or federal government agency waivers based on serving underserved

communities are exempt from the H-1B cap.

What are the advantages to applying for an H-1B?

One of the things that makes this visa so desirable is that, unlike many other non-immigrant visa categories, it is a "dual intent" visa. This means that a visa will not be denied simply because an individual has intentions to become a permanent resident. The assumption is that if for some reason the permanent residency petition is denied, the person would still have the intention to return home. Thus, assuming the applicant meets all of the statutory requirements for the H-1B visa, the main reason it would be denied is if the consular officer feels there is good reason to believe the applicant will not comply with the terms of the visa (such as having a history of failing to comply with the terms of a visa).

Another advantage to the H-1B category is that the

employer does not need to demonstrate that there is a shortage of qualified US workers and, consequently, a labour certification process can be avoided. Aside from documenting that the position offered is in a specialty occupation and that the employee has the appropriate credentials for the job, the employer need only verify that the H-1B worker is being paid the prevailing wage for the work being performed and that employment of a foreign worker is not harming conditions for US workers.

How does one apply?

In an H-1B visa application, the US employer is called the petitioner and the foreign worker is called the beneficiary. After an offer of employment is made, the petition process begins. The first step is for the petitioner to ensure that the worker will be paid at least 95% of the prevailing wage paid to similarly employed workers in the geographic area where the beneficiary will be employed. The employer must also be sure that it is not paying less than the actual wage paid to its other employees with similar qualifications. The prevailing wage can be determined through a private wage survey or through a state Employment Security Agency. The benefit of relying on a state wage determination is that it cannot be challenged later by the US Department of Labor. On the other hand, state determinations are frequently not a close match to the job performed and are slow in being issued.

Once the wage information has been obtained, a Form ETA 9035 Labor Condition Application (LCA) must be submitted to the US Department

of Labor. On this form, the employer must submit the wage to be paid, the prevailing wage, and must make certain attestations. The form is submitted by the web or by fax and the Department of Labor only reviews the form to make sure it is properly completed. It does not look to see whether the information is accurate and instead investigates a small percentage of cases where violations of the regulations appear to be occurring.

(For more information, see the Department of Labor's Foreign Labor Certification web page at <http://workforcesecurity.doleta.gov/foreign/>.)

The certified LCA petition is submitted to USCIS as part of the H-1B petition package. Other information that should be included in USCIS petition includes documentation of the beneficiary's qualifications, the petitioner's type of business, and the type of work the beneficiary will be performing. Each of these will be further detailed below.

For more information on the application process, see H-1B flow chart at <http://www.visalaw.com/02dec1/H1B.pdf>.

What is the purpose of the LCA?

The LCA serves two related purposes: (1) ensuring that US wages are not depressed by the hiring of foreign labour and (2) that foreign workers are not exploited. On this document, the employer makes specific representations regarding the conditions under which the foreign worker was hired and will be employed. These attestations are as follows:

- The employer will pay the required wage, which is the greater of the prevailing wage or the actual wage paid to other employees in the same position

- The employment of H-1B workers will not adversely affect the working conditions of US workers
- When the LCA was filed, there was no strike, lockout or other work stoppage because of a labour dispute
- The H-1B worker will be given a copy of the LCA, and the employer has notified the bargaining representative if the job is unionized, or if not, has posted in a conspicuous place notice that an LCA was filed.

Within one business day of filing the LCA, the employer must establish a public access file that may be viewed by any person. This file must include a copy of the LCA, a statement of the actual wage received by the H-1B worker, the prevailing wage, including its source, whether the state or a private survey is used, a memo from the employer explaining the actual wage determination, and evidence that the LCA has been filed.

In addition, the employer must keep other information that need not be made available to the public. This includes payroll data for all employees in the same occupations as the H-1B worker, a calculation of the actual wage paid the H-1B worker, the raw data behind the prevailing wage determination, documentation of any fringe benefits provided to workers, and evidence that the H-1B worker has been given a copy of the LCA. Once approved, an LCA is valid for three years.

Beginning in 1998, some new requirements were added to the LCA process. However, these requirements apply only to "H-1B dependent" employers, a concept

also created in 1998. These requirements sunset on October 1, 2003, were restored in late 2004. Whether an employer is H-1B dependent depends on the following guidelines:

- If the employer has over 50 employees, the employer is H-1B dependent if at least 15% of the workforce is comprised of H-1B visa holders
- If the employer has 26-50 employees, the employer is H-1B dependent if it employs more than 12 H-1B workers
- If the employer has 25 or fewer employees, the employer is H-1B dependent if it employs more than seven H-1B workers

While in most cases the new requirements apply only to H-1B dependent employers, they also apply to employers who have been found to have committed a wilful failure or misrepresentation with regard to any attestation made on the LCA. If the employer is H-1B dependent, it must comply with these requirements:

- The employer must attest (swear under oath) that it has not and will not "displace" a US worker during the period from 90 days before the H-1B petition is filed until 90 days after it has been filed.
- The employer must attest that it has taken "good faith steps" to recruit US workers for the job, and that they have offered it to any US worker who applied that was at least as qualified as the H-1B non-immigrant.

What is the next action after filing the LCA?

Obtaining an LCA is only the first step in the H-1B process.

The application for an H-1B visa must present evidence that will convince USCIS of three basic truths:

- The employer has a legitimate need for a "specialty occupation worker"
- The position offered is in a "specialty occupation"
- The prospective employee is qualified for the position.

1. The employer's need

This is often the easiest aspect of an H-1B petition to demonstrate. As a general rule large and well-known businesses do not have much difficulty in showing they have a need for an H-1B worker. Problems can be encountered if the employer is small, or if the business was recently started. In such cases USCIS has requested evidence relating to the stability of the business, such as tax returns and payroll records. Court decisions have, in the past, said USCIS is not supposed to examine the financial background of a company. However, USCIS routinely asks for such documentation even for many large employers.

2. The nature of the position

Demonstrating that a position is in a specialty occupation is quite easy with some jobs, such as lawyers, accountants, engineers and professors. With many positions, however, it is not so simple. In these situations, the application must carefully define and describe the job. Two volumes published by the Department of Labor are helpful in this area. They are the Dictionary of Occupational Titles and the Occupational Outlook Handbook. The Dictionary of

Occupational Titles contains a list of job titles and lists job duties that are associated with each. The Occupational Outlook Handbook lists general educational requirements for entry into certain areas of employment, but often it deals with such broad fields that it is of limited usefulness. While the books are helpful in documenting a case, neither is binding on USCIS and the use of the publication should always be used with caution. Also, the database provided by the Department of Labor provides helpful information in documenting a position is a specialty occupation.

In cases where the specialty nature of the position is not evident, many types of evidence may be used. Trade and association publications may be presented. Petitioners may also procure affidavits from authorities in the field. Such an affidavit would be especially useful if written by someone who has personally observed the workplace and the position's role in it. One of the best types of evidence is the employer's own hiring practice in hiring for the position. Evidence of the minimum qualifications required for positions below that for which an H-1B worker is sought can also be helpful, especially if such people are required to have a university degree.

If the occupation is little known or is relatively new, extensive documentation will be required to convince USCIS of the need for an H-1B worker. In these cases appropriate evidence would include affidavits from other employers in the field and professional organizations in the field.

3. The alien's qualifications

To qualify as a specialty occupation, the position must require at least a bachelor's degree or its equivalent. Therefore, one of the most important parts of an H-1B case is documenting the alien's education and/or experience. A diploma may be submitted if it indicates the alien's field of study and that field is relevant to the position sought. If this is not the case, transcripts should also be submitted. If the relevance of the subjects studied is not apparent, course descriptions from the school catalog may be included. If the alien did not attend school in the US, their degree must be evaluated by a credentials evaluation service to ensure it is at least equal to a US bachelor's degree. Note that if the alien attended college abroad, and then obtained an advanced degree in the US, no evaluation of their undergraduate degree is required because it is presumed that the US graduate institution would not have admitted the student without at least possessing the equivalent of a bachelor's degree.

While possession of a degree is the most common way of establishing a person's ability to work in a specialty occupation, a degree is not required to obtain an H-1B visa. The applicant can demonstrate through work experience or a combination of education and experience that they have the equivalent of a bachelor's degree. If work experience will be used, USCIS requires affidavits from former employers outlining the alien's responsibilities and skills learned during the employment.

Under USCIS rules, three years of work experience is equal to one year in college.

If there are any additional requirements that the alien must meet to take the position offered, documentation that these requirements are met must be submitted. An example would be when a license is required by the state in which the alien will be working.

How long can an alien be in H-1B status?

Under current law, an alien can be in H-1B status for a maximum period of six years at a time. After this time, an alien must remain outside the United States for one year before another H-1B petition can be approved. Certain aliens working on Defense Department projects may remain in H-1B status for 10 years. Additionally, certain aliens may extend their status beyond the 6-year period in one year increments if:

- 365 days or more have passed since the filing of any application for labour certification, Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant, or
- 365 days or more have passed since the filing of an EB immigrant petition.

For whom can an H-1B non-immigrant work?

H-1B aliens may only work for the petitioning US employer and only in the H-1B activities described in the petition. The petitioning US employer may place the H-1B worker on the

worksite of another employer if all applicable rules (such as the Department of Labor rules) are followed. H-1B aliens may work for more than one US employer, but must have a Form I-129 petition approved by each employer.

H-1B employees may apply for a change of status from one employer to another. The application process is fairly similar to applying for a brand new H-1B except that the process can be completed in the US without a trip abroad to a US consulate.

How does an H-1B non-immigrant change or add an employer?

One of the easiest ways for an H-1B visa holder to run into trouble with his or her visa status is to fail to comply with immigration regulations when switching employers or changing the terms of his or her employment.

The most difficult problems are often created when someone changes jobs without taking care of immigration issues. In fields like computer programming or physical therapy, it is not unusual for an individual to move frequently from employer to employer. But for an H-1B visa holder, each change can present challenges.

The first basic rule to note is that an H-1B is employer specific. In other words, it is only valid for the petitioning employer and only entitles the recipient to work for the employer approved by USCIS. That means that each time a worker moves to a new employer, a new H-1B approval is required.

It is possible to apply for a change of status to switch employers from the US without having to leave and get a new visa stamp, however. But it is important to remember that the process involved will be pretty similar to getting an H-1B visa from scratch.

At one time, it was thought that changing H-1B employers meant that a new visa stamp would be needed the next time someone leaves and re-enters after a change of status in the US. USCIS and the State Department now make it clear that as long as the visa remains unexpired the applicant remains in H-1B classification. Note that someone who changed from another visa to H-1B status in the US (such as from F-1 to H-1B) and never has had a visa stamp will still need to get an H-1B visa at a consulate.

What is 'H-1B Portability'?

In October 2000, former President Clinton signed the American Competitiveness in the Twenty-First Century Act (AC 21). One of the most sought after provisions in AC 21 is the "portability" provision, which eases the process of changing jobs. Under it, H-1B workers can begin working for a new employer as soon as the new employer files an H-1B petition for the worker. In the past, the worker had to wait for the petition to be approved before he could begin working for the new employer. Because this provision applies to petitions for new employment filed before or after the enactment of AC 21, workers for whom a new petition was filed can begin work for the new employer immediately.

The primary limitation on this portability provision is that the new employer must have filed a "non-frivolous" petition, which is one with some basis in law and fact. To take advantage of the portability provision, the worker must be in the US pursuant to a lawful admission, and must not have engaged in unauthorized employment since that admission.

The portability provision has created concern among employers about how they will comply with I-9 requirements, which obligate employers to ensure that all employees are legally authorized to work in the US. While the worker who begins working for a new employer after the filing of a new petition is work authorized, the I-9 form contains no provision for such a situation. Employers in this situation should follow current documentation procedures, as well as keeping a copy of the worker's I-94 and a copy of the receipt notice for the new H-1B petition.

How does the H-1B cap affect an immigrant who requests a change in employers?

USCIS has stated that the limit on the number of H-1B visas does not apply in this situation. However, if one leaves an employer and waits more than 30 days to apply for a new H-1B visa, the cap would apply again. Also, if one works for a cap-exempt employer and then switches to an employer that is not exempt from the cap, the cap will apply.

In the case of a concurrent filing of an H-1B application where a person is working for an exempt employer and then seeks

additional employment with a non-exempt employer, the cap will not apply to the second position.

What if you change employers and then decide to go back to the first employer?

The news here is good. The H-1B petition continues to remain valid until it expires or until the employer has it revoked. USCIS takes the position that if neither of the above has occurred, one can resume work for the first employer without filing a new petition or an amendment.

What if several employers file H-1Bs for the same worker?

Let's say that two employers successfully file an H-1B and the worker enters to work for Company 1. After coming here, the worker decides to go work for Company 2 instead. Even if the worker never worked before for Company 2, the worker can switch to Company 2 without the need for a new petition. As noted above, a revocation of the petition by Company 2 or the expiration of the visa approval period for Company 2 would mean a new petition is required.

What about the case where an employee accepts a job with a second employer without giving up the first position?

There is no legal reason why this cannot take place. An H-1B worker can work for several employers simultaneously if desired. However, each employer must have a separate approval for the worker to work there. Also, USCIS does not recognize "co-employer" arrangements, so

if this is the case either one employer must designate itself as the petitioner, or each employer must file a separate petition.

There are many times when a change in the nature of one's employment will trigger the need to file either an amendment to an H-1B petition or a completely new petition. USCIS position is that if the change in employment is "material" then an amendment must be filed. So, for example, if there is a significant change in job duties, then a new petition will probably be necessary. Also, being transferred to a different legal entity within the same corporation would trigger an amendment. Also, in certain cases, changing job locations could require an amendment.

Mere changes in job titles without a serious change in job duties will probably not require an amendment. The same holds true for raises in salary unless the change is so great that USCIS presumes that the position is really a new one.

Note that changes in the corporate structure of a company could mean that a new H-1B petition must be filed. The general rule is that if a new legal entity is created, a new petition is required. This would be the case, for example, if a company is sold and the new company dissolves the old company without assuming its liabilities. A merger that results in the creation of a new company might also mean that new petitions should be filed. If the new company is what in corporate law is called a "successor in interest" then a new petition is normally not necessary. Changes in a company's

name will not trigger the need for an amendment or to refile, but an amendment is useful in order to avoid confusion when the worker reenters the country later on.

Must an H-1B alien be working at all times?

As long as the employer/employee relationship exists, an H-1B alien is still in status. An H-1B alien may work in full or part-time employment and remain in status. An H-1B alien may also be on vacation, sick/maternity/paternity leave, on strike, or otherwise inactive without affecting his or her status.

Can an H-1B alien travel outside the US?

Yes. An immigrant with H-1B status may reenter the US during the validity period of the visa and approved petition.

What are the filing fees associated with an H-1B visa?

There are four government filing fees that come up in H-1B cases. First, the base filing fee for an H-1B case is applicable in every case. As of publication of this article, that fee is \$320.

In late 2004, Congress passed legislation restoring a worker retraining fee. The previously applicable worker retraining fee was reinstated and increased from \$1000 to \$1500. Employers with less than 25 full-time equivalent employees in the US (including employees of affiliates and subsidiaries pay \$750. Previously exempt employers will continue to be exempt from the fee.

The following categories of employers and employees are

exempt from the H-1B retraining fee:

- The employer is an institution of higher education as defined in the Higher Education Act of 1965; or
- The employer is a nonprofit organization or entity related to, or affiliated with an institution of higher education; or
- The employer is a nonprofit research organization or governmental research organization, that is primarily engaged in basic research and/or applied research; or
- This petition is the second or subsequent request for an extension of stay filed by the employer regardless of when the first extension of stay was filed or whether the \$1,000 filing fee was paid on the initial petition or the first extension of stay; This petition is an amended petition that does not contain any requests for extension of stay filed by the employer; or
- This petition is to correct an Immigration and Naturalization Service error; or
- The employer is a primary or secondary education institute; or
- The employer is a nonprofit entity which engages in an established curriculum-related clinical training or students register at the institution.
- Applicants seeking faster processing can pay a \$1000 premium processing fee to be guaranteed an answer within 15 days.

Finally, on March 8, 2005, a new \$500 fraud prevention and detection came into force.

H-2A VISAS

The H-2A temporary agricultural visa is a non-immigrant visa which allows foreign nationals to enter the U.S. to carry out temporary or seasonal agricultural labour or services. Given estimates that more than half of America's agricultural workers are undocumented immigrants, the use of the H-2A visa is becoming more and more important.

What are employers required to do to obtain workers on H-2A visas?

Generally, employers must satisfy two criteria to hire non-immigrant workers when filing an application with the USCIS:

1. The employer must show that able, willing, and qualified US workers are not available at the time and place needed
2. The employer must show that an adverse effect on wages or working conditions of similarly employed US workers will not result from the employment of foreign workers

Who may file an application for an H-2A visa?

- An agricultural company or employer who expect a shortage of U.S. workers needed to perform temporary or seasonal agricultural labour or services
- An authorized agent filing on behalf of an agricultural employer

The employer may be an individual proprietorship, a partnership or a corporation. A collective of agricultural producers may file as either a sole employer, a joint employer with its members, or act as an agent on behalf of its members.

What steps must employers follow to do to obtain workers via the H-2A process?

First, two copies of the ETA-750 are filed, of which one should be sent to the appropriate Department of Labor (DOL)

region, and the other to the respective state workforce agency (SWA) for the state in which the work is sought. This application has to be submitted at least 45 days before the H-2A temporary workers are needed and it also has to be approved by the DOL before the starting work date.

The application fees, which must be paid by the employer, include \$100 base fee plus \$10 for each position certified, up to a maximum of \$1000.

Second, recruitment efforts follow, which are directed by the SWA for H-2A positions in one of three ways: the SWA refers candidates to the employer (with the employer using the state's electronic data bank), the employer conducts independent recruitment, or the recruitment is conducted after the SWA certifies the applications. Generally, referrals come from the state agencies. Employers are required to hire US workers who apply for work until half of the contract period is over.

Third, following the recruitment period, a decision is made regarding certification. The

SWA subtracts the number of US workers successfully referred from the total number of workers requested by employers to calculate and certify the remaining job openings.

Once certification is granted, the application is then filed with the DOL national processing center, which it may be filed for multiple unnamed workers. As they become available, however, the DOL must be provided with names. Finally, following DOL approval, the workers can then apply for visas at the appropriate consulate office.

What might be some reasons for which the DOL might not issue certification?

One pitfall preventing certification is if the DOL determines that US workers have filled all the job openings, or for example, if the DOL determines that H-2A candidates have been offered better working conditions than their US counterparts. Another reason preventing certification could be if a strike or a lockout results, or if the employer is in significant violation of the H-2A program with the previous two years. Yet another block could be if the employer fails to show that H-2A workers will be covered by workers compensation, or if the employer fails to comply with the recruitment efforts.

How long are the H-2A visas valid?

Generally, the H-2A visas are valid for a one year maximum. Extensions of up to one year, however, are possible but with a maximum of three years. After the alien has spent three years in the US under the H-2A status, then the alien must leave for six months before continuing H-2A employment. Subsequent to this time, however, the alien can reenter the US in any status not based on the performance of agricultural work.

How do employers calculate workers' earnings?

Usually farm workers receive either an hourly wage or are paid by the piece. Under the H-2A program, however, workers have to be offered a wage equal to that of US workers. In the past, this has been interpreted to mean the higher payout of the following:

- The prevailing industrial wage in the relevant labor market
- The state or federal minimum wage
- The "adverse effect wage rate" (AEWR)

For workers earning money by the piece, an employer must pay

any difference between worker earnings and the AEWR. Additionally, on or before each day the H2A worker is paid, the employer must provide the worker with an earnings statement listing total earnings, hours of work offered versus actually worked, and whether the worker is paid hourly or by the piece.

What benefits are employers required to provide the workers?

- Transportation to and from the workers' temporary home to the workplace
- When the contract period is up, transportation home or to their next workplace

- Housing to all workers who do not commute, which must be inspected by the Department of Labor as well as meet minimum federal standards for temporary labour camps
- Either three meals a day or facilities in which the workers can prepare food
- Any tools and supplies necessary to perform the work
- Workers compensation insurance where required by state law; if state law does not require it, the employer must provide equivalent insurance.

H-2B VISAS

What kinds of jobs qualify for H-2Bs?

For a foreign worker to be covered by an H-2B visa, the job the employer offers needs three essential criteria:

- The job and the employer's need must be one time, seasonal, peak load or intermittent;
- The job must be for less than one year; and
- There must be no qualified and willing U.S. workers available for the job.

When should an employer file for an H-2B visa?

The employer should file for H-2B status at least 60 days, but not more than 120 days before the worker is needed.

What are the steps an employer must follow to obtain H-2B certification?

The employer must go through a seven step process to obtain an H-2B visa:

1. The employer files a completed Form ETA 750 in duplicate to the local State Workforce Agency (SWA) covering the area of proposed employment.
2. The SWA informs the employer on requirements for recruitment, wage options, and working conditions offered and refers qualified candidates to the employer for interviews. The employer will also be required to advertise the position to demonstrate a lack of availability of American citizen and permanent resident workers.
3. The employer creates a recruitment report summarizing the results of the effort, including names and addresses of applicants, and reasons for not hiring particular interviewees. The employer must demonstrate that there are no immediately available citizen or permanent resident workers willing to work at the prevailing wage (or the actual wage paid by the employer if higher).
4. After an evaluation, the SWA will forward the applications to the appropriate National Processing Center (NPC).
5. The NPC certifying officer (CO) will review the applications. The CO will grant certification if he/she finds that qualified persons in the U.S. are unavailable and that the employment terms will not adversely affect the wages and working conditions of workers in the U.S. similarly employed.
6. The certifications/denials are given to the employer, and used to support a visa petition filed with USCIS. The Labor Certification Determination and the form I-129 are submitted to the USCIS.

7. The foreign potential employee must apply for a visa at his or her respective U.S. Consulate.

How long is an H-2B visa valid?

The length of stay on an H-2B visa will be granted in increments of up to a year depending on the anticipated length of the employment period. The visa may be extended in one year increments for a total of three years, but USCIS will often deny extension requests because they question whether a job is really temporary.

What documentation must an employer keep on an H-2B worker?

If the worker is self-employed:

- A contract between the employer and the worker specifying the wages and terms of employment
- A complete itinerary of the planned employment, if numerous employers are involved:
- The dates of the proposed employment
- The name and address of the employers
- List of locations where the work will be performed.

How many H-2Bs are Granted per year?

Up to 66,000 H-2Bs are granted each year with half reserved for jobs with start dates

in the first half of the government fiscal year and the remainder reserved for the second half. The 66,000 limit does not apply to spouses and children and they may enter the US in H-4 status. H-2B workers are only counted against the cap in the first year of the H-2B petition and are not counted when returning for seasonal work or extensions.

What obligations does an employer have in an H-2B case?

The employer is required to pay the prevailing wage and if an employee is terminated early, the employer must pay return transportation costs home.

Can an employer substitute workers in an H-2B case?

Yes, but only if the petition was approved for unnamed beneficiaries, the petition was for a group or the job does not require education, teaching or experience. The substitutions can be made at a consulate.

Who is eligible/ineligible for an H-2B visa?

Either skilled or unskilled workers may be employed on an H-2B visa. The visa is generally used for entertainers and athletes and who do not meet the requirements of the O and P visa categories. Recently, the H-2B visa has become very popular with professions in the hospitality industry.

The only workers specifically excluded are foreign medical graduates seeking to perform work in medical fields and agricultural workers.

ADOPTING FOREIGN ORPHANS

What requirements that must be met for obtaining permanent residence are specific for adopted foreign orphans?

Special rules apply for obtaining permanent residence for adopted foreign orphans that do not apply in other family based immigrant categories. For these special rules to apply, the following five requirements must be met:

- The child's country of origin must permit adoptions by foreign nationals, and the prospective US citizen parents must comply with all of the

rules of that country relating to adoptions;

- The child to be adopted must be under 16 years old and must either have no surviving parent or only one parent who cannot care for the child and has authorized the child's adoption and immigration;
- The adoptive parent must be a US citizen, although in the case of a married couple, who must make a joint petition, only one needs to be a US citizen. Single adoptive parents must be at least 25 years of age;

- The child must have been formally adopted in its country of origin, or the adoptive parents must have custody of the child for immigration and an adoption to be finalized in the US; and

- A designated agency must make a favourable recommendation about the suitability of the home into which the adopted child will move.

People interested in foreign adoptions should be aware of all the rules relating to adoption in the country from which they want to adopt. These rules can

vary greatly, and are often quite complex. However, trying to avoid these rules will result in the USCIS denying the orphan application. While these rules are beyond the scope of this article, the State Department website provides a great deal of helpful information on foreign adoptions at <http://travel.state.gov/family>.

What is an orphan?

Whether a person qualifies as an orphan depends on US law, not on the law of their home country. An orphan must be under 16, except in one circumstance. A Bill which President Clinton signed into law allows a person under 18 who is adopted with a natural sibling under 16.

A child can become an orphan in a number of ways. The death or disappearance of both parents will cause a child to be an orphan. Abandonment by both parents will also render a child an orphan. Abandonment is strictly defined in USCIS regulations.

It is a wilful relinquishing of all parental rights and obligations when the child is no longer in the control and possession of the parents, where the parents have not transferred those rights to another person. Releasing a child to the prospective adoptive parents is not abandonment. Desertion will also cause a child to be an orphan. Desertion occurs when the parents are not involved with the child and their whereabouts are unknown and they cannot be found.

When the child has only one surviving parent, and the parent is not able to provide adequate care, the child is considered an orphan. The mother of a child born out of wedlock and not

legitimated can be considered a sole parent if the father has died, disappeared, deserted or abandoned the child. Not being able to provide adequate care means being unable to provide for the basic needs of the child in accordance with local standards.

What requirements must the adoptive parents meet?

The person seeking to adopt a foreign orphan must be a US citizen. If the person is married, the couple must file the petition jointly. However, in this case, only one of the prospective parents needs to be a US citizen. For a single person to file an orphan petition, he or she must be at least 25. Furthermore, if the single adoptive parent was under 25 at the time of a foreign adoption, the adoption will be considered invalid for immigration purposes and the child must be readopted in the US.

If the child was not adopted abroad, or if the foreign adoption was invalid, the child must be adopted in the US. For this to occur, the following requirements must be met:

- The parent, or a person or organization acting on the parent's behalf, must have legal custody of the child under the laws of the child's home country
- The parent must obtain an irrevocable release for adoption and immigration from the person or entity that last had legal custody of the child
- The parent must comply with all pre-adoption requirements of the state in which they will live with the adoptive child
- The state in which the adoptive parent and child will

live must allow a re-adoption or else provide for judicial recognition of a foreign adoption that was invalid for immigration purposes.

What is included in the home study requirement?

Before an adopted child can be classified as an orphan, the parent and any other adults that will be living with the adopted child must be evaluated. This is part of the home study, which is to be conducted by an USCIS authorized organization. Each adult in the home must be interviewed at least once, and the home must be visited at least once. The home study report must detail the physical, mental, and emotional ability of the prospective parents to properly care for the child. If the person conducting the home study feels that they are not able to render an opinion on any of these issues, they must refer the parents to a licensed professional.

Along with interviews and psychological evaluations, the home study must contain the following:

- An assessment of the prospective parent's finances
- An analysis of the suitability of the home is there is any history of substance abuse, child abuse, sexual abuse or domestic violence by anyone in the home in which the orphan will live. The examiner must search any available child abuse registry, and if no such registry is available, that fact must be noted in the report. A history of abuse will not automatically result in an unfavourable recommendation

if the person shows that they have been rehabilitated.

- A discussion of any previous denial of an adoption or unfavorable home study report.
- A discussion of any criminal history or arrests of any adult in the household
- A thorough description of the home in which the orphan will live
- If the orphan is handicapped or has other special needs, there must be an evaluation of the suitability of the home in light of those needs
- A summary of required pre-adoption counselling about processing and problems in international adoptions
- If the home study results in a favourable recommendation, there must be a discussion of the reasons for that recommendation.

The home study must be submitted to USCIS while it is less than six months old. If there are significant changes after it has been submitted, it must be amended.

How do I go about petitioning for an adopted orphan?

There are two steps in petitioning for an adopted orphan. The first, called advance processing, examines the ability of the prospective parents to provide a suitable home for the child. The second focuses on whether the child can properly be classified as an orphan.

In the advance processing step, the prospective parents must submit evidence of at least one spouse's US citizenship, and, in the case of a single parent, that the parent is of the proper age.

The advance processing application can be filed by a single parent at 24 years of age. If married, the marriage certificate must be submitted as well as evidence of the termination of any prior marriages. The home study is also submitted at this stage. The application is submitted to the local USCIS office with jurisdiction over the place where the adoptive parent lives.

If the application is approved, the parents will be notified and the application sent to either an USCIS office overseas where the child lives, or, if there is not an USCIS office, to the closest consulate that issues immigrant visas. The petition for the orphan must be filed within 18 months of the approval of the advance processing application. The orphan petition must include a copy of the advance processing application approval notice, proof of the orphan's identity and age, and evidence that they are in fact an orphan. If the child is in the US, the parent can seek to have the child classified as an orphan, and also file for adjustment of status at a local USCIS office, but only if the child has been paroled into the US. Children who are in the US in a non-immigrant status or who are here without USCIS authorization are not eligible to receive orphan status or to adjust status. If the child is abroad, they will receive an immigrant visa from the consulate. Once the consulate adjudicates the case, the child will be admitted as a permanent resident.

What are the visa types for orphans travelling to the United States to be adopted?

In order to bring an orphan to the U.S. with an immigrant visa,

adopting parents must demonstrate to CIS that they can and will provide proper care to the child if admitted to the United States. The I-600A application allows adopting parents to demonstrate that they are financially, logistically and otherwise prepared to adopt a child internationally. The I-600A also identifies any U.S. state requirements that must be met prior to or after the adoption.

Adopting parents are often encouraged to begin the overseas adoption process early by filing the I-600A before identifying a particular child to adopt. Parents who already have identified or even adopted a child may demonstrate their suitability to adopt by filing the same documentation with the I-600 petition (described below), but parents choosing this route should be aware that it may take longer and that they must file such I-600 petitions with a CIS office (not the consular officer at a U.S. Embassy or Consulate.)

If used, the I-600A Application for Advance Processing of Orphan Petition should be filed with the U.S. Citizenship and Immigration Services (CIS) office having jurisdiction over the adopting parents' place of residence. The following documents must be submitted with the I-600A:

- Completed and signed I-600A (Application for Advance Processing of Orphan Petition);
- Proof of the prospective petitioner's United States citizenship;
- Proof of the marriage of the prospective petitioner and spouse, if applicable;
- Proof of termination of any prior marriages of the prospec-

tive petitioner and spouse or unmarried prospective petitioner, if applicable;

- A "home study" completed by the appropriate State organization with a favourable recommendation (CIS regulations include very specific instructions on the issues to be addressed in the home study, authorized providers of home studies, and the recommendations regarding suitability).
- Filing fee of \$525.00

In addition, the petitioner, spouse (if married) and each additional adult member of the adopting parent(s)' household must also be fingerprinted as part of the I-600A application. For adopting parents in the United States, CIS will provide information once the I-600A is filed on being fingerprinted at local CIS offices. For adopting parents residing overseas, adopting parents should contact the U.S. Embassy or Consulate

with jurisdiction over their place of residence to schedule fingerprinting prior to submitting the I-600A.

At the time they file the I-600A, the petitioner should request that CIS notify the U.S. Embassy in the country where they plan to process the case as soon as the I-600A is approved.

CIS approval notices of the I-600A often identify the type of child the prospective parents are authorized to adopt overseas. Approved I-600As are valid for 18 months. Adopting parents must file an I-600 petition for a child fitting the I-600A criteria (if any) during this validity period; if the I-600A approval has expired, parents will need to re-file the I-600A and obtain approval prior to filing the I-600. Adopting parents should also note that fingerprint clearances obtained during the I-600A process are only valid for 15

months. If the I-600 is not filed and approved during this fingerprint validity period, adopting parents should consult with the office where their fingerprints were originally taken for instructions on obtaining updated fingerprint clearances, prior to any planned travel overseas. If parents arrive overseas intending to file the I-600 petition and their fingerprint clearances are not valid, parents will be charged an additional fee for re-fingerprinting and will be required to wait several days for fingerprint clearances before their I-600 can be approved.

How can the adopted orphan be naturalized?

The Child Citizenship Act of 2000 confers automatic citizenship upon IR-3 orphans upon their admittance to the United States. IR-4 orphans must be readopted in the United States before they are automatically U.S. citizens.