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HIRING FOREIGN PROFESSIONALS IN HAWAII
A WHITE PAPER ON THE H-1B VISA FOR EMPLOYERS
AND HUMAN RESOURCES MANAGERS





The H-1B visa is the most used employment-based visa

Because the H-1B visa is temporary, the application process is streamlined

As the marketplace for goods and services globalizes, so does the marketplace for talent

INTRODUCTION

Each year U.S. employers use the H-1B visa program to recruit and hire tens of thousands of international job candidates, including many foreign graduates from U.S. universities and colleges. Here in Hawai'i, employers hire roughly 600 to 1,200 H-1B visaholders annually, depending on the state of the economy.

The H-1B visa is the most used employment-based visa, and provides U.S. businesses with a relatively straightforward and inexpensive way to employ international job candidates in professional level positions. The visa provides temporary employment authorization allowing the international professional to work in the U.S. for an initial period of three years, and can be extended for an additional three years, for a total of six years.

Because the H-1B visa is temporary and does not, in itself, provide the international worker with permanent residence or a "green card," the process is intentionally made less cumbersome and time-consuming than other immigration programs. In fact, an application can often be assembled and prepared for submission in as little as two weeks. There is no requirement that the job position be advertised or that competitive interviewing be done, as with other visa programs. Should there be a need to get a quick turnaround from U.S. Citizenship and Immigration Services (USCIS), an additional fee will expedite their decision on the application to within fifteen calendar days.

Talent acquisition strategies are becoming ever more refined, and top firms need to consistently hire from the top end of the talent pool. Human resources managers have come to realize that they cannot let potential high-performing candidates slip by because they were unable or unwilling to accommodate their visa requirements. In some fields, such as engineering and information sciences, over half of a given graduating class may be international students. To simply exclude all of them from the hiring pool would leave those firms at a competitive disadvantage, and risk that employee performance goals go unmet.

As Hawai'i firms connect more and more with the global marketplace they need to build global perspectives, including cultural awareness and language skills, into the workforce. There is no more efficient way to accomplish this than through embedding international employees into a firm's operational and management team.



The employing firm is the visa sponsor

The employer must pay the prevailing wage

The employer must provide working conditions similar to other workers

The employer must allow the hiring process to be transparent

THE EMPLOYER'S ROLE AND COMMITMENTS

The H-1B visa program is designed to be relatively straightforward, allowing employers to recruit international candidates without the need to make permanent commitments before knowing the candidate's career potential and company fit. Although the employer's obligations under the H-1B program are not especially burdensome, they are quite specific. If your firm is thinking about hiring international candidates under the H-1B visa program, here are some basic things to consider at the outset:

- In immigration terms, the employer is the Petitioner, and the job candidate is the Beneficiary of the H-1B visa process. There are some additional expenses and administrative work involved, so smart employers use the H-1B process to recruit top candidates, and as an incentive where a competitive edge is needed in the hiring process.
- The Department of Labor provides a method for checking the prevailing wages for occupations in specific geographic locations, and you will need to commit to paying that wage as a minimum. This protects U.S. workers from having their wage rates depressed by foreign competition.
- H-1B workers' working conditions must not adversely affect the working conditions of other workers in the labor market. Employers may not use H-1B hires in situations where there is a strike or lockout.
- Employers must notify other workers of the H-1B hiring process. There is a specific protocol for making the H-1B process transparent, which includes notifying existing employees of the hire, and maintaining basic information about the process in a "public access file."
- If an employer terminates an H-1B employee, they must provide for return transportation to the employee's home country. This does not apply if the worker leaves the job of his own choice, or when termination is for "cause." Nor does this apply to the H-1B worker's family members.
- The actual filing process involves two separate applications, one to the Department of Labor and another to the U.S. Immigration and Citizenship Services, and each has its own documentary requirements. These are aimed at assuring: 1) that the employer is qualified to hire the candidate; 2) that the position offered is qualified as a professional job in a "specialty occupation"; and 3) that the candidate is qualified for the position offered.

Overall, these requirements ensure that employing firms engage the visa sponsorship process as good corporate citizens, and discourage exploitative practices.



Most H-1B visas in Hawai'i cost about \$4,700.00 total

Visa costs include filing fees paid to the U.S. government and attorney's fees

Employers are required, at a minimum, to pay the ACWIA Training Fee

Attorney's fees for H-1B applications in Hawai'i range from about \$1,500 to over \$5,500

Nation-wide, attorney's fees for H-1B visas appear to average about \$3,000

WHAT DOES AN H-1B VISA APPLICATION COST?

For most Hawai'i employers, the total cost of an H-1B visa application will be between \$4,000.00 and \$7,000.00, depending on the size of the firm, the need for expedited service, and a few other variables. This total cost combines U.S. Government filing fees, and attorney fees and costs. The chart below breaks these down with more detail.

Government Filing Fees paid to U.S. Citizenship and Immigration Services:

Basic USCIS Filing Fee	325.00
Mandatory Anti-Fraud Fee	500.00
American Competitiveness & Workforce Improvement Act (ACWIA) Training Fee for firms with 1 -25 full-time employees	750.00
<i>or</i>	
for firms with over 25 full-time employees	1,500.00
Premium Processing Fee (<i>optional</i>) to expedite adjudication within 15 days	1,225.00

Attorney fees and costs:

Flat fee rate (MigrationCounsel.com, 2013) includes all preparation, copying, and mailing costs	3,000.00
General Excise Tax on attorney fees	141.36

Under this pricing structure, a basic application from a small firm will cost \$4,716.36, and an application from a large firm who also needs an expedited decision will cost \$6,691.36. Most Hawai'i applications fall within this range.

Attorney's fees will vary from law firm to law firm, so informed consumers will want to be clear about what is included and how fees are derived. Some law firms continue to apply hourly billing rates plus administrative fees to H-1B work, and this will often result in substantially higher pricing. The emerging standard is towards flat fee pricing, which tends to result in improved cost predictability and lower rates overall.

The USCIS requires all documents to be in the English language or be submitted with a competent translation, and requires that degrees from overseas colleges and universities be evaluated for equivalence to U.S. degrees. Where foreign documents are required to prove a job candidate's qualifications, there can be modest additional costs related to translations and evaluations.

Finally, recent federal law has imposed an extra cost on certain H-1B visa sponsors. If the sponsoring firm has more than 50 employees, and over 50% of these employees are H-1B visa holders, the USCIS now collects an extra \$2,000.00 per application. This additional fee appears to be aimed at very large computer industry consulting firms using the "job shop outsourcing" business model, and so far it does not appear that any employer in Hawai'i has been subject to this fee.



The annual quota on H-1B visas results in a competition for available visas, and late-filers may be disappointed

Understanding the H-1B seasonality issue improves the likelihood of successfully obtaining the visa

Efforts to raise the quota appear unlikely to succeed in the near-term, so employers will need to continue to work within the seasonal system

TIMING AND THE H-1B APPLICATION PROCESS

Two factors combine to create a timing issue for H-1B application filings. The first factor is the annual quota, or cap, of 85,000 H-1B visas that the law allows in any fiscal year. Demand for H-1B visas consistently surpasses this limited supply, so some potential applicants will be disappointed when the yearly quota is exhausted before they are able to submit their applications.

The second factor arises from the fact that an H-1B visa petition may not be filed earlier than six months before the job starting date. Because the USCIS operates on the federal fiscal year, which begins on October 1, the H-1B filing season begins each year on April 1.

The combination of these two factors creates a competition in which highly motivated firms and job seekers push to finalize their applications as early as possible in anticipation of the April 1st opening date to maximize their chances of obtaining a visa before the quota is exhausted.

The resulting “seasonality” of the H-1B visa application process needs to be considered in planning recruitment for international talent. In particular, graduates who enter the job market in early summer following graduation in May will need to synchronize their plans for post-graduation training programs or fellowships to the H-1B season if they intend to seek work in the U.S. after the conclusion of their studies. Firms who regularly recruit from the spring graduate pool will want to be aware of this timing issue.

Likewise, firms with an ongoing need for international recruitment at the professional level may want to plan around the “Spring rush” and anticipate the periods following the exhaustion of the annual quota when no further visas may be available until the next fiscal year.

Many large firms, such as Microsoft and Oracle, who are large users of the H-1B visa program, have lobbied in recent years to raise the H-1B quota, citing the necessity of hiring the best-qualified candidates to maintain international competitiveness. Thus far, Congress has not given any clear indication that the H-1B visa quota will be expanded in the foreseeable future.

Finally, there are some employers who are not subject to the quota system, and these exempt petitions may be filed at any time of the year. Exempt petitioners include institutions of higher education, non-profits affiliated with institutions of higher education, and certain non-profit and governmental research organizations.



The H-1B job candidate's degree must be a clear fit with the job's requirements

Where an entry level position does not require at a minimum a bachelor's degree, the H-1B visa may be an uncertain option

The USCIS has recently begun a program of workplace inspections to verify H-1B program compliance

Compliance standards are minimal, but need to be documented and available for inspection

EMPLOYEE QUALIFICATIONS: A MATTER OF DEGREE?

The basic requirements for an H-1B visa is a job candidate with a bachelor's degree or higher in a specific field, and a job opening for a position that requires that specific degree. For example, a graduate with a bachelor's degree in accounting who goes to work as an accountant is a very good fit for an H-1B visa. On the other hand, a graduate with a bachelor's in sociology who is offered a job selling insurance will not qualify.

Some of the most commonly recognized qualifying occupations include accountants, architects, computer and information technology, business specialties, engineering, social work, law, education, theology, mathematics, biotechnology, the physical sciences, the social sciences, the health sciences and the arts. This represents a diverse range of potential occupations serving a wide cross-section of Hawai'i's business community. Not coincidentally, Hawai'i's universities have degree programs in every one of these fields.

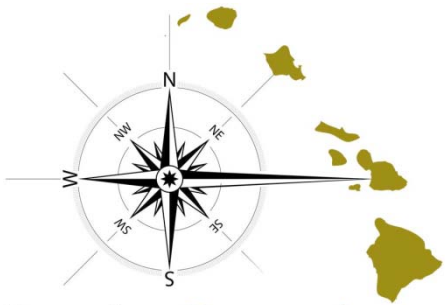
At the national level, H-1B visa hires tend to be concentrated in the financial and high technology sectors. Here in Hawai'i, H-1B employers are more evenly spread over a number of sectors, with educational institutions leading, and the professions, especially architecture and engineering, also showing strong and consistent recruiting for international talent. Sectors distinctive to our island economy, such as astronomy, aquaculture, and the hospitality industry are also active in seeking out international professionals. Employers in our growing high-tech sector, where ability and innovation compete on a global level, often use visa sponsorship as a competitive edge in recruiting top talent.

A WORD ABOUT COMPLIANCE ISSUES

Visa abuse harms workers and discredits legitimate employers, so new USCIS efforts to tighten compliance rules are welcome. Still, unexpected on-site audits can be unsettling, and the USCIS has said their new compliance inspections will be for the most part unannounced. According to Alejandro Mayorkas, Director of USCIS, the purpose of the new inspection plan is to verify that "the location of employment actually exists and if a beneficiary is employed at the location specified, performing duties as described, and paid at the salary as identified in the petition."

These are perfectly reasonable requirements, so the best response to increased likelihood of inspection is to be in compliance and have your H-1B Public Access File up-to-date and readily available at the workplace. Recent payroll documents showing compliance with the Prevailing Wage for the position should be in the file, and any changes in H-1B employee location assignment should be reported. If an H-1B employee has been transferred or terminated, notice should be given to the USCIS and recorded in the file.

If your Immigration Attorney has not provided you with a complete Public Access File for this purpose, you may want to proactively contact them to assist you in getting into compliance.



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Our promise

- We commit to being accessible to our clients, and will provide quick responses to your inquiries, usually within 24 hours.
- We know that the Immigration system is complex and often confusing: we will take the time to be sure you understand the process from beginning to end.
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- We believe that we are smarter together, so let's collaborate!

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