

# AILA Issue Paper

## THE H-1B PROGRAM: AMERICA'S HOME COURT ADVANTAGE IN GLOBAL COMPETITION

**THE ISSUE:** The H-1B program offers a prompt, lawful way for U.S. employers to hire foreign-born professionals on a temporary basis. This program allows U.S. business to recruit and hire the best-qualified candidates from around the world, and compete on a level playing field with foreign companies in such key industries as high-tech, manufacturing, pharmaceuticals, biotechnology, and education.

**BACKGROUND: Who are H-1Bs?** H-1Bs are temporary foreign professionals hired by U.S. employers. They can be hired only for "specialty occupations," which are defined under the law as jobs that require a professional who has the equivalent of a bachelor's degree in their field of specialty. Examples are doctors, engineers, professors, accountants, researchers, medical personnel and computer professionals.

**What does the Employer Need to Do?** A U.S. employer using this program must guarantee that 1) the foreign professional will be paid at or above the rate paid for a similar position at the employer's own offices, or at those of their local competitors; 2) the foreign professional will not adversely affect the working conditions of U.S. colleagues; 3) U.S. colleagues will be given notice of the professional's presence among them; and 4) there is no strike or lockout at the worksite. The employer also must demonstrate that the position requires a professional in a specialty occupation and that the intended employee has the required qualifications. Under a 1998 law, employers who use a higher percentage of H-1B workers must meet additional requirements, including documenting their recruitment in the United States, and are forbidden from laying off American workers to hire an H-1B professional. Punishments for companies that violate the law include fines of up to \$35,000, a three-year bar from participating in visa programs, and repaying salaries and benefits to any under-paid foreign professionals. Since 1998, H-1B employers are required to pay an additional fee per visa to fund education and training programs for U.S. workers. The fee is currently \$1,000.

**Why is the H-1B program essential?** U.S. employers use the H-1B program to hire foreign professionals with highly needed skills. Employers typically hire H-1B professionals for three reasons: to obtain essential skills or rare and unique knowledge possessed by the individual; to obtain special expertise in overseas needs, markets, trends or distribution, allowing U.S. businesses to compete in global markets; or to alleviate temporary shortages of U.S. workers with the necessary skills. No employer would go through the extra burdens, costs, and delays of hiring a foreign professional worker unless they could not find the skills they need among U.S. workers. If American companies are prevented from hiring essential people to fill critical positions, an increasing number of jobs dependent upon these slots will go unfilled each year or be moved offshore, resulting in American jobs being lost and American projects losing out to foreign competition. As the U.S. economy becomes increasingly global, H-1B professionals become even more essential to America's continued economic growth.

**What H-1B Legislation Has Recently Passed?** In 1998, the 105th Congress passed and President Clinton signed into law the American Competitiveness and Workforce Improvement Act ("ACWIA," Title IV, P.L. 105-277) to address the demand for H-1B professionals by increasing the cap from 65,000 (where it had been since 1990) to 115,000. ACWIA also added a requirement for domestic recruitment and a prohibition on laying off U.S. workers for employers that use a high percentage of foreign professionals, and required all employers sponsoring H-1Bs to pay a \$500 fee to fund education and training programs for U.S. workers. The 106th Congress passed and President Clinton signed into law the American Competitiveness in the 21st Century Act (P.L. 106-313) in October 2000. AC21 increased the cap on H-1B visas to 195,000 for the next three fiscal years. The law also increased the ability of H-1B professionals to change employers once they are in the United States, increased the fee employers must pay to educate and train U.S. workers in technology occupations to \$1000, and made some changes to prevent INS delays from hurting H-1B professionals who are applying for green cards. Finally, the law allows all available employment-based green cards to be issued each year, regardless of the nationality of the applicants.

**CURRENT STATUS:** In December 2000, the Department of Labor issued interim final rules for the H-1B program that would implement the 1998 law. Employers criticize these regulations as over-reaching and burdensome, and inhibiting their ability to use the H-1B program to hire needed foreign professionals. The regulations went into effect the day before the Bush Administration took office, and thus are not subject to the moratorium announced by Chief of Staff Andrew Card. Employers are urging the new Labor Secretary, Elaine Chao, to take their concerns into consideration before these regulations are finalized.

It is unclear if the new 195,000 cap will be sufficient to meet demand. However, INS delays in processing may serve as an effective cap if the agency cannot process all 195,000 visas in each of the next three years. As of February 2001, the INS had not even estimated the number of cases counted against the FY2001 cap. It is certain that a significant number of these new H-1B professionals will apply for green cards at some point in the future. It also is likely that the current cap on employment-based green cards (140,000) will be reached. Employers are looking at proposals to increase the employment-based cap to ensure that the U.S. will not lose the valuable services of these needed professionals.

**AILA's POSITION:** AILA believes that the H-1B program is vital to our economy. Each H-1B employee allows U.S. employers to develop new products, create groundbreaking research, implement new projects, expand their operations, create additional new jobs, and compete in the global marketplace. The United States is not the only country working to attract professional employees: Canada, Germany, Australia and other countries are adapting their immigration policies to allow companies to hire foreign professionals with exceptional talents and abilities. America must continue its leadership in the world economy by expanding opportunities for the highly educated and skilled from around the world to come here and contribute their talents.

39IP1004 3/1/2001

---

[Copyright](#) © 2001, American Immigration Lawyers Association