

I-129 H-1B Standard Operating Procedures

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THE H-1B CLASSIFICATION – Introduction

Definition Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B beneficiary as a person:

... who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)... or as a fashion model, who meets the requirements of the occupation specified in section 214(i)(2) or, in the case of a fashion model, is of distinguished merit and ability, and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under 212(n)(1);...

The H-1B Class There are three divisions of H-1B classification:

- H-1B1 is for a position in a specialty occupation.
- H-1B2 is for a Department of Defense, cooperative research and development project, or co-production project position.
- H-1B3 is for aliens of distinguished merit and ability in the field of fashion modeling.

***Note:** It is extremely important to apply ONLY the H-related regulations in adjudicating these petitions. Viability of the petitioner, ability to pay, funds at risk, and other criteria that apply to EB-5 and/or other immigrant visa petitions DO NOT apply to H petitions. Do not issue RFEs, denials, or intent correspondence based solely on non-H criteria.

“Specialty Occupation” 214(i)(1) of the Act defines “specialty occupation” as: an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor’s or higher degree (or its equivalent) in the specific specialty as a minimum for entry into the occupation in the United States.

Filing Fees An I-129 petition for a nonimmigrant worker requires a base fee of \$110, plus an additional \$500 fee, unless the petitioner is exempt under 8 CFR 214.2(h)-(19)(iii). Payment of this additional \$500 fee is not waivable under 8 CFR 103.7(c)(1); however the \$110 base fee is waivable.

[8 CFR 103.7(b)(1)]

Who is exempt from paying the additional fee The following organizations are not required to pay the additional fee:

- institutions of higher education as defined in section 101(a) of the Higher Education Act of 1965;
- affiliated or related nonprofit entities that are connected or associated with institutions of higher education; and,
- nonprofit research organizations or governmental research organizations.

Also, the following filing situations do not require payment of the additional fee:

- amended petitions not requesting extension of stay;
- petitions filed for the sole purpose of correcting a Service error; and,
- petitions for an alien’s second or successive extension of stay with the same employer.

[8 CFR 214.2(h)(19)(iii) and (v)]

Who must pay the additional fee Unless exempt, United States employers who file a Form I-129 on or after 12/1/98 but before 10/1/01 (statutory authority for this fee expires on 10/1/01), must pay the additional fee if the petition is for the following purposes:

- An initial grant of H-1B status;
- An initial extension of stay; or,
- Authorization for a change in employment.

[8 CFR 214.2(h)(19)]

The Service will ONLY accept a remittance for the additional fee if it paid by the petitioner or its representative. The \$110 base fee, however, may be paid by any party.

The H-1B “Cap” The limit on the number of new H-1B beneficiaries that can be approved in a given fiscal year is commonly called the H-1B cap. At any given time there may be special instructions for processing these cases. Follow that guidance.

RFE Checklist Throughout the steps below, you will encounter references to—and directives to annotate—the RFE checklist. This checklist can be used to track unmet evidentiary needs while reviewing the case; however it IS NOT required.

Adjudication The following list is an overview of items to review and issues to consider in adjudicating an H-1B petition. Elaboration on these topics is provided in the pages that follow.

GENERAL REQUIREMENTS

1. Form I-129 properly filed (i.e. petitioner is eligible to file; petition is filed in the proper jurisdiction and is properly signed).
2. Rev. 12/22/99 of Form I-129W properly filed with proper signatures, and the additional fee is paid if appropriate.
3. Form ETA 9035 Labor Condition Application (LCA) certified by the Department of Labor (DOL) for specialty occupations and fashion models (H-1B1 and H-1B3 classifications).
4. Evidence that the offered position qualifies under one of the H-1B classification requirements.
5. Evidence that the beneficiary qualifies for the position including licensing, examinations, and/or English competence, if applicable.
6. If Change of Status and/or Extension of Stay is being requested, evidence that the alien is eligible to change from his/her existing classification to H-1B and that existing status has not been violated.

H-1B1 ADJUDICATION

- 1a. Verify that the petitioner meets the I-129 filing eligibility criteria. The following entities may file for an H-1B nonimmigrant:

ENTITY DEFINED AS:

A U.S. Employer A person, firm, corporation, contractor, or other association or organization in the U. S. which: permits a person to work in the U.S.; has an IRS tax identification number; and has employer-employee relationship(s) demonstrated by having the ability to hire, pay, fire, supervise, or otherwise control the work of any employee.

*Note: This does not empower you to question the employer's ability to pay the wage stated in the petition. Rather, the entity's general ability to hire, pay, fire, supervise or otherwise control the work of employees is an indicator of his/her/its qualification as a "US employer."

[8 CFR 214.2(h)(4)(ii)]

An Agent A U.S. individual or company in business as an agent may file for types of workers who are traditionally self-employed or use an agent to arrange short-term employment with numerous employers. [8 CFR 214.2(h)(2)(i)]

IF... THEN...

the petitioner is ineligible to apply because it is a foreign company prepare to deny the petition; however, before doing so, review the petition to determine if there are any other grounds for denial.

the petitioner appears unqualified on any other grounds annotate the RFE checklist and go to Step 1b.

*Note: An alien may be employed by more than one employer (petitioner) at any given time. However, a separate petition must be approved for each employer. Also, part-time employment IS allowed.

1b. If the petitioner is an agent, he/she must guarantee the wage offered and provide the other terms and conditions of the beneficiary's employment.
[8 CFR 214.2(h)(4)(vii)(A)(2)]

If the petitioner is an agent, has he/she provided a copy of written agreement between himself and the beneficiary, or a summary of the oral agreement?

IF... THEN...

Yes Go to Step 1c.

No Annotate the RFE checklist and go to Step 1c.

1c. Does the petitioner include a complete itinerary of service or engagements including dates, names and addresses of the actual employers and locations where the services will be performed?

IF... THEN...

Yes Go to Step 2.

No Annotate the RFE checklist and go to Step 2.

2. Ensure that the petitioner has signed in the proper block in Part 6 of the I-129.
Note: If the petitioner signs in the wrong location, you must send an RFE because the attestation is improper.

IF... THEN...

The petitioner has properly signed the petition Go to Step 3.

The petitioner has not properly signed the petition Annotate the RFE checklist and go to Step 3.

3. Review the I-129 petition for jurisdiction.

A) Look at the address where the beneficiary will work in Part 5 of the petition and any itinerary* provided by the petitioner.

IF... THEN...

All work locations are in your center's jurisdiction (see jurisdiction table on the next page) Go to Step 4.

There are multiple jurisdictions, including yours OR no locations are listed
Go to part B below.

None of the listed work locations are in your center's jurisdiction Go to part C below.

B) Look at the employer's address in Part 1 of the petition.

IF... THEN...

The employer's address is in your center's jurisdiction (see jurisdiction table on the next page) Go to Step 4.

It is not in your center's jurisdiction Go to Part C below.

C) Check to see if the employer is on your center's sole jurisdiction list.

IF... THEN...

If the employer is on the sole jurisdiction list, Go to Step 4.

If the employer is not on the sole jurisdiction list Initiate action to transfer the case to the correct jurisdiction.

* See the glossary for a definition of what constitutes an itinerary.

Standard Jurisdiction Table

State/Territory

Service Center

AZ, CA, Guam, HI, NV CSC

AK, CO, IA, ID, IL, IN, KS, MI, MN, MO, MT, ND, NE, OH, OR, SD, UT, WI, WA, WY, NSC

AL, AR, FL, GA, KY, LA, MS, NC, NM, OK, SC, TN, TXTSC

CT, DC, DE, MA, MD, ME, NH, NJ, NY, PA, PR, RI, VA, VI, VT, WV VSC

4. Review the ETA Form 9035 Labor Condition Application (LCA) to ensure it meets the following criteria:

IF... THEN...

the LCA:

- is signed by DOL,
- includes DOL certified starting and ending dates,

- includes an LCA case number,
- was filed by this petitioner,
- was filed for the location specified on the petition, and,
- was filed for the position specified on the petition. Go to Step 5.

the LCA fails to meet any of the above-mentioned criteria Annotate the RFE checklist and go to Step 5.

5. Determine if the petition and supporting evidence convinces you that there is an actual job offer or that the employment, if prospective, is legitimate (i.e., employment is not speculative in nature). A question you can ask yourself is, “Does the petitioner have sufficient H-1B caliber work to justify the position(s) identified in this petition?”

Caution: Use discretion in determining whether the petitioner has met the burden of establishing that it has an actual employment opportunity for the alien. Requests for contracts and/or other types of documentation should be made only in those cases where you can articulate a specific need for such documentation.

IF... THEN...

You are convinced that there is a job offer based on an actual position or the prospective employment is legitimate, Go to Step 6.

You are not convinced that there is a such a job offer, Annotate the RFE checklist and go to Step 6.

6. Verify that the position qualifies as a specialty occupation. See below.

IF... THEN...

The position qualifies Go to Step 7.

The position does not qualify Annotate the RFE checklist and go to Step

7.

“Specialty Occupation” Criteria

For H-1B petitions involving a “specialty occupation,” 8 CFR 214.2(h)(4)(iii)(A) requires that the position meet one of the following criteria:

- A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- The degree requirement is common to the industry in parallel positions among similar organizations or the position is so complex or unique that it can be performed only by an individual with a degree;
- The employer normally requires a degree or its equivalent for the position; or,
- The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Note: It is not sufficient to simply establish that a bachelor's degree or higher degree is a minimum for entry into the occupation, the position must require a degree in a specific specialty. [INA Section 214(i)(1)]

Job Description

The petitioner must provide you with a detailed description of the job duties to be performed and you can request a description in non-technical terminology. Consider all the information provided by the petitioner in making your decision as to whether or not the position qualifies as a specialty occupation.

Nurses The H-1A nurse program ended on September 1, 1995; however nurses can be considered under the H-1B classification. Most nursing positions are not professional and do not require a person with a four-year degree. To qualify for H-1B classification, the institution and/or the duties of the position must be exceptional. You need to be satisfied that the position requires a four-year degree.

*Note: Nursing positions not qualified for H-1B classification may qualify for H-1C classification under Section 2 of Public Law 106-95. Regulations governing the H-1C classification have not yet been published.

Reference Materials

Occupational Outlook Handbook (OOH)

A good reference for determining if a position meets specialty occupation criteria is the Department of Labor's Occupational Outlook Handbook (OOH). The OOH outlines the duties normally performed by an occupation, and its basic educational and experience requirements. When using the OOH, be careful that the job title you are researching accurately reflects the job duties to be performed. Caution: Look at each case individually; do not get in the habit of classifying based only on the job title.

Dictionary of Occupational Titles (DOT) Many petitioners rely on the DOT as a reference tool in supporting their cases. Once you are familiar with the verbiage used in the DOT, it is not difficult to locate the text used to describe the job duties.

Refer to the DOT's Specific Vocational Preparation (SVP) table to assist in determining whether the position qualifies as a specialty occupation. Exercise caution in interpreting the SVP. Appendix C on page 1009 of the DOT, Volume II, Fourth Ed., Revised 1991, describes the SVP. An SVP of 8 (over 4 years up to and including 10 years) does not necessarily equate to attainment of a baccalaureate degree. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs. Four to ten years of work experience alone will not equate to a baccalaureate degree in any discipline.

*Note: Do not use the SVP as the sole determining factor in assessing whether or not a position qualifies as a specialty occupation.

General Educational Development Tables In addition to the SVP, the DOT contains the General Educational Development (GED) tables (pp. 1009-1011) which can be consulted to determine the level of reasoning, mathematical, and language development necessary to qualify for a position. This table's value is that it recognizes the attainment of scientific thinking, logical analysis, and level of reading ability and interpretation.

Occupational Information Network (O-Net) This resource contains comprehensive information on job requirements and worker competencies. It captures changes in the work place in terms that reflect the latest research in the field of job analysis. The O-Net can be accessed online at <http://www.doleta.gov/programs/onet>.

7. Verify that the beneficiary is qualified for the position (see requirements below):

IF... THEN...

The beneficiary is qualified Go to Step 8.

The beneficiary is not qualified Annotate the RFE checklist and go to

Step 8.

H-1B1 BENEFICIARY REQUIREMENTS

Beneficiary Qualifications In order for an individual to qualify to perform services in a specialty occupation, the alien must:

- Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or,
- Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Relevance of Degree When a beneficiary's degree is not directly related to the position occupation, evaluate the beneficiary's course work related to the occupation to determine his/her qualifications.

For example, the beneficiary in an H-1B petition for an accountant has a degree in Business Administration. Generally, a degree in Business Administration will not satisfy the requirement that the beneficiary have a degree in a specialty because of the general, non-specific nature of the coursework required for this type of degree. The beneficiary may, however, have taken a significant number of accounting courses while obtaining the degree in Business Administration. These accounting courses may be sufficient to establish that the alien has the required education for H-1B status.

Foreign Degree Advisory

If the beneficiary is educated outside the U.S., determine whether the foreign education is equivalent to a United States degree. Just because the degree says it is a bachelor's degree does not necessarily mean that it is equivalent to a United States bachelor's degree.

For example, India has both three- and four-year bachelor's degrees. Generally, the three-year degrees are equivalent to three years of undergraduate coursework at a US institution of higher learning. The four-year degrees from India can usually be considered equivalent to a US bachelor's degree. Be careful not to penalize a beneficiary who earns four-year degree in three years.

If you are unable to make a determination, send an RFE asking for an advisory evaluation of the beneficiary's education.

Nurses The H-1B nurse must be licensed; the CGFNS certificate cannot be substituted for a license (unlike the Schedule A, Group 1, nurses on an I-140 petition). A petition for an H-1B nurse must include an ETA 9035 and evidence of a four-year degree like all other H-1Bs.

Degree Equivalence The beneficiary's education, specialized training, and/or progressively responsible experience may be recognized as equivalent to a baccalaureate degree if the beneficiary has knowledge, competence and practice in the specialty occupation that has been determined to be equal to a baccalaureate or higher degree as evidenced by:

- 1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- 2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP) or Program on Non-collegiate Sponsored Instruction (PONSI);
- 3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign education credentials. Note: These are advisory only.

The INS does not endorse or recommend evaluators. Many private individuals, organizations and educational institutions provide this service;

For purposes of item 3 above, an acceptable evaluation of formal education should:

- Consider formal education only, not practical experience;
- State if the collegiate training was post-secondary education, (i.e., whether the applicant completed the U.S. equivalent of high school before entering college);
- Provide a detailed explanation of the material evaluated rather than a simple concluding statement; and,
- Briefly state the qualifications and experience of the evaluator providing the opinion. [8 CFR 214.2(h)(4)(iii)(D)(3)]

Suggestion: Look at transcripts and credentials to get a feel for whether a beneficiary qualifies for the position before looking at the credentials evaluation. If the evaluation is reasonably close to your evaluation, particularly if the evaluator's methodology makes sense, you can give the evaluation a higher degree of credibility.

Degree Equivalence, con't. 4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty; or,

5) A determination by the Service that the equivalent of the degree required has been acquired through a combination of education, specialized training and/or work experience and that the beneficiary has also achieved recognition of expertise in a specialty occupation as a result of such training and experience. [8 CFR 214.2 (h)(4)(iii)(D)(5)]

For the purpose of item 5 above:

Education Substitutions

*Bachelors' Degree Combination of education and training and/or progressively responsible related work experience (three years of specialized training and/or progressively-responsible related work experience must be demonstrated for each year of college-level training the alien lacks).

*Master's equivalent Bachelor's followed by 5 years work experience.

*There are no substitutions for a Ph.D.

Degree Equivalence, con't. Evidence of the beneficiary's training and work experience must demonstrate that:

- the beneficiary's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty; and,
- the claimed experience was gained while working with peers, supervisors, and/or subordinates who have a degree or equivalent in the specialty.

The beneficiary must have recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
 - Membership in a recognized foreign or U.S. association or society in the specialty occupation;
 - Published material by or about the alien in professional publications, trade journals, or major newspapers;
 - Licensure or registration to practice the specialty occupation in a foreign country;
- or,
- Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Ultimately, you make the final determination that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty, and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

8. Verify that the beneficiary has met any necessary licensure requirements for employment in the position (see below).

IF... THEN...

Licensure requirements are met Go to Step 9.

Licensure requirements are not met Annotate the RFE checklist and go to

Step 9.

Licensed Occupations If the occupation requires a state or local license for an individual to fully perform that occupation, an alien seeking H-1B classification in that occupation must have the license prior to approval of the petition.

[8CFR 214.2(h)(4)(v)(A)]

Some states do not issue licenses until the worker is present. In these cases, accept a statement from the state licensing authority stating that a license will be issued to the beneficiary immediately upon arrival in the United States; however, approve these petitions for 1 year only. [HQ Memo 5/4/1992]

States may allow an individual to fully practice the licensed occupation under the supervision of licensed senior or supervisory personnel in that occupation. If the nature of the duties and the level at which they are performed demonstrate that the alien under the supervision could fully perform the duties of the occupation, H classification may be granted. [8 CFR 214.2(h)(4)(v)(c)]

Physicians to be employed by the Department of Veterans' Affairs (VA) are not required to have a license from the state in which they will work. They may have a license from any state.

Temporary Licenses – One Year Limit

If a temporary license is available in the state of employment, and the alien is allowed to fully perform the duties of the occupation without a permanent license, then H-1B classification may be granted. Where licensure is required in an occupation, approve the petition for one year or for the period that the temporary license is valid, whichever is longer.

[8 CFR 214.2(h)(4)(v)(B) and (E)]

If the file does not contain a temporary or permanent license and the state does not tell you that the person is eligible to practice immediately in that state without a temporary or permanent license, do not approve the petition.

9. If the employment is for a physician, has the beneficiary met the additional physician requirements (see below)?

IF... THEN...

Yes Go to Step 10.

No Annotate the RFE checklist and go to Step 10.

Physicians For an alien physician to qualify to perform unrestricted patient care duties, the petitioner must establish that the beneficiary has passed the Federal Licensing Examination (FLEX) or an equivalent examination or is a graduate of a US medical school. The beneficiary must also have competence in oral and written English as evidenced by a certificate issued by the Educational Commission for Foreign Medical Graduates (ECFMG)* or be a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education. The physician must also meet licensure requirements.

Otherwise, physicians to be employed as H-1Bs are restricted to teaching, conducting research or both at or for a public or non-profit private educational or research institution or agency. No patient care can be performed except that which is incidental to the alien's research or teaching.

[8CFR214.2(h)(4)(viii)(B)]

* Graduates of Canadian medical schools are considered competent in oral and written English. Therefore, they are not required to take the ECFMG exam.

[Memo, from the Commissioner, INS, March 29, 1977]

Physicians of National or International Renown Foreign medical school graduates who are of national or international renown are exempt from restrictions on direct patient care listed above. They would, however, require licensure and an LCA. [8 CFR 214.2(h)(4)(viii)(C)]

Physician Examination Requirements By notice published on September 16, 1992 at 57 FR 42755, if the physician is required to pass the FLEX, or the NBME, or the USMLE, he or she must have done one of the following:

- a) Passed components 1 and 2 of the FLEX, or
- b) Passed Parts I, II and III of the National Board of Medical Examiners (NBME), or
- c) Passed Steps 1, 2 and 3 of the United States Medical Licensing Examinations (USMLE)

These criteria cannot be combined. To meet H-1B requirements, the physician must have passed all parts of the exams specified by a), b) or c) above. For example, passing Part I of the NBME and Steps 2 and 3 of the USMLE WOULD NOT make a physician eligible for H-1B status.

The Licentiate of the Medical Council of Canada (LMCC), the Canadian medical licensing procedure, is not equivalent to the FLEX.

10. If Change of Status or Extension of Stay is requested, follow the instructions in the COS/EOS addendum before continuing. (See page COS/EOS –1)

11. Review the I-129W. In particular, ensure that the “Beneficiary’s Highest Level of Education” reflects his/her formal completed, not what equivalency s/he has attained as a result of training and/or experience. If the wrong box is checked, change it and write your initials.

IF... THEN...

The I-129W is not the correct version and/or is not signed by the petitioner
Annotate the RFE checklist and initiate an RFE for any evidentiary needs you have identified.

The I-129W is the correct version and is properly signed AND a “yes” answer in Part B is adequately supported If you have previously identified other evidentiary needs, initiate an RFE for them. Otherwise, approve the petition.

The I-129W is the correct version and is properly signed AND none of the “yes” answers in Part B are adequately supported AND you need other additional evidence Annotate the RFE checklist to require payment of the additional \$500 fee, and initiate an RFE for payment of the additional \$500 fee or documentation to support the exemption AND any other evidentiary needs.

The I-129W is the correct version and is properly signed AND none of the “yes” answers in Part B are adequately supported AND you do not need other additional evidence Prepare an Intent to Deny letter for non-payment of the additional fee.

Review the Adjudication Reminders (p.35), then go to Adjudicative Action (p.37).

H-1B2 ADJUDICATION – DEPARTMENT OF DEFENSE (DOD) SPECIALTY

Definition Section 8 CFR 214.2(h)(4)(i)(4) states in part:
...petition for alien to perform... services relating to a DOD cooperative research and development project or co-production project...

General Requirements Services of an exceptional nature relating to DOD cooperative research and development projects or co-production projects shall be those services which require a baccalaureate or higher degree, or its equivalent, to perform the duties. The existence of this special program does not preclude the DOD from utilizing the regular H-1B provisions provided the required guidelines are met.

*Note: Petitioner is not required to provide a Form ETA-9035 (LCA).

1a. Verify that the petitioner meets the I-129 filing eligibility criteria.
The following entities may file for a H-1B nonimmigrant:

ENTITY DEFINED AS:

A U.S. Employer A person, firm, corporation, contractor, or other association or organization in the U. S. which: permits a person to work in the U.S.; has an IRS tax identification number; and has employer-employee relationship(s) demonstrated by having the ability to hire, pay, fire, supervise, or otherwise control the work of any employee.

*Note: This does not empower you to question the employer's ability to pay the wage stated in the petition. Rather, the entity's general ability to hire, pay, fire, supervise or otherwise control the work of employees is an indicator of his/her/its qualification as a "US employer."

[8 CFR 214.2(h)(4)(ii)]

An Agent A U.S. individual or company in business as an agent may file for types of workers who are traditionally self-employed or use an agent to arrange short-term employment with numerous employers.

[8 CFR 214.2(h)(2)(i)]

1a. (con't) IF... THEN...

The petitioner is ineligible to apply because it is a foreign company
Prepare to deny the petition; however, before doing so, review the petition to determine if there are any other grounds for denial.

The petitioner appears unqualified on any other grounds Annotate the RFE checklist and go to Step 1b.

*Note: An alien may be employed by more than one employer (petitioner) at any given time. However, a separate petition must be approved for each employer. Also part-time employment IS allowed.

1b. If the petitioner is an agent, he/she must guarantee the wage offered and provide the other terms and conditions of the beneficiary's employment.
[8 CFR 214.2(h)(4)(vii)(A)(2)]

If the petitioner is an agent, has he/she provided a copy of written agreement between himself and the beneficiary, or a summary of the oral agreement?

IF... THEN...
Yes Go to Step 1c.
No Annotate the RFE checklist and go to Step 1c.

1c. Does the petitioner include a complete itinerary of service or engagements including dates, names and addresses of the actual employers and locations where the services will be performed?

IF... THEN...
Yes Go to Step 2.
No Annotate the RFE checklist and go to Step 2.

2. Ensure that the petitioner has signed the proper block in Part 6 of the I-129. Note: If the petitioner signs in the wrong location, you must send an RFE as the attestation is improper.

IF... THEN...
The petitioner has properly signed the petition Go to Step 3.
The petitioner has not properly signed the petition Annotate the RFE checklist and go to Step 3.

3. Review the I-129 petition for jurisdiction.

a) Look at the address where the beneficiary will work in Part 5 of the petition and any itinerary* provided by the petitioner.

IF... THEN...
All work locations are in your center's jurisdiction (see jurisdiction table on page 8). Go to Step 4.
There are multiple jurisdictions, including yours OR no locations are listed Go to part B below.
None of the listed work locations are in your center's jurisdiction Go to part C below.

b) Look at the employer's address in Part 1 of the petition.

IF... THEN...

The employer's address is in your center's jurisdiction (see jurisdiction table on page 8), Go to Step 4.

It is not in your center's jurisdiction Go to Part C below.

3. (con't). b) Check to see if the employer is on your center's sole jurisdiction list.

IF... THEN...

The employer is on your center's sole jurisdiction list, Go to Step 4.

The employer is not on your center's sole jurisdiction list, Initiate action to transfer the case to the correct jurisdiction.

* See the glossary for a definition of what constitutes an itinerary.

4. Verify that the petition is accompanied by a verification letter. This letter must state that the alien will be working on a cooperative project under a reciprocal government-to-government agreement administered by DOD. Details about the specific project are not required.

IF... THEN...

The verification letter is present and complete, Go to Step 5.

The verification letter is not present or incomplete, Annotate the RFE checklist and go to Step 5.

5. The petitioner must also:

- provide a general description of the alien's duties and indicate the actual dates of the alien's employment on the project.

- submit a statement indicating the names of aliens currently employed on the project in the United States and their dates of employment. The petitioner shall also indicate the names of aliens whose employment on the project ended within the past year.

IF... THEN...

The petitioner provides the required information Go to Step 6.

The petitioner fails to provide the required information Annotate the RFE checklist and go to Step 6.

6. Verify that the petition is accompanied by evidence that the beneficiary has a baccalaureate or higher degree or its equivalent in the occupational field in which he or she will be performing the services.

IF... THEN...

The beneficiary does meet the requirements Go to Step 7.

The beneficiary does not meet the requirements, or the evidence is inconclusive Annotate the RFE checklist and go to Step 7.

7. If Change of Status or Extension of Stay is requested, follow the instructions in the COS/EOS addendum before continuing. (See page COS/EOS –1).

8. Review the I-129W. In particular, ensure that the “Beneficiary’s Highest Level of Education” reflects his/her formal completed, not what equivalency s/he has attained as a result of training and/or experience. If the wrong box is checked, change it and write your initials.

IF... THEN...

The I-129W is not the correct version and/or is not signed by the petitioner Annotate the RFE checklist and initiate an RFE for any evidentiary needs you have identified.

The I-129W is the correct version and is properly signed AND a “yes” answer in Part B is adequately supported If you have previously identified other evidentiary needs, initiate an RFE for them. Otherwise, approve the petition.

The I-129W is the correct version and is properly signed AND none of the “yes” answers in Part B are adequately supported AND you need other additional evidence Annotate the RFE checklist to require payment of the additional \$500 fee, and initiate an RFE for payment of the additional \$500 fee or documentation to support the exemption AND any other evidentiary needs.

The I-129W is the correct version and is properly signed AND none of the “yes” answers in Part B are adequately supported AND you do not need other additional evidence Prepare an Intent to Deny letter for non-payment of the additional fee.

*Note: Because of the sensitivity of these types of petitions, it is prudent to consult with your supervisor before taking an adverse action with these cases.

A maximum of 100 aliens can be employed in the DOD research program at any time. Before you approve the petition, contact Headquarters Office of Program and Regulatory Development at (202) 353-8177.

Review the Adjudication Reminders (p.35), then go to Adjudicative Action (p.37).

H-1B3 ADJUDICATION– MODELS

Definition Section 101(a)(15)(H)(i)(b) of the Act relates to an alien:

...who is coming temporarily to the United States to perform services...as a fashion model...of distinguished merit and ability...

General Requirements H-1B classification may be granted to an alien who is of distinguished merit and ability in the field of fashion modeling. The alien must come to the United States to perform services that require a fashion model of prominence, and he or she must demonstrate such prominence. [8 CFR 214.2(h)(4)(i)(C)]

Prominence means a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of fashion modeling. [214.2(h)(4)(ii)]

Note: An LCA is required for each Standard Metropolitan Statistical Area (SMSA) where the beneficiary will work.

Step Action

1a. Verify that the petitioner meets the I-129 filing eligibility criteria. The following entities may file for a H-1B nonimmigrant:

ENTITY DEFINED AS:

A U.S. Employer A person, firm, corporation, contractor, or other association or organization in the U. S. which: permits a person to work in the U.S.; has an IRS tax identification number; and has employer-employee relationship(s) demonstrated by having the ability to hire, pay, fire, supervise, or otherwise control the work of any employee.

*Note: This does not empower you to question the employer's ability to pay the wage stated in the petition. Rather, the entity's general ability to hire, pay, fire, supervise or otherwise control the work of employees is an indicator of his/her/its qualification as a "US employer."

[8 CFR 214.2(h)(4)(ii)]

1a. ENTITY DEFINED AS:

(con't) An Agent A U.S. individual or company in business as an agent may file for workers who are traditionally self-employed or use an agent to arrange short-term employment with numerous employers.

[8 CFR 214.2(h)(2)(i)]

IF... THEN...

the petitioner is ineligible to apply because it is a foreign company prepare to deny the petition; however, before doing so, review the petition to determine if there are any other grounds for denial.

the petitioner appears unqualified on any other grounds annotate the RFE checklist and go to Step 2.

*Note: An alien may be employed by more than one employer (petitioner) at any given time. However, a separate petition must be approved for each employer. Also part-time employment IS allowed.

1b. If the petitioner is an agent, he/she must guarantee the wage offered and provide the other terms and conditions of the beneficiary's employment.
[8 CFR 214.2(h)(4)(vii)(A)(2)]

If the petitioner is an agent, has he/she provided a copy of written agreement between himself and the beneficiary, or a summary of the oral agreement?

IF... THEN...

Yes Go to Step 2.

No Annotate the RFE checklist and go to Step 2.

2. Ensure that the petitioner has signed the proper block in Part 6 of the I-129. Note: If the petitioner signs in the wrong location, you must send an RFE as the attestation is improper.

IF... THEN...

The petitioner has properly signed the petition Go to Step 3.

The petitioner has not properly signed the petition Annotate the RFE checklist and go to Step 3.

3. Review the I-129 petition for jurisdiction.

a) Look at the address where the beneficiary will work in Part 5 of the petition and any itinerary* provided by the petitioner.

IF... THEN...

All work locations are in your center's jurisdiction (see jurisdiction table on page 8). Go to Step 4.

There are multiple jurisdictions, including yours OR no locations are listed
Go to part B below.

None of the listed work locations are in your center's jurisdiction Go to part C below.

b) Look at the employer's address in Part 1 of the petition.

IF... THEN...

The employer's address is in your center's jurisdiction (see jurisdiction table on page 8), Go to Step 4.

It is not in your center's jurisdiction Go to Part C below.

3. (con't) c) Check to see if the employer is on your center's sole jurisdiction list.
IF... THEN...
If the employer is on your center's sole jurisdiction list, Go to Step 4.

If the employer is not on your center's sole jurisdiction list. Initiate action to transfer the case to the correct jurisdiction.

*See the glossary for a definition of what constitutes an itinerary.

4. Review the ETA Form 9035 Labor Condition Application (LCA):

IF... THEN...

The LCA:

- is signed by DOL,
- includes DOL certified starting and ending dates,
- includes an LCA case number,
- was filed by this petitioner,
- was filed for the location specified on the petition, and,
- was filed for the position specified on the petition. Go to Step 5.

The LCA fails to meet any of the above-mentioned criteria Annotate the RFE checklist and go to Step 5.

- 5a. Does the petitioner include a complete itinerary of service or engagements including dates, names and addresses of the actual employers and locations where the services will be performed?

IF... THEN...

Yes Go to Step 5c.

No Annotate the RFE checklist and go to Step 5c.

- 5b. If the petitioner is the employer (not an agent), has he/she/it provided copies of any written contracts with the beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the beneficiary will be employed?

IF... THEN...

Yes Go to Step 5c.

No Annotate the RFE checklist and go to Step 5c.

5c. Does the petitioner establish that the services to be performed involve an event, production or activity which have a distinguished reputation OR the services are to be performed for an organization or establishment that has a distinguished reputation for, or record of, employing prominent persons?

IF... THEN...
Yes Go to Step 6.
No Annotate the RFE checklist and go to Step 6.

6. Verify that the beneficiary is qualified for the position. To establish that the beneficiary qualifies as an alien of distinguished merit and ability in the field of modeling you must have evidence of two of the following: [8 CFR 214.2(h)(4)(vii)(C)]

1. Has achieved national or international recognition for outstanding achievements evidenced by critical reviews or other published material by or about the alien in major newspapers, trade journals or magazines;
2. Has performed and will perform services as a fashion model for employers that have a distinguished reputation;
3. Has received recognition for significant achievements from organizations, critics, or other recognized experts in the field of fashion modeling. Such testimonials must be in a form that clearly indicates the author's authority, expertise, and knowledge of the alien's achievements;
4. Commands a high salary or other substantial remuneration for services (in relation to others in the field) as evidenced by contracts or other reliable evidence.

7. If Change of Status or Extension of Stay is requested, follow the instructions in the COS/EOS addendum before continuing. (See page COS/EOS –1)

8. Review the I-129W. In particular, ensure that the "Beneficiary's Highest Level of Education" reflects his/her formal completed, not what equivalency s/he has attained as a result of training and/or experience. If the wrong box is checked, change it and write your initials.

IF... THEN...

The I-129W is not the correct version and/or is not signed by the petitioner
Annotate the RFE checklist and initiate the RFE.

The I-129W is the correct version and is properly signed AND a "yes" answer in Part B is adequately supported If you have previously identified other evidentiary needs, initiate the RFE. Otherwise, approve the petition.

The I-129W is the correct version and is properly signed AND none of the "yes" answers in Part B are adequately supported AND you need other additional

evidence Annotate the RFE checklist to require payment of the additional \$500 fee, and initiate the RFE.

The I-129W is the correct version and is properly signed AND none of the “yes” answers in Part B are adequately supported AND you do not need other additional evidence Prepare an Intent to Deny letter for non-payment of the additional fee.

H-1B ADJUDICATION REMINDERS

Effects of a Strike A petition may not be approved if the Secretary of Labor has certified to the Commissioner that a strike, or other labor dispute that involves a work stop, is in progress. Management keeps us informed of current strike information.

[8CFR 214.2(h)(17)]

Debarment A petition may not be approved if there is a debarment action in force from the Secretary of Labor. Management keeps us informed of current debarment information.

Criteria Apply to Job and Beneficiary Both the job and the beneficiary must meet the specialty occupation criteria. The mere fact that the beneficiary has a baccalaureate degree does not necessarily mean that the duties to be performed require an individual of that caliber.

Fraud Detection Be familiar with the latest visa fraud trends, possible detection points, and current investigation information maintained by the Operations Division. In the course of adjudication, you may also come upon other signs of suspect documentation, reasons to suspect involvement of a dummy corporation, etc.

Seek assistance from your supervisor and/or the Operations Division in resolving these issues. If your center has any prescribed procedures on this matter, follow them.

Time Limits Non-immigrant specialty occupation employees and fashion models are limited to 6 years in combined H and L status and no petition can be approved for more than 3 years at a time. Aliens employed under the DoD specialty are limited to 10 years in combined H and L status and no petition can be approved for more than 5 years at a time (“H and L status” includes H2, H3, H4, L1 and L2).

Exceptions to Time Limits Time limitations do not apply to aliens who did not reside continually in the United States and whose employment in the U.S. was seasonal or intermittent or was for an aggregate of six months or less per year. The limitations do not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and alien must

provide clear and convincing evidence. Such evidence shall consist of documents such as arrival and departure records, copies of tax returns, and records of employment abroad.

Recapture of Time Time spent out of the United States during the validity period of a petition must be counted toward the alien's maximum period of stay in the United States, if the time spent outside of the United States did not interrupt the alien's employment in the United States. Periods of time spent outside of the United States which are considered to be a normal part of a work year (e.g., vacations, holidays, and weekends) do not interrupt the alien's employment in the United States. Likewise, short work details to other countries for the United States employer do not interrupt the alien's employment in the United States.

Examples of periods of time spent outside of the United States which interrupt an alien's employment in the United States include, but are not limited to: maternity leave, extended medical leave, and long-term details to an employment location outside of the United States.

[HQ Policy Memo, March 4, 1994 signed by Lawrence J. Weinig, Acting Associate Commissioner]

Precedent Decisions and AAO Decisions not designated as precedents A list of precedent decisions is provided in the "References" section (page 58) of this SOP. A precedent decision establishes one or more binding rules of decision for all cases involving the same facts and issues, unless the Service has modified or overruled the precedent decision in a later precedent decision. A decision of the Supreme Court or a Federal Court of Appeals may also affect the continued viability of a precedent decision. If a petitioner argues that this is the case, consult your supervisor and the assistant regional counsel assigned to support your local office for guidance. Moreover, part of a precedent decision may have been rendered moot by subsequent statute or regulation changes.

You can find a summary of a precedent decision in its head-note. It is important, however, that you read the actual decision, not just the head-note, to determine how the precedent decision applies to your case. In your decision, refer to and if necessary, quote from the actual precedent decision, not the head-note.

AAO decisions that are unpublished are NOT binding and should NEVER be cited in RFE, intent and denial correspondence. If a petitioner or applicant cites an unpublished AAO decision, you should include in your denial correspondence a paragraph such as the following:

The petitioner cites in support of its petition the [date] decision of the Administrative Appeals Office in [case name and case number]. That decision does not provide a binding rule of decision for this case, however, because the Service has not designated the [case name] decision as a precedent. Moreover, the record in [case name] is not now

before the Service for decision, and the Service must decide this current petitioner's case only on the basis of the record of the proceeding in this particular case.

[8 CFR 103.2(b)(16)(ii) and 8 CFR 103.3(c)]

Precedent Decisions and AAO Decision not designated as precedents, con't. A petitioner must also cite a decision of a Federal district court. If so, your decision should include a paragraph like the following:

The petitioner cites in support of its petition the [date] decision of the U.S. District Court for [district name] in [case name, case number]. That decision does not establish a binding rule of decision in this case since the parties to that case are not involved in this current case. Matter of K-S-, 20 I & N Dec. 715 (BIA 1993). The Service must decide the current petition solely on the basis of the record before the Service. [8 CFR 103.2(b)(16)(ii)]

If the petitioner cites an opinion of a Federal Court of Appeals, consult your supervisor and/or the assistant regional counsel assigned to your local office. Not all appellate decisions are precedents, even in the court that made the decision.

ADJUDICATIVE ACTION

Requesting Evidence When you require additional evidence to render a decision, compose an RFE notice using the standard language on the LAN whenever possible. If local policy allows you to hand-write the RFE, you may do so. Ensure that the RFE addresses the issues for which you will deny the case if no response is received AND addresses H petition criteria ONLY (viability of the petitioner, ability to pay, funds at risk, and other criteria that apply to EB-5 and/or other immigrant visa petitions DO NOT apply to H petitions). Saving the document is not required; however, doing so may simplify writing the denial letter if it becomes necessary to do so. You must, however, include a copy of the RFE letter—and evidence of the date it mailed and the address to which it was sent – in the record of proceeding. The last two items can be on the copy of the letter.

DO NOT grant extensions of the time allotted to return requested evidence.

Intent to Deny Pursuant to 8 CFR 214.2(h)(10)(ii), when an adverse decision is proposed on the basis of derogatory information of which the petitioner is unaware, notify the petitioner of the intent to deny the petition and cite the basis. The petitioner has 30 days from the date of the notice to inspect and rebut the evidence. Consider all relevant rebuttal material in making a final decision.

Intent to Revoke Issue an Intent to Revoke a previously approved petition when the Service becomes aware that:

- the beneficiary is no longer employed by the petitioner or is no longer receiving training as specified in the petition;

- the statement of facts contained in a petition was not true and correct;
- the petitioner violated terms and conditions of the approved petition;
- the petitioner violated requirement of section 101(a)(15)(H) of the Act or 8 CFR 214.2(h) provisions; or
- the approval the petition violated 8 CFR 214.2 (h)(4) or involved gross error.

The petitioner has 30 days from the date of the notice to inspect and rebut the evidence. Consider all relevant rebuttal material in making a final decision.

[8 CFR 214.2(h)(11)(iii)]

Revocation on Notice If the petitioner fails to respond to an Intent to Revoke or the evidence submitted in response to the Intent to Revoke fails to convince you that the petition should not be revoked, issue a revocation. In these cases, the petitioner has the same appeal rights as with denial.

Withdrawal When a petitioner notifies the Service that he/she/it wishes to withdraw a petition before it has been approved, place the withdrawal letter in the file and follow denial procedures.

A petitioner can also withdraw a petition after it has been approved provided that:

- the beneficiary has not been admitted to the US; or,
- no change of status has been approved; and,
- the “From” validity date of an extension of stay petition has not passed.

Petitions meeting these criteria are processed like automatic revocations (see below) except that withdrawal cannot be retracted.

[8 CFR 103.2.b.6]

Automatic Revocation When a petitioner notifies the Service that he/she/it wishes to withdraw a petition and it does not meet withdrawal criteria listed above, OR, notifies the Service that the beneficiary has terminated employment, the approval can be automatically revoked without first sending an Intent to Revoke notice. The petitioner has no appeal rights after an automatic revocation.

[8 CFR 214.2 (h)(11)(ii)]

Validity Dates – General Information H-1B (Professionals and Models) are initially approved for up to three years with extensions granted in increments up to three years. The total period of stay may not exceed six years UNLESS the alien has resided and has been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year (see “Exceptions” below)

- H-1B (DOD) are initially approved for up to five years. The total period of stay may not exceed ten years UNLESS the alien has resided and has been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

Processing Initial Approvals

Petition Annotations Complete the following items in the “FOR INS USE ONLY” section of Page 1 of the petition.

STEP ITEM ACTION

1. Class “H1B1” for professionals
“H1B2” for DOD
“H1B3” for models
2. Number of workers Enter “1” for H-1B petitions
3. Priority Number Leave this field blank
4. Validity Dates See the validity date section below.
5. Classification Approved Check the appropriate box(es)
6. Occupational Code Select most appropriate code from OC list
7. Partial Approval *
8. Action Block Stamp and Sign**
9. Cabling/Faxing Direct this action only if the case meets expedite criteria. (See local policy for expedite guidelines.)

* Normally field is left blank. If you limit the validity period of the petition, write “Approval limited per [authority cite].” For example, if the validity period must be limited under temporary licensure rules because supervision is required, write “Approval limited per 8 CFR 214.2 (h)(4)(v)(B).”

** For H-1B2 petitions, after contacting Headquarters Office of Program and Regulatory Development as instructed on page 27, write, “Approved Pursuant to Section 223 of IMMACT 90” in the action block. Also include the name of the person with whom you spoke at Headquarters in this block.

Validity Dates for H-1B1 and H-1B3 Initial Approvals For specialty occupations and fashion models, limit the validity period of the petition to the validity of the Labor Condition Application (LCA) up to a maximum of three years.

FROM

- the “From” date of intended employment listed in part 5 of the petition, or,
- the date you approve the petition, or,
- the “From” date on the LCA, whichever is the latest.

TO

- the “To” date of intended employment in part 5 of the petition, or,
- the “To” date on the LCA, or,
- three years from the “From” validity date established above, or,
- the date the alien completes six years in L and H status combined, whichever is the earliest.

Exception:

Aliens with temporary licenses are limited to a validity period of one year or the time specified on the temporary license, whichever is longer.

Examples:

If the petitioner is requesting validity for two years on the petition, the start date of the two years has already passed, and the LCA is valid for three years, the “From” date should be the date you approved the petition and the “To” date should be the “To” date of intended employment in Part 5 of the petition.

If the petitioner is requesting two years and, at the time of adjudication the LCA is only valid for a year and a half, you are required to ONLY approve the petition until the “TO” date on the LCA. Therefore, the petition would ONLY be approved for a year and a half, NOT the two years for which the petitioner is asking.

Validity Dates for H-1B2 Initial Approvals For DOD specialty aliens, limit the validity period of the petition to 5 years.

FROM

- the “From” date of intended employment listed in part 5 of the petition, or,
- the date you approve the petition, whichever is later.

TO

- the “To” date of intended employment in part 5 of the petition, or,
 - 5 years from the “From” date established above, or,
- the date the alien completes ten years in L and H status combined, whichever is the earliest.

PROCESSING APPROVALS FOR CHANGE OF STATUS, EXTENSION OF STAY AND AMENDED PETITIONS

Petition Annotations Annotate the petition as instructed in the “Processing Initial Approvals” section (page 41) using the validity date instructions below.

“From” Validity Date for COS and EOS When determining the “from” validity date for a COS/EOS or EOS approval, follow this general rule:

The “from” validity date of the petition should be the latest of the following:

- the approval date (date of adjudication),
- the LCA “from” date, or,
- the date requested by the petitioner.

Same Employer Exception (EOS petitions only):

If the beneficiary's status has expired prior to the date that you selected as the "from" date (according to the general rule listed above), AND the petition was filed by the same employer, then back-date the validity date to the day after the beneficiary's status expires to eliminate gaps. If the petition is filed by a different employer, DO NOT backdate the "from" validity date.

Note: For the purposes of the extension, treat petitions filed as a result of a merger or acquisition as though filed by the original employer.

Gaps A gap between the expiration of the beneficiary's existing status and either the requested from date or the LCA from date does not automatically require that you deny the EOS. Look at the evidence provided to determine if the reason for the gap is excusable.

"To" Validity date for COS and EOS When determining the "To" validity date for a COS/EOS or EOS approval, follow this general rule:

The "To" validity date of the petition should be the earliest of the following:

- the "To" date of intended employment in part 5 of the petition, or,
- the "To" date on the LCA (H-1B1 and H-1B3 only), or,
- the date you determined as a result of applying a regulatory limitation. (See notes below.)

Notes:

- 1) H-1B1 and H-1B3 aliens are limited to a maximum of 3 years validity for any given approval, and 6 years in combined H and L status. (Intermittent and seasonal employees are exempt from the 6-year limit.)
- 2) H-1B2 aliens are limited to a maximum of 5 years validity for any given approval, and 10 years in combined H and L status. (Intermittent and seasonal employees are exempt from the 10-year limit.)
- 3) Aliens with temporary licenses are limited to a validity period of one year or the time specified on the temporary license, whichever is longer.
- 4) Aliens in certain health care occupations (nurse, physical therapist, occupational therapist, speech language pathologist, medical technologist, medical technician, physician's assistant) who are the beneficiaries on a COS or EOS petition must be limited to a one-year validity period or the requested period, if less than 1 year. If, however, the petitioner submits evidence that the beneficiary has met all the requirements of section 212(a)(5)(C) of the Act as determined by an independent credentialing organization approved by the Attorney General, the 1-year limitation does not apply.

[HQ Policy memos, April 30, 1998, and June 6, 1997 signed by Louis D. Crocetti, Jr.]

Consular Notification for COS and EOS Cases If the petitioner wishes that INS notify a consulate or port of entry of the beneficiary's status change or extension of stay, he/she/it must provide a second copy of the I-129. The requested change of status or extension of stay should be indicated on the I-129, and the consulate to be notified indicated on the I-824 or cover letter.

Adjudicate the I-129 as if there was no I-824 attached. If you deny the classification portion of the I-129, deny the I-824. If you deny the COS or EOS request, process the petition for consular notification and approve the I-824, if provided (an I-824 is not required) [Office of Service Center Operations policy memo, December 9, 1999, subject: Form I-129 and H-1B Cap Definitions and Proper Usage of Form I-824]. Complete all blocks on the second copy of the petition, and stamp it. Check the "Consulate/POE/PFI notified" block, enter the consulate/POE name, and check the "Extension Granted" or "COS/Extension Granted" block.

PROCESSING SPLIT DECISIONS (EITHER CHANGE OF STATUS OR EXTENSION OF STAY IS BEING DENIED)

Petition Annotations Annotate the petition as instructed in the "Processing Initial Approvals" section (page 41) except in the partial approval block write, "COS Denied" or "EOS Denied" as appropriate. Use the validity date instructions below.

* Note: These cases require special notice generation procedures. See the Post-Adjudication Section of this SOP for instructions.

Validity Dates The validity dates of the petition are FROM:

- the date you adjudicate the petition, or
- the "From" date requested in Part 5 of the petition, or,
- the "From" date on the LCA, whichever is the latest.

TO

- the "To" date of intended employment in part 5 of the petition, or,
- the "To" date on the LCA (H-1B1 and H-1B3 only), or,
- 3 years (H-1B1 or H-1B3) or 5 years (H-1B2) from the "From" date established above, or,
- the date the alien completes 6 years in any H and L status combined* whichever is the earliest.

*Note: H-1B2 can be granted up to 10 years in combined H-1B2 and L status combined.

Exception:

Aliens with temporary licenses are limited to a validity period of one year or the time specified on the temporary license, whichever is longer.

PROCESSING DENIALS

Petition Annotations In the “For INS Use only” section of Page 1 of the petition, write “Denied” and the date. If local policy requires additional information for this section of the petition, follow that policy.

Denial of I-129 Compose the denial notice using the standard language on the LAN wherever possible. Save the document in the directory specified by local policy using the prescribed file name format.

Reminders:

- When there are multiple reasons for denial, address them all
- Address the evidence presented, tying the denial language to the regulations pertaining to the issue
- Cite inconsistencies, but do not make speculative statements
- Avoid using insulting language; address the facts of the case only
- Do not stretch the interpretation of precedent decisions
- Do not make incorrect quotations

***Note:** It is extremely important to apply ONLY the H-related regulations in adjudicating these petitions. Viability of the petitioner, ability to pay, funds at risk, and other criteria that apply to EB-5 and/or other immigrant visa petitions DO NOT apply to H petitions. Do not issue RFEs or denials based on non-H criteria.

No Appeal Rights for Denial of COS/EOS There is no provision for a petitioner to appeal a denial of COS or EOS. The petitioner must file a Motion to Reopen or to Reconsider.

[For COS: 8 CFR 248.3(g); For EOS: 8 CFR 214.1(c)(5)]

Abandonment Denials When the petitioner fails to respond to an RFE within the time allowed, deny the case. Compose the denial notice using the standard language on the LAN wherever possible. Save the document in the directory specified by local policy using the prescribed file name format. This action can be performed by clerical staff at the Director’s discretion.

No Appeal Rights for Abandonment Denials Pursuant to 8 CFR 103.2(b)(15), there is no provision for an appeal of a petition denied for abandonment. A motion to reopen/reconsider may be filed. The motion can be granted only if the petitioner meets one of the three categories of eligibility listed under 8 CFR 103.5(a)(2):

- 1) the requested evidence was immaterial to eligibility;
- 2) the requested evidence was submitted before the denial notice was sent and went unnoticed by the Service; or,
- 3) the RFE was mailed to the wrong address.

ADJUDICATIONS GLOSSARY

AAO Administrative Appeals Office. The office to which H-1B cases are appealed.

ACWIA American Competitiveness and Workforce Improvement Act. The law that established the \$500 additional fee for most H-1B petitions.

Agent A US individual or company which may petition for workers who are traditionally self-employed or use an agent to arrange short-term employment with numerous employers.

Amended Petition A petition involving a material change in the terms and conditions of employment that does not involve a change of classification or an extension of stay beyond that which was previously authorized.

Anticipated Employment The establishment of a position(s) by a petitioner based on sound business projections (contrast with speculative employment). Sound business projections will demonstrate that the petitioner has a sound basis for anticipating that it will have sufficient work to justify the position(s).

Batch A group of 25 or fewer files that are bundled together through processing.

Beneficiary The proposed employee on the petition. The beneficiary is not eligible to file, obtain case status etc. unless the beneficiary is also the petitioner. All inquiries must be made by the petitioner or his/her/its attorney or representative.

Centralized Filing See sole jurisdiction.

CGFNS

Certificate Commission on Graduates of Foreign Nursing Schools

CLAIMS Computer Linked Application Information Management System. The case processing system in which petitions are processed.

CLEP College Level Examination Program. One of the examinations that can demonstrate that a beneficiary's knowledge, competence and practice are equivalent to a baccalaureate degree.

Congressional Interest A case in which a Congressional office has expressed interest in the decision. It is NOT necessary for this case to receive priority processing (see definition).

COS Change of Status. Changing from one non-immigrant classification to another.

Cover letter A letter submitted by the petitioner or representative accompanying most petitions. The cover letter may include a request to waive the base fee, a request for expeditious handling, an itinerary (see definition), and/or other information about the case.

Distinguished Merit & Ability The level of accomplishment that a fashion model must have attained in order to qualify for the H-1B classification.

DOD Department of Defense.

DOL Department of Labor. The certifying authority for Form ETA 9035 (Labor Condition Application).

DOT Dictionary of Occupational Titles. A reference document that can assist in determining if a position is a specialty occupation.

ECFMG Educational Commission for Foreign Medical Graduates. An organization which issues certificates as evidence that foreign-educated physicians have competence in oral and written English.

Employee ID# A two-letter, four-number identifier for a contract employee who works at one of the service centers.

EOS Extension of Stay. Extension of a beneficiary's authorized stay in the United States without changing his/her non-immigrant classification.

Expedite Expedites can either be automatic, discretionary or Congressional.

Automatic expedites are cases that receive priority processing based on the visa classification or other "trigger" which is identified by local management.

Discretionary expedites are cases in which the petitioner requests expeditious handling of the case either via telephone or letter. These cases require a decision to be made by INS staff as to whether or not the case should receive priority processing prior to the actual adjudication of the case.

Congressional expedites are cases for which a Congressional office has requested expeditious handling.

Handle expedite cases in accordance with locally-issued policy and procedures.

Fee Waiver Request When a petitioner requests a waiver of the \$110 base fee. A decision on the request must be made by INS staff prior to receipting the petition.

FLEX Federal Licensing Examination. Upon passing this exam, foreign-educated physicians can be allowed to perform unrestricted patient care duties **PROVIDED** that they have competence in oral and written English.

G-28 A form identifying the legal representative or attorney of the petitioner.

GED General Educational Development tables. A reference document that can be used to determine the level of reasoning, mathematical and language development a position requires.

H-1B1 The visa classification associated with specialty occupation positions.

H-1B2 The visa classification associated with DOD cooperative research and development project or co-production project positions.

H-1B3 The visa classification associated with fashion models of distinguished merit and ability.

H-1B Cap The limit on the number of new H-1B beneficiaries that can be approved in a given fiscal year is commonly referred to as the H-1B Cap. At any given time there may be special instructions for processing these cases. Follow that guidance.

I-129W A form required to be submitted with all H-1B petitions. The I-129W enables INS to gather data that must be reported to Congress, and to determine if the petitioner is exempt from paying the additional \$500 fee.

Intent Correspondence from the INS to the petitioner indicating the intention to deny a pending petition or to revoke a previous approval.

Itinerary A list of dates and locations where the beneficiary will work.

Jurisdiction The geographic area served by a service center.

LCA Labor Condition Application (Form ETA 9035). A form that must be certified by the Department of Labor and submitted in support of H-1B1 and H-1B3 petitions.

LMCC Licentiate of the Medical Council of Canada. The Canadian license-issuing body for foreign-educated physicians. These licenses do not qualify a beneficiary for the H-1B classification.

Manual Reject Rejection of a petition on grounds other than unacceptable remittance, or unsigned or improperly signed petition.

NBME National Board of Medical Examiners. Upon passing this exam, foreign-educated physicians can be allowed to perform unrestricted patient care duties **PROVIDED** that they have competence in oral and written English.

Non-immigrant visa classification The classifications under which the INS authorizes aliens to work temporarily in the United States. The I-129 is used to obtain or extend the following non-immigrant visa worker classifications:

E1 – Treaty trader

E2 – Treaty investor

H-1B1 – Specialty occupation worker

H-1B2 – Department of defense worker

H-1B3 – High Fashion model

H-1C – Nurse

H2A – Temporary agricultural worker

H2B – Temporary non-agricultural worker

H3 – Trainee or participant in a special education exchange visitor program

L1A – Multinational company intra-company transferee (executive or manager)

L1B – Multinational company intra-company transferee (specialized knowledge)

O1A – Alien with extraordinary ability in the sciences, education, business or athletics

O1B- Alien with extraordinary ability in the arts, or extraordinary achievement in motion pictures or television

O2 - Essential support personnel to an O1 athlete, artist or entertainer

Non-immigrant visa classifications, con't. P1A – Internationally recognized athlete, group or team

P1B – Internationally recognized entertainment group

P1S – Essential support person to any P1 alien

P2 – Artist or entertainer involved in a reciprocal exchange program

P2S – Essential support person to any P2 alien

P3 – Artist or entertainer in a culturally unique program

P3S – Essential support person to any P3 alien

Q1 – International cultural exchange participant

Q2 – Irish peace process participant

R1 – Certain religious workers

TN1 – Canadian NAFTA professional

TN2 – Mexican NAFTA professional

Non-precedent decision A decision by the AAO which cannot be used to support decisions in other cases.

OOH Occupational Outlook Handbook. A reference document that can assist in determining if a position is a specialty occupation.

Petitioner The person or company submitting the I-129 to the INS.

PONSIProgram on Non-collegiate Sponsored Instruction. One of the examinations that can demonstrate a beneficiary's knowledge, competence and practice are equivalent to a baccalaureate degree.

Precedent Decision A decision by the AAO that has been designated as establishing a principle which can be used in adjudicating other cases. Findings in precedent decisions are binding on Service officers.

Priority

Processing For the purposes of this SOP, the expeditious handling of a case whether as a result of an automatic, discretionary or Congressional expedite.

RAFACS Receipt and A-File Accountability and Control System. The system that reports a file's location and maintains a history of file movement.

Receipt Date The date that the petition information is keyed into CLAIMS (see definition). This date is NOT used in determining the petition's position in the queue.

Received Date The date the petition is physically received by the Service. For properly filed petitions, this is the date that is used to determine the position in the queue, processing times, etc. For all legal purposes and statistics, this is the Service's date of record.

Representative Pursuant to a properly completed G-28, a person or entity who/which is legally permitted to inquire about a case, receive and respond to correspondence from the Service, and pay fees on behalf of the petitioner.

RFE Request for evidence. Correspondence from the INS to the petitioner or representative requesting additional information pertaining to the petition.

RFE Checklist A checklist which can be used to track the area which require further documentation to establish that a petition meets approval criteria.

ROP Record of Proceeding. The order in which documents in a file are assembled for legal purposes.

Riding Application An application which may accompany an I-129. I-102, I-539 and I-824 are applications which can ride with the I-129.

SMSA Standard Metropolitan Statistical Area.

Sole Jurisdiction A petitioner's ability to submit all of its applications/petitions with a given service center regardless of where the beneficiary will work or where the petitioner is located. If a petitioner is headquartered in, has its human resources activity located in, or has its legal operations located in a center's jurisdiction, it may request this privilege. If the request is approved, the petitioner is placed on the center's sole jurisdiction list. Synonymous with centralized filing.

Speculative Employment The establishment of a position(s) by a petitioner based on less than sound business projections (contract with anticipated employment). These positions should not be approved for the H-1B classification.

Split Decision When the classification portion of a petition is approved and the change of status or extension of stay portion (whichever is requested) is denied.

SVP Specific Vocational Preparation table. A table in the DOT that can assist in the determination as to whether a position qualifies as a specialty occupation.

System Reject A petition rejected because it is unsigned or improperly signed, or accompanied by an unacceptable remittance. These rejections are processed in CLAIMS.

USMLE United States Medical Licensing Exam. Upon passing this exam, foreign-educated physicians can be allowed to perform unrestricted patient care duties PROVIDED that they have competence in oral and written English.

Validity Period/ Validity Dates The time period (dates) for which a petition is valid.

Verification Letter A letter accompanying H-1B2 petitions that verifies that the beneficiary will be working on a cooperative project under a reciprocal government-to-government agreement administered by the DOD.

REFERENCES

General Sources · Sec. 101 (a)(15)(H)(I)(b) of the Immigration and Nationality Act

- Sec. 214 of the INA
- 8 Code of Federal Regulations Part 214.2(h) – INS REGS
- 22 Code of Federal Regulations Part 41.53 – STATE DEPT REGS
- 20 Code of Federal Regulations Part 655.700-800 – DOL H-1B REGS
- OI 214.2(h)
- T/O Series 200-399
- Denial Standards
- Immigrant Inspector’s Handbook – Appendix F (Reference Library)
- E. Handbook
- Occupational Outlook Handbook (Reference Library)
- State Licensure Requirements – (Reference Library)
- Immigration Law and Procedure, Gordon and Mailman, Vol 1 Chp 20

**Precedent
Decisions**

The following decisions are most commonly applied to the adjudication of the Form I-129. Reminders: When using precedent decisions, read the entire decision, not just the head-note. Also remember that parts of a decision may have been rendered moot by regulatory and statutory changes.

Precedent Decisions –Applicability of law or regulations

Decision Source Summary

Matter of Safetran 20 I&N Dec. 49 (Comm. 1989) The limitation of stay imposed on H and L nonimmigrant aliens is cumulative; it includes both the time spent in the U.S. as an H and L.

Matter of Sea, Inc 19 I&N Dec. 817

(Comm. 1988) Experience which is substituted for education must include the theoretical and practical application of specialized knowledge required at the professional level of the occupation. It cannot be concluded that any on-the-job experience related to a professional activity may be substituted for academic education.

Decision Source Summary

Matter of Caron International, Inc 19 I&N Dec. 791 (Comm. 1988) General managerial occupations such as those of vice-president are normally not considered to be professional endeavors requiring specific academic degrees. A manager is not considered to be a member of the professions unless he or she is qualified for, and intends to work in, a professional occupation requiring the attainment of such a degree. Also...

The Immigration and Naturalization Service may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence.

Matter of Khan 14 I&N Dec 397 (BIA 1973) by extension; Matter of M-, 4 I&N Dec 532 (BIA1951;BIA, A.G.1952). This Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous.

Matter of Ord 18 I&N Dec. 285

(Reg.Comm.1982) An alien employed by a firm marketing the temporary services of professionals (i.e. a “job shop”) may qualify as an H-1 even though the firm has a permanent need for professionals having the alien’s qualifications, if the petitioning firm can demonstrate its intention to employ the alien for only a temporary period.

Decision Source Summary

Matter of Lee 18 I&N Dec. 96

(Reg.Comm.1981) Fact that the job offer is for an indefinite period warrants denial of the petition despite the fact that the beneficiary qualifies as a member of a profession and is to perform duties requiring such professional skills. The H-1B alien must be coming

“temporarily” and is not coming “temporarily” if there is no specified termination date. Also...

Failure to continue in the temporary employment which formed the basis for admission as an H-1 constitutes failure to maintain status.

Matter of St. Joseph’s Hospital 14 I&N Dec. 202
(Reg.Comm.1972) An alien who is qualified as a member of the professions must be immediately qualified to perform the duties of the position upon entry in the United States. Since the beneficiary (a pharmacist) requires additional training and a New York State license before he may perform the full duties of pharmacist, the petition may not be approved.

Matter of Ling 13 I&N Dec. 35.
(Reg.Comm.1968) Since “business administration” is a general term including both professional and nonprofessional activities, a degree in business administration alone is insufficient to qualify the holder as a member of the professions, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field of business administration in which he is engaged or plans to be engaged.

Matter of Essex Cryogenics Industries, Inc. 14 I. & N. Dec. 196 (Dep. Assoc. Comm. 1972)

Status accorded even though there is no labor shortage in area of employment and wage may adversely affect U.S. citizens and LPR’s similarly employed. Note: LCA requirements do apply.

Precedent Decisions –Applicability of law or regulations (continued)

Decision Source Summary

Matter of Bienkowski 12 I. & N. Dec. 17 (D.D. 1966) Professional experience, combined with some education may equate to a bachelor’s degree.

Matter of Pizarro 12 I. & N. Dec. 537 (Reg.Comm.1967)

Beneficiary not considered professional despite attainment of a degree. Profession requires a higher degree to practice as a professional.

Matter of Ling 13 I. & N. Dec. 35 (Reg.Comm.1968) The attainment of a bachelor’s degree in Business Administration does not necessarily establish that the beneficiary is a member of the professions.

Matter of Caron International, Inc. 19 I. & N. Dec. 791 (Comm. 1988) Defines a “professional position.”

Precedent Decisions- Whether professions qualify as specialty occupations

Matter of Wang, 11 I&N Dec. 282 Senior Librarian
(Actg. Reg. Comm. 1965)

Matter of Stamatiades, 11 I&N Dec. 643 Biologist
(D.D. 1966)

Matter of Hsueh, 11 I&N Dec. 652 (D.D. 1966)	Physicist
Matter of Yen, 11 I&N Dec. 694 (D.D. 1966)	Geneticist
Matter of Wu, 11 I&N Dec. 697 (D.D. 1966)	Minister
Matter of Raychaudhuri, 11 I&N Dec. 715 (D.D. 1966)	Zoologist
Matter of Basu, 11 I&N Dec. 777 (D.D. 1966)	Biochemist
Matter of Vos, 11 I&N Dec. 779 (D.D. 1966)	Law Librarian
Matter of Nakatsugawa, 11 I&N Dec. 843 (D.D. 1966)	Entomologist
Matter of Shao, 11 I&N Dec. 845 (D.D. 1966)	Economist
Matter of Roldan, 11 I&N Dec. 869 (D.D. 1966)	Dietitian
Matter of Ku, 11 I&N Dec. 876 (D.D. 1966)	Mathematician
Matter of McGowan, 11 I&N Dec. 898 (D.D. 1966)	Chiropractor
Matter of Saini, 12 I&N Dec. 20 (D.D. 1966)	Soil Scientist
Matter of Che, 12 I&N Dec. 146 (D.D. 1967)	Social Worker
Matter of Mostafa, 12 I&N Dec. 151 (D.D. 1967)	Geophysicists
Matter of Wu, 12 I&N Dec. 459	Vocational Counselor

(D.D. 1967)

Matter of Sun, 12 I&N Dec. 535
(D.D. 1966) Hotel Manager

Matter of Samuel, 12 I&N Dec. 542
(D.D. 1967) Psychologist

Matter of Perez, 12 I&N Dec. 701
(D.D. 1968) Journalist

Matter of Hanna, 12 I&N Dec. 798
(D.D. 1968) Ceramic Engineer

Matter of Chu, 13 I&N Dec. 122
(Reg. Comm 1969) Physician

Matter of Retino, 13 I&N Dec. 286
(Reg. Comm 1969) Nutritionist

Matter of Reyes, 13 I&N Dec. 406
(D.D. 1969) Social Worker

Matter of Panganiban, 13 I&N Dec. 581
(Dep. Assoc. Comm. 1970) Medical Technologist

Matter of Ulanday, 13 I&N Dec. 729
(BIA 1971) Attorney

Matter of Villanueva, 13 I&N Dec. 733
(Dep. Assoc. Comm. 1971) Medical Records Librarian

Matter of Desai, 17 I&N Dec. 569 Tech. Publications Writer

Matter of Sheikh, 17 I&N Dec. 634 Epidemiologist

Policy Memos/ Correspondence
FURLOUGH

- Memorandum dated 4-22-96

· AMENDED H-1B PETITIONS

- Memorandum dated 1-19-96

LCA'S AND THE GOVERNMENT

- VALIDITY PERIOD OF I-129 PETITIONS
- Memorandum dated 7-10-95

- GUIDELINES ON H-1 "ITINERARY" ISSUE
- Memorandum dated 1-10-96

- * INTERPRETATION OF THE TERMS "ITINERARY" FOUND IN 8 CFR 214.2(h)(2)(I)(B) AS IT RELATES TO THE H-1B NONIMMIGRANT CLASSIFICATION
- Memorandum dated 12-29-95

- SUPPORTING DOCUMENTATION FOR H-1B PETITIONS
- Memorandum dated 11-13-95

- ABILITY TO PAY THE PREVAILING WAGE IN H-1B CASES
- Memorandum dated 6-08-95

- LIMITATIONS OF ADMISSION OF H AND L NONIMMIGRANTS
- Memorandum dated 3-09-94

- H-1B PHYSICIANS
- Memorandum dated 9-24-92

- *STRIKES AND WORK STOPPAGES AND THEIR EFFECT ON H PETITIONS AND APPLICATIONS
- Memorandum dated 6-18-91

- INSTRUCTIONS ON THE PROCESSING OF CERTAIN FOREIGN HEALTH CARE WORKERS: IIRIRA SECTION 343
- Memorandum dated June 6, 1997

- AMENDED H-1B PETITIONS
- Memorandum dated August 22, 1996

- PETITIONS FOR H-1A, H-1B, O AND P TEMPORARY WORKERS FILED BY AGENTS AND CONTRACTORS
- Memorandum dated May 5, 1993

- PROCESSING OF PIPELINE H-1B CASES
- Memorandum dated May 11, 1992

- DETERMINING EDUCATIONAL EQUIVALENCIES IN PETITIONS INVOLVING SPECIALTY OCCUPATIONS
- Memorandum dated May 19, 1993

- PHYSICIAN ASSISTANTS AND RESEARCHERS UNDER THE H-1B NONIMMIGRANT CLASSIFICATION
 - Memorandum dated February 15, 1996

- PROHIBITION ON EMPLOYMENT-BASED IMMIGRATION FROM IRAN
 - Memorandum dated January 15, 1998

- TEMPORARY LICENSURE FOR H-1B NONIMMIGRANTS
 - Memorandum dated May 4, 1992

- SPECIAL CONSIDERATIONS FOR ADJUSTMENT OF STATUS APPLICANTS
 - A. MAINTENANCE OF E, H, OR L NONIMMIGRANT STATUS.
 - B. CONTINUED VALIDITY OF UNEXPIRED NONIMMIGRANT EMPLOYMENT AUTHORIZATIONS.
 - Memorandum dated August 5, 1997

- WAIVERS OF THE TWO-YEAR FOREIGN RESIDENCE REQUIREMENT UNDER SECTION 212(E) OF THE IMMIGRATION AND NATIONALITY ACT (THE ACT).
 - Memorandum dated October 4, 1999