



white paper

# DEMYSTIFYING THE EMPLOYMENT ELIGIBILITY PROCESS FOR EMPLOYEES HOLDING H-1B VISA STATUS

This White Paper seeks to clarify the requirements for and present a common-sense approach for Form I-9 compliance when the employee is an H-1B holder.

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*H-1B status a temporary non-immigrant status that allows foreign nationals to work in the United States in a “specialty occupation.”<sup>1</sup> For many employers, employing an H-1B visa holder is the only way they can fill openings in the computer science fields.<sup>2</sup> Many companies struggle with Form I-9 compliance for H-1B visa holders due to vague and conflicting guidance from the United States Citizenship and Immigration Services (USCIS). This White Paper seeks to clarify the requirements for and present a common-sense approach for Form I-9 compliance when the employee is an H-1B holder.*

## I. WHAT IS AN H-1B VISA?

Generally, a visa is required for an alien to visit or work in the United States. There are many types of visas foreign nationals may apply for.<sup>3</sup> An H-1B visa allows a foreign national to live and work in the United States, generally for three years with the possibility of an additional three year extension.<sup>4</sup> An H-1B visa holder (hereinafter “the employee”) must work in a specialty occupation where a bachelor’s degree (or equivalent) is a minimum requirement for the position.<sup>5,6</sup> The individual must have a record of distinguished merit and ability.<sup>7</sup>

The employer must certify to the United States government that they will pay the individual the prevailing wage in the occupation for that labor market.<sup>8</sup> Once the company makes that showing, they can file a Form I-129, Petition for Alien Worker, with the United States Citizenship and Immigration Services (USCIS).<sup>9</sup> Demand for H-1B visas far exceeds the supply of such visas, which are capped at 85,000 per year.<sup>10</sup> USCIS received 308,613 applications for fiscal year 2022.<sup>11</sup>



<sup>1</sup> INA § 101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(i)

<sup>2</sup> [H-1B Visas Are Scarce As Computer Job Vacancies Reach 1.2 Million \(forbes.com\)](#)

<sup>3</sup> See generally INA § 101(a)(15).

<sup>4</sup> [6.5 H-1B Specialty Occupations | USCIS](#)

<sup>5</sup> Supra n. 1. Fashion models are also eligible for an H-1B visa.

<sup>6</sup> A “specialty occupation” is defined as one that requires a body of highly specialized knowledge *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See 8 C.F.R. § 214.2(h)(1)(ii)(B)(1); INA § 212(n)(1).

<sup>9</sup> See Form I-129.

<sup>10</sup> See INA § 214(g).

<sup>11</sup> See [H-1B Electronic Registration Process | USCIS](#)

Employees may leave the petitioning employer for another employer, so long as their new employment does not violate the terms of their status, a process called “porting.”<sup>12</sup>

## II. COMPLETING A FORM I-9 FOR AN EMPLOYEE WITH AN APPROVED H-1B VISA

Each employee hired on or after November 6, 1986 must complete Section 1 of the Form I-9 after they accept the offer for the position but before the end of their first day of work for wages.<sup>13</sup> The employer must complete Section 2 of Form I-9 prior to the end of the third business day of employment.<sup>14</sup> Forms I-9 for H-1B visa holders are subject to the same deadlines, and to other specific rules, which are outlined below.

### a. Initial Verifications for H-1B Visa Holders Working for their First Petitioning Employer

A newly hired H-1B employee must timely complete the Form I-9 in the same manner as any other employee. The employee is free to choose what documents he or she proffers to establish identity and employment authorization.<sup>15</sup> Many times, the employee will submit their foreign passport and Form I-94 or I-94A.<sup>16</sup> The employee may provide a printout of their Form I-94 from the Customs and Border Patrol (CBP) website or the Form I-94 that is attached to the Form I-797A receipt. The Form I-94 or I-94A must be unexpired and match the name on the foreign passport and include an endorsement

of the employee’s status.<sup>17</sup> Further the proposed employment must not conflict with any restrictions listed on the Form I-94 or Form I-94A.<sup>18</sup> As with any other employee, the employer may make photocopies of the documents proffered, but once the employer starts copying documents, he or she must copy them for all subsequent hires.<sup>19</sup>

### b. Subsequent Verifications<sup>20</sup> for H-1B Visa Holders Continuing Employment with the Same Employer

Employers must ensure that employees are work authorized throughout the tenure of their employment.<sup>21</sup> This means that employers must ask the employee if they have renewed their work authorization or are eligible for any work authorization extensions while their work authorization renewal application is pending. This must occur prior to the expiration of the work authorization or employment authorization document used in the initial verification.<sup>22</sup>

For H-1B employees whose work authorization is expiring, employers can file a Form I-129, Petition for Alien Worker, to extend their stay.<sup>23</sup> If the employer files the Form I-129 prior to the expiration of the employee’s work authorization, the employee is authorized to continue working for up to 240 days while USCIS processes the Form I-129.

When noting the extension on the Form I-9, employers should write “240-Day Ext.” and the date the Form I-129 was filed in the “Additional Information” field of Section 2.<sup>24</sup> USCIS states that employers should keep the following documents with the Form I-9 to evince filing of the Form I-129: (1) a copy of the

<sup>12</sup> See INA § 214(n).

<sup>13</sup> See 8 C.F.R. § 274a.2(b)(1)(i)(A).

<sup>14</sup> See 8 C.F.R. § 274a.2(b)(1)(i)(B).

<sup>15</sup> See INA § 274B(a)(6).

<sup>16</sup> See Form I-9; 8 C.F.R. § 274a.2(b)(1)(v)(A)(5). Given the increase in states issuing driver’s licenses to nonimmigrant workers, we are now seeing an increase in nonimmigrant employees who proffer a driver’s license and Form I-94 during the Form I-9 process. This is a valid List B and C document combination.

<sup>17</sup> *Id.*; 8 C.F.R. § 274a.2(b)(1)(v)(A)(5).

<sup>18</sup> *Id.*

<sup>19</sup> Form M-274, at § 9.2.

<sup>20</sup> Certiphi Screening uses the term “subsequent verifications” to encompass both reverifications and extensions of work authorization because both reverifications (where Section 3 is completed upon expiration of the initial work authorization and any applicable extension) and extensions of work authorization are essential to Form I-9 compliance. However, extensions are frequently overlooked or misunderstood as a “reverification.” This issue is the subject of a forthcoming White Paper.

<sup>21</sup> 8 C.F.R. § 274a.2(b)(1)(vi).

<sup>22</sup> *Id.*

<sup>23</sup> See [Form M-274 at § 6.5](#).

<sup>24</sup> *Id.*

Form I-129 or Form I-129CW; proof of payment of the filing fee; and proof of mailing.<sup>25</sup> Once the Form I-797C, Notice of Receipt, is received by the employer, the Form I-129 and other proof of filing may be destroyed and the Form I-797C may be kept in their place.<sup>26</sup>

Once the Form I-797A is received, the employer must reverify the employee by completing Section 3 using the information contained on the Form I-94 portion of the Form I-797A.<sup>27</sup> If the Form I-129 is denied, the employee is no longer authorized to work in the United States.

### **c. H-1B Employees Changing Employers (Porting)**

H-1B employees may change employers so long as the new employment does not violate the terms of their status.<sup>28</sup> An H-1B employee may begin working for the new employer as soon as the employer files the Form I-129.<sup>29</sup> The Form I-129 must be filed before the employee's period of authorized stay expires. When completing the Form I-9 for such an employee, an employee will usually proffer their foreign passport and Form I-94 issued for employment with the previous employer to

establish identity and employment authorization.<sup>30</sup> When completing the Form I-9, the employer should record the foreign passport and Form I-94 in Section 2 and should enter the code "AC-21" and the date the Form I-129 was filed with USCIS in the "Additional Information" field of Section 2. As with employees seeking an extension of stay while continuing with the same employer, employers hiring a "porting" employee should keep evidence of the Form I-129 filing with the Form I-9, whether that be the Form I-129 and associated documents listed above, or the Form I-797C.

As always, employees retain the ability to proffer any List A or B and C document to establish identity and employment authorization while porting.<sup>31</sup> Employers who demand certain documents or combinations of documents from employees may be unwittingly committing document abuse.<sup>32</sup>

Once the form I-797A is received, the employer must reverify the employee by completing Section 3 using the information contained on the Form I-94 portion of the Form I-797A.<sup>33</sup> If USCIS

denies the Form I-129, the employee is no longer authorized to work.

### **d. Cap-Gap Considerations**

An alien who enters the United States on one visa may switch to another type of visa while still remaining in the United States. One example of this is when a student who entered in F-1 status is hired upon graduation and changes status to that of an H-1B. Because H-1B visas always start on October 1, there is a gap between the ordinary graduation timeframe (spring) to the H-1B start date (fall). This is known as the "Cap-Gap." An F-1 student who seeks to change to H-1B status may be eligible for an extension of stay and employment authorization through September 30 of the year in which the employer filed the Form I-129, but only if the employee's H-1B status begins on October 1.<sup>34</sup>

An eligible F-1 student may receive an extension of stay if: (1) the employer timely<sup>35</sup> files a petition to change the student's status to H-1B; and (2) the employer states that the employment start date is October 1 of the year the employer filed the H-1B petition.<sup>36</sup> If the student is not participating in OPT at

<sup>25</sup> See [Form M-274 at § 6.7.](#)

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See INA § 214(n).

<sup>29</sup> See Form M-274 at § 6.5.

<sup>30</sup> *Id.*

<sup>31</sup> See INA § 274B(a)(6).

<sup>32</sup> *Id.*

<sup>33</sup> See [Form M-274 at § 6.7.](#)

<sup>34</sup> See 8 C.F.R. § 214.2(f)(5)(vi).

<sup>35</sup> "Timely" means that the H-1B petition (which indicates change of status) was filed during the acceptance period while the employee's authorized F-1 duration of status admission was still in effect; including an period of time during the academic course of study, any authorized periods of post-completion OPT, and the 60 day departure preparation period. See [Extension of Post Completion Optional Practical Training \(OPT\) and F-1 Status for Eligible Students under the H-1B Cap-Gap Regulations | USCIS.](#)

<sup>36</sup> See [M-274 at § 6.4.](#)

the time the Form I-129 is filed, the student may receive an extension of stay through October 1 but will not be authorized to work until the petition is approved and their H-1B status begins.

If an employee is in F-1 status when the Form I-129 is filed and is currently participating in post-completion OPT, they will receive an automatic extension of stay and work authorization through September 30.

When completing the Form I-9 for a new employee subject to the Cap-Gap extension, the employee should select “An alien authorized to work until” and enter September 30 and the year the change of status petition was filed in Section 1.<sup>37</sup> The employee’s expired EAD, along with the Form I-797C, is considered a List A document for Form I-9 purposes.<sup>38</sup> The employer should enter EAD as the document title and the receipt number from the Form I-797C as the document number.<sup>39</sup> Then, enter September 30 and the year the petition was filed in the expiration date field.<sup>40</sup> Lastly, the employer should enter “Cap-Gap” in the additional information field of Section 2.<sup>41</sup>

If you have a current employee who is eligible for the Cap-Gap extension, once you receive the Form I-797C, enter “Cap-Gap September 30 [year the petition was filed]” in the additional information field.

Critically, employers must reverify an employee’s employment authorization by September 30 of the year the petition was filed.<sup>42</sup> When USCIS approves the H-1B petition, the employer will receive a Form I-797A with the employee’s new Form I-94 attached. Use the information contained on the I-94 to complete the Section 3 reverification.<sup>43</sup>

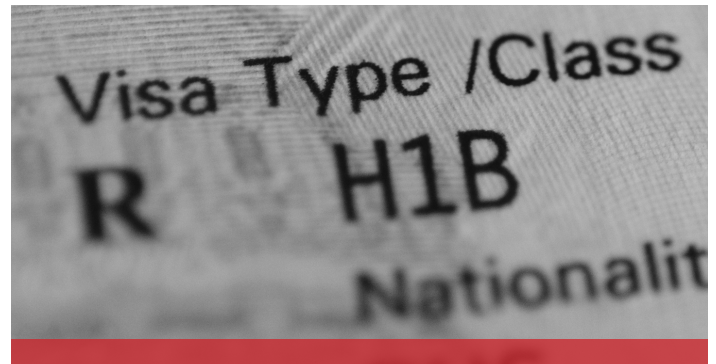
### III. E-VERIFY AND H-1B

E-Verify is a free service offered by the USCIS and the Social Security Administration (SSA) that allows employers to almost instantly verify an employee’s work authorization.<sup>44</sup> E-Verify is mandatory in some states<sup>45</sup> and for certain recipients of federal contracts.<sup>46</sup> Once an employer begins using E-Verify, they must consistently use E-Verify for each new employee.<sup>47</sup> Generally, an employee may only be processed through E-Verify one time, within three days of their hire.<sup>48</sup> E-Verify is not used for reverifications.<sup>49</sup>

There are no known deviations from the normal E-Verify process for H-1B employees. Some issues may arise, however, when the employer listed in the E-Verify system does not match the employer who is submitting the E-Verify request, resulting in a tentative nonconfirmation. This can be resolved by the employee. Further, according to USCIS, E-Verify is automatically updated with extensions and will recognize that an otherwise expired EAD has been extended by the filing of the subsequent Form I-129.

### IV. CONCLUSION

In short, H-1B visas are a vital source of talent for many United States employers and help keep America competitive on the world’s stage. Employing H-1B visa holders is an arduous administrative process that is not complete until the Form I-9 is completed. The above primer is intended to lift the veil and provide clear, common-sense instructions for completing Forms I-9 for H-1B employees. ■■■



37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*

44 See [Form M-775 at § 1.1.](#)

45 State chart

46 [Form M-775 at § 1.1.](#)

47 See [Form M-775 at § 1.5.](#)

48 See [Form M-775 at § 2.1.](#)

49 See [Form M-775 at § 4.2.3.](#)