

# AILA H-1B Online Course Outline

*The AILA H-1B Online Course is designed to provide a comprehensive review of H-1Bs for those who are new to the category, as well as those who are more experienced. It will cover H-1B basics, as well as provide an in-depth look at how to prepare petitions. Finally, the course will address how to tackle difficult Requests for Evidence (RFEs) and other post-filing issues. This course has something for everyone!\**

## MODULE 1: H-1B BASICS: INTRODUCTION AND OVERVIEW

*This module presents an introduction to the H-1B visa and an overview of the petition process. It also includes instructions on how to take this course.*

### *Faculty:*

*Adekunbi Adejumo (ML), Online Course Committee, Atlanta, GA*

*Lorna A. De Bono, AILA USCIS Case Assistance Committee, Marina Del Rey, CA*

*Anna Buskila, Chicago, IL*

### *Module Outline:*

- **Video:** Welcome to the H-1B Online Course
- **Reading:** How to Take This Course
- **Video:** H-1B Overview Video
  - In This Module
  - Overview of H-1B Visa Category
    - H-1B1 for Chile and Singapore
    - E-3 for Australians
  - Definition of Key Terms
    - U.S. Employer
    - Petitioner and Beneficiary
    - Employer and Employee Relationship
    - Specialty Occupation
  - Overview of the Requirements for H-1B Visa
  - Overview of the H-1B Visa Cap
- **Reading:** N. Barker et al., "H-1B Nonimmigrants" *Navigating the Fundamentals* (2022-23 Ed.)
- **Document:** H-1B Client Intake Form
- **Exercise:** Determining Eligibility for an H-1B Visa
- **Video:** Who Is Your Client? The Employer or Employee? (Ethics)
  - Definitions of Employer and Employee
  - Dual Representation: Ethical Issues, Potential Conflict of Interest Between Employer and Employee
  - Representation of the Employer
  - Limited Representation of the Employee
- **Video:** "How Do We Apply for an H-1B Visa for Our Employee?" The H-1B Petition Process
  - Key Terms and Government Agencies Involved
  - Brief Overview of the U.S. Department of Labor (DOL) Labor Condition Application (LCA) and U.S. Citizenship and Immigration Services (USCIS) Processes
  - Petition Forms: I-129, I-129 H, I-129 W Data Collection, I-907, I-539, I-765, and G-28

\* = Invited, not confirmed.

(ML) = Module Leader

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- H-1B Fees
  - Initial Fees: Fraud Fee, American Competitiveness and Workforce Improvement Act (ACWIA), Public Law, and I-129 Petition Fee
  - Premium Processing
  - Extension: Exempt from ACWIAH
- The Cap and H-1B Online Registration
- **Document:** Completed I-129 Petition
- **Video:** “We Got Approved! What Happens Next?”
  - F-1 Cap-Gap
  - How to Obtain an H-1B Visa at the Consular Office Abroad
    - DS-160
    - Interview Appointment
- **Video:** H-4 Visas for Family Members
  - Family Members: Spouses and Minor Children
  - Work Not Allowed, Except If Eligible for H-4 Employment Authorization Document (EAD)
  - How to Obtain H-4 Status for Family Members Who Are in the United States
    - I-539 Biometrics Requirements and Processing Delays
  - How to Obtain H-4 Visas for Family Members Who Are Outside the United States
  - H-4 EAD Requirements and How to Apply (I-140 Approval, I-765, I-539 Biometrics, etc.)
- **Video:** How Long Can the Employee Stay in the United States? A Brief Overview
  - Duration of H-1B Status, Six-Year Maximum, Overview of AC21 Extensions, Recapturing H-1B Time
  - Process for Extending H-1B Status
  - How to Change Employers
  - Amendments, Including Change of Terms and Conditions of Employer (*i.e.*, Worksite)
  - Withdrawal of H-1B Status
- **Hypotheticals**
- **Resources List**
  - *A Curated List of Additional Publications, Recordings, and Resources*

## **MODULE 2: THE H-1B CAP**

*This module provides an overview of the H-1B cap process from registration to filing. Panelists will discuss practice pointers for managing an H-1B cap group and address issues affecting H-1B petitions subject to the quota.*

*Faculty:*

*Stephanie Scarborough (ML), Jacksonville, FL*

*Tejas N. Shah, Chicago, IL*

*Module Outline:*

- **Video:** Overview and Ethical Considerations for the H-1B Cap
  - In This Module
  - H-1B Cap Process: Registration, Selection, and Filing
  - Regular Cap vs. U.S. Master’s Cap

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- **Reading:** “AILA Provides Feedback to USCIS on FY2021 H-1B Electronic Registration Process and Recommendations for Improvements” (Dec. 29, 2020), AILA Doc. No. 20122908
- **Reading:** “USCIS Provides FAQs on the H-1B Electronic Registration Process” (Feb. 26, 2021), AILA Doc. No. 20030200
- **Video:** Pre-Registration Preparation
  - Creating a myUSCIS Account for an Attorney
  - Providing Instructions for Clients to Create a myUSCIS Account for Employers
  - Collecting Registration Information and Documents for Analysis
  - Preparing and Submitting H-1B Registrations Online
  - Monitoring Status of H-1B Registrations
- **Document:** H-1B Registration Handshake Instructions
- **Document:** Template Spreadsheets of H-1B Registration Data
- **Video:** Post-Selection Preparation
  - Obtaining H-1B Selection Notices
  - Preparing and Filing H-1B Petitions with the Appropriate Service Center
- **Document:** Checklist for H-1B Cap Filing Package
- **Video:** Special Issues
  - F-1 Cap-Gap
  - Master’s Cap
  - Change of Status Request and Travel
  - J-1 Two-Year Home Residence Requirement
- **Video:** Practice Management and Billing Considerations for the H-1B Cap
- **Reading:** "USCIS Provides Presentation from Webinar on H-1B Electronic Registration Process" (March 2, 2022), AILA Doc. No. 22012801
- **Exercise:** Develop H-1B Cap Timeline
- **Hypotheticals**
- **Resources List**
  - *A Curated List of Additional Publications, Recordings, and Resources*

### **MODULE 3: CAP-EXEMPT H-1Bs**

*This module examines the regulations applicable to “cap-exempt” H-1B visas, and the strategic use of this classification to help obtain work eligibility when cap-subject H-1Bs are not available.*

*Faculty:*

*Jeff Goldman (ML), Online Course Committee, Salem, MA*

*Jennifer Minear, AILA President, Richmond, VA*

*Module Outline:*

- **Video:** Overview of Module 3: Cap-Exempt H-1B Visas
  - In This Module
  - Definition/Timing: Exempt from Annual H-1B Lottery System, Can Obtain Immediately and at Any Time
  - Key Concepts
    - The Four Types of Cap-Exempt Organizations
    - “Employed by” vs. “Located at” Models

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- Can a Foreign National Have Multiple H-1B Visas? Concurrent Employment, Full/Part-Time Employment, and LCA Considerations for Multiple Employers
- **Document:** Cap-Exempt H-1B Process Summary
- **Reading:** AILA’s USCIS HQ (Benefits Policy) Committee, “Practice Pointer: Recent H-1B Cap Exemption Developments for Non-Profit Research Organizations,” AILA Doc. No. 19121032
- **Reading:** “USCIS Letter on H-1B Portability from Cap Exempt to Cap Subject,” AILA Doc. No. 07052563
- **Video:** Concurrent Filings with Cap-Exempt Organizations
  - Law and Clarifying Memorandum
  - “Located at”: Private Company Can Be Located at or Have the Employee Located at the Cap-Exempt Org
  - “Employed by”: Private Company Can Have Employee Employed by the Cap-Exempt Organization Part-Time and Piggy-Back
- **Video:** H-1B Cap-Exempt Employment—Part 1 (Mock Interview)
  - Lost H-1B Lottery
  - Optional Practical Training Expiration Outside of the Annual Lottery Cycle
- **Video:** H-1B Cap-Exempt Employment—Part 2 (Mock Interview)
  - Outside the United States and Cannot Wait for Lottery
  - Genuine Interest in Working for Cap-Exempt Organization
- **Document:** H-1B Cap-Exempt Support Letter Template
- **Video:** Challenges and Complications with Cap-Exempt H-1B Visas
  - Professional Employed by Cap-Exempt Organization Directly
    - Not Counted Against the Cap
    - Difficult to Move to a New Company, Should Consider Entering Lottery Each Year
  - Private Company or Employee Located at a Cap-Exempt Organization
    - Time Commitment: Twenty Hours Per Week Required
    - Proving the Day-to-Day Work Is Primarily in Furtherance of the Cap-Exempt Organization
  - Part-Time Employment at Cap-Exempt Organization Concurrently Employed by Full-Time Company
    - Two Petitions Filed
    - Costs
    - Proving Specialty Occupation Twice
  - Ethics: Who Pays for the Concurrent Visa Program? Who Pays the Salary and the H-1B?
    - Wage Issues
- **Video:** H-1Bs for International Physicians
  - Licensing Requirements/Exceptions
  - J-1 Waivers Must Be in H-1B Status
  - H-1B for an FMG: Alternative to J-1 Visa for Graduate Medical Education Programs
  - H-1B Physician Positions Often Exempt from the Cap
  - DOL Wage Issues: Occupational Employment Statistics (OES) Default Wage, Surveys
  - Interim DOL Final Rule (October 8, 2020) Raises Prevailing Wage Determination (PWD) Based on OES Wage Data
- **Exercise:** Matchmaking: H-1B Cap Exempt Scenarios and Solutions
- **Hypotheticals**
- **Resources List**

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- *A Curated List of Additional Publications, Recordings, and Resources*

**MODULE 4: PREVAILING WAGE REQUIREMENT, LABOR CONDITION APPLICATION, AND THE PUBLIC ACCESS FILE**

*This module will address the preparation and processing of labor condition applications in the H-1B process, as well as related ethical and compliance issues.*

*Faculty:*

*William Johnson (ML), San Diego CA*

*Sarah K. Peterson, AILA Board of Governors/DOL Liaison Committee Chair, Minneapolis, MN*

*Rebecca R. Massiatte, Dallas, TX*

*Module Outline:*

- **Video:** Overview and Ethical Considerations of Module 4: The LCA and Its Role in the H-1B Process
  - In This Module
  - Ethical Considerations for the LCA's Role in the H-1B Process
    - Should the Employer Obtain a Prevailing Wage Determination from DOL and Take Advantage of the "Safe Harbor" Rule?
    - Does the Attorney or the Employer Make the Final Determination in Choosing the Appropriate OES Code?
    - Should the LCA Be Filed/Prepared in Advance of the March Pre-Registration Process?
- **Video:** Defining the Employers' Obligations Under the LCA
  - Wage Obligations
  - Notice
  - Termination and Return Transportation Home
  - Maintaining a Public Access File (PAF)
  - Material Changes in Employment and Obtaining a New LCA
- **Video:** Prevailing Wage Requirement: Defining the Prevailing Wage and Related Ethical Considerations
  - Determining the Prevailing Wage for a Particular Position: Use of DOL's O\*NET/OES Survey
  - Choosing the Appropriate OES Code, Job Titles and Job Duties; Choosing the Proper Wage Level
  - Ethical Considerations
- **Video:** Using Alternative Wage Surveys
  - Alternative Wage Survey Sources Options
  - Regulatory Requirements for Alternative Prevailing Wage Sources: How Many Data Points?
  - How to Use the Alternative Prevailing Wage Data Either Within an Initial Prevailing Wage Rate or Prevailing Wage Redetermination
- **Exercise:** Selecting a Standard Occupational Classification (SOC) and Prevailing Wage Based on the Job Description
- **Video:** Public Access File: Creating and Maintaining the PAF

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- Employer Requirement to Retain the LCA and Supporting Documentation in a “Public Access File”
- Contents of PAF
- Ethics: Ensuring the Client’s Compliance with PAF Requirements, Co-Client’s Relationship with the Employer-Employee
- What Are the Civil Liabilities for Failure to Maintain the PAF?
  - Investigations Through DOL vs. USCIS’ Fraud Detection and National Security Directorate
- **Document:** Instructions to Employers Regarding Creating and Maintaining the Public Access File
- **Video:** Practical Considerations: Filing the LCA with DOL
  - How to File the LCA
  - How to Post the LCA: Format for Postings with Sample
  - Timeline for Obtaining a Certified LCA
- **Document:** Sample LCA Posting
- **Reading:** AILA DOL Liaison Committee, “Practice Pointer: Roadmap to Alternative Wage Surveys for LCAs and PWDs,” (Oct. 30, 2020) AILA Doc. No. 20103033
- **Reading:** AILA DOL Liaison Committee, “Practice Pointer: New PWD Procedures as of 1/1/10,” (Dec. 22, 2009) AILA Doc. No. 09221222
- **Hypotheticals**
- **Resources List**
  - *A Curated List of Additional Publications, Recordings, and Resources*

## MODULE 5: MEETING THE REQUIREMENTS: SPECIALTY OCCUPATION AND THE BENEFICIARY’S DEGREE

*The alleged failure by petitioners to prove that an H-1B position qualifies as a “specialty occupation” is the number one reason cited by USCIS for H-1B RFEs the past few years. This module covers the specialty occupation, including the evidence required to show that the employer’s position (i.e., title and job duties) meets the statutory definition and regulatory criteria.*

### *Faculty:*

*April A. Caminez Bentley (ML), Online Course Committee, Tallahassee, FL*

*Amy Erlbacher-Anderson, AILA Business Immigration Response Team, Omaha, NE*

*Joseph John Shepherd, AILA USCIS Case Assistance Committee, New York, NY*

### *Module Outline:*

- **Video:** Overview of Module 5 and Defining “Specialty Occupation”
  - In This Module
  - Defining the Specialty Occupation: INA §214(i)(1) and 8 CFR §214.2(h)(4)(ii)
  - Fitting the Position Within the Specialty Occupation Criteria at 8 CFR §214.2(h)(4)(iii)(A)
  - Minimum Degree Requirement for Entry into the Particular Position
  - The Other Three Criteria to Establish the Position Qualifies as a Specialty Occupation
- **Document:** Sample RFE: Specialty Occupation Template
- **Video:** Specialty Occupations and Professional Positions
  - Specialty Occupations Encompass the Definition of Professional
  - Positions Recognized by USCIS to Be (and Not to Be) Specialty Occupations

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- Recent Trends: Occupations Requiring Specialized Course of Study in Multiple, Related Fields
- **Reading:** JJ Shepherd et al., "H-1B: Specialty Occupations Outside the Box," *Immigration Practice Pointers* (2022-23 Ed.)
- **Video:** Documenting the Position as a Specialty Occupation
  - Importance of the Employer's Job Description and Requirements
  - DOL Occupational Outlook Handbook
  - Specific Vocational Preparation and O\*NET Data to Establish Position as Specialty Occupation
  - Determining Whether Position Qualifies as Specialty Occupation
    - Size of Employer
    - LCA Wage
  - Other Documentation to Establish the Position as a Specialty Occupation
  - Computer Programmers
- **Reading:** AILA Practice Pointer: "H-1B Specialty Occupation RFE Toolbox" (Nov. 11, 2020) AILA Doc. No. 19080140
- **Exercise:** Drafting Effective Job Descriptions and Requirements
- **Video:** The Employee's Professional Qualifications
  - Credentials of Prospective H-1B Employee
  - USCIS Rules on Equivalency: Credentials Equivalent to the Required Degree
- **Video:** U.S. Employer and Employer-Employee Relationship: Definitions and Ethics
  - Defining and Documenting the Employer-Employee Relationship
  - Employer's Right to Control Beneficiary's Work and Revised Itinerary Policy
  - Reviewing the Ethics of Attorney Representation: Employer or Employee?
- **Video:** U.S. Employer and Employer-Employee Relationship: Special Issues
  - Multiple Worksites
  - Third-Party Placements: The Neufeld Memo (2010) and the Requirements Memo (2018)
- **Reading:** "USCIS Issues Updated Policy Guidance and Rescinds Two Policy Memos Regarding the Adjudication of Certain H-1B Petitions" (June 17, 2020), AILA Doc. No. 20061804
- **Reading:** *Vic Goel, et al.*, "Assault on the H-1B: 'No, It's Not the Latest Hollywood Action Movie'," *AILA Immigration Practice Pointers* (2019–20 Ed.)
- **Document:** Cover Letter for H-1B Petition Package
- **Hypotheticals**
- **Resources List**
  - *A Curated List of Additional Publications, Recordings, and Resources*

## **MODULE 6: POST-FILING ISSUES: RFEs AND CONSULAR PROCESSING**

*This module examines the types of H-1B RFEs issued and strategic planning considerations, including how to communicate with clients (employer and employee) and third-party expert witnesses. It also will cover post-approval issues, including consular processing.*

*Faculty:*

*James D. Prappas (ML), Online Course Committee, Houston, TX*

*Vincent W. Lau, AILA DOL Liaison Committee Vice Chair, Boston, MA*

*Lisa Scott, Chicago, IL*

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*Module Outline:*

- **Video:** Overview of Module 6: You Have Filed the H-1B Petition. Now What? Approval, Denial or RFE
  - In This Module
  - Manage Client Expectations and Share Recent Trends: Send Email After Receipt Is Received
  - Undertake Legal Research to Develop a Strategy
  - Identify the Legal Issues
  - Check Recent Developments on AILA InfoNet
  - Foreign National's Employment Authorization Expiration: Determining the Date and Advising the Client in Writing
  - Communication with the Client
- **Document:** Sample I-129
- **Video:** How to Deal with an RFE and Not Panic: Ethics and Wellness
  - Study the RFE and Prepare a Draft Email for the Client
  - Consult with Colleagues and Do Your Homework
  - Reaching Out to Speak with the Client Directly
- **Video:** I Received an RFE: Determining the Issues and Developing a Strategy to Reply
  - Types of RFEs
  - Position Is Not a Specialty Occupation: Position Requires Multiple Degrees, Not Single Degree; Not Specialized Degrees
  - The Foreign National Does Not Have a Degree
  - Beneficiary's Degree/Position Mismatch
  - Level 1 and Level 2 Wage Issues
  - Degree Normally Required vs. Always Required
  - Employer-Employee Relationship and Third-Party Worksite
  - LCA Job Title/Position Does Not Match the SOC Code
  - Beneficiary Does Not Have the Required License
- **Video:** Types of Evidence, Case Law, and Strategy Post-Denial Under Various Scenarios
  - Use of Expert Testimony
  - Timing, Finding the Expert, and Determining the Additional Out of Pocket Expenses
  - What Is Your Strategy If the Petition and/or Extension or Change of Status Is Denied?
- **Video:** Post-Approval Issues (Excluding Consular Processing)
  - Material Changes/Amended Petitions
  - Termination of Employment: Employer Obligations, How to Effectuate, Notice to USCIS and Potential Conflict of Interest
  - Six-Year Maximum, Recapturing Time, and AC21 Extensions
  - H-1B Site-Visits/Fraud Investigations
  - I-94 Mistakes
- **Video:** Post-Approval Issues: Consular Processing
  - Check the Post Website: Requirements Vary
  - Determine If There Are Any National Interest Exceptions (NIE) or Other COVID-19 Issues
  - Discuss with Your Client What Happens If There Is a Delay (*i.e.*, Administrative Processing, Visa Denial), and Look Ahead to Manage Expectations

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- Conference Call with the Employer and Foreign National: Review the Process and Potential Issues
- **Exercise:** RFE Analysis: Develop a Response Strategy and Assign Tasks
- **Hypotheticals**
- **Reading:** AILA Practice Pointer: “H-1B Specialty Occupation RFE Toolbox” (Nov. 11, 2020), AILA Doc. No. 19080140
- **Reading:** Eleanor Pelta and Kathleen Campbell Walker, "H-1B Cap Season Lottery Challenges: Considerations for the Fortunate Few and the Unchosen," *Immigration Practice Pointers* (2022-23 Ed.)
- **Document:** Client RFE Response Letter Template
- **Document:** Letter from Attorney with Instructions for Consulate Interview After USCIS Approval
- **Resources List**
  - *A Curated List of Additional Publications, Recordings, and Resources*

### **H-1B Online Course Committee**

Lisa Helen York, Online Course Committee Chair, Denver, CO  
 Adekunbi Adejumo, Atlanta, GA  
 Marjorie Baltazar, Chicago, IL  
 April A. Caminez Bentley, Tallahassee, FL  
 Jeff Goldman, Salem, MA  
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 James D. Prappas, Houston, TX  
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