



H-4 DOMESTIC VIOLENCE SURVIVORS AND INA § 106 EMPLOYMENT AUTHORIZATION

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I. Introduction

Immigrant survivors of domestic violence and other serious crimes may qualify for several different forms of immigration relief, including the U visa, the T visa, and relief under the Violence Against Women Act. If the survivor is a spouse of certain nonimmigrant visa holders, they may also be able to obtain a work permit independent of their spouse. This advisory¹ will provide an introduction to that option for H-1B spouses.

The H-1B visa program authorizes employers in the United States to hire qualified individuals who are not otherwise authorized to work in the United States on a temporary basis. Temporary workers with H-1B visas can petition for visas for their spouses and unmarried children, known as H-4 visas. Most H-4 visa holders are ineligible to apply for employment authorization and are thus dependent on the principal H-1B visa holder for both their immigration status and economic support. This financial dependence can be used as a tool for abuse and control in relationships and exacerbate domestic violence situations.

Consequently, U.S. immigration law allows domestic violence survivors who are spouses of temporary workers to apply independently for an employment authorization document (EAD). This practice advisory introduces the work permit process for abused spouses of H-1B visa holders and other nonimmigrants. It provides information on H-1B visa and application process, the H-4 spousal visa, and the eligibility criteria and application process for employment authorization for H-4 survivors of domestic abuse.

II. H-1B Visa Application Process and Requirements

In order to understand the options for H-1B spouses, it is necessary to start with the qualifications for H-1B principal applicants. The H-1B visa program authorizes employers in the United States to employ qualified individuals who are not otherwise authorized to work in the United States on a temporary basis.² The program allows employers to hire noncitizens as “workers in specialty occupations or as fashion models of distinguished merit and ability.”³ Most H-1B temporary workers in the United States are educated, highly skilled professionals working in specialty fields. An H-1B visa holder’s spouse and unmarried children may come to the United States as well through a derivative visa, the H-4 visa, discussed in Section III.

There are three requirements for the H-1B Specialty Occupation visa:⁴ First, the employee must hold a U.S. bachelor’s degree (or its foreign equivalent) in a specialty field (or equivalent training and experience). Second, the job position must normally require a bachelor’s degree or its equivalent. Finally, the employer must pay the H-1B employee a salary that is *at least* equal to the actual salary paid by the employer to other workers with similar experience and qualifications for the position.

To begin the application process, the applicant’s employer must first file a Labor Condition Application (LCA) with the U.S. Department of Labor. In the LCA, the employer must attest to all of the following:

1. They will pay the H-1B employee the required wage rate;⁵
2. The working conditions for H-1B visa employees will not adversely affect similarly employed workers;
3. There is no strike or lockout at the place of employment at the time of the LCA; and
4. Notice of the LCA has been giving to other employees.⁶

A violation of these attestations can result in fines, bars on sponsoring future nonimmigrant or immigrant petitions, or other sanctions against the employer or agent.⁷ After the LCA is submitted, the employer must wait for the LCA to be approved by the Department of Labor.⁸

Once the Department of Labor approves the LCA, the employer can then file the H-1B petition. A complete H-1B petition usually consists of the filing fee, a completed Form I-129 Petition for a Nonimmigrant Worker (the H-1B petition form), the approved LCA, a letter from the employer detailing the proposed employment, and evidence of the employee’s qualifications including a copy of college degrees and transcripts.⁹ U.S. Citizenship and Immigration Services (USCIS) will process and adjudicate the petition. USCIS has four service centers at which it processes I-

129 petitions, one in Vermont, California, Texas, and Nebraska. The filing office will depend on the type of H-1B visa sought as well as the location of the proposed employment.¹⁰ After USCIS approves the Form 1-129 petition, the applicant may apply for a visa with the U.S. State Department.

The H-1B visa application consists of an online application form, a visa application fee, and a passport-style photograph.¹¹ After the applicant submits an H-1B visa application, the process usually takes one to two months for first time applicants.¹² For an employee who already holds a H-1B visa from another employer, the process usually takes one to two weeks.¹³ Upon entering the United States, U.S. Customs and Border Protection will issue an Arrival-Departure Record, Form I-94, which is stapled into the applicant's passport.¹⁴ The I-94 indicates the date of arrival and the H-1B visa's expiration date.¹⁵ The initial H-1B visa is issued for three years, but can be extended for another three years, for a total of six years.¹⁶ H-1B visa holders are permitted to travel freely into and out of the United States, but they can only work for employers who have submitted H-1B petitions on their behalf.¹⁷

III. H-4 Visa for Spouses and Unmarried Children of H-1B Visa Holders

An H-1B visa applicant's spouse and unmarried, minor children may also apply for a visa to accompany or join the applicant, the H-4 visa.¹⁸ The principal applicant must be able to show that they will be able to financially support their beneficiary family members in the United States.¹⁹ H-4 visa holders do not have work authorization incident to their status.²⁰ Additionally, most H-4 visa holders are ineligible to apply for work authorization.²¹

NOTE: Proposed Changes: Work authorization for H-4 spouses has been the cause of much political attention. On January 20, 2021, President Biden proposed giving all H-4 visa holders work authorization, making EADs a fixed part of H-4 visas as part of the U.S. Citizenship Act of 2021.²² By contrast, former President Trump proposed a rule that would have ended employment authorization for all H-4 visa holders. On January 25, 2021, the Biden administration withdrew this proposed rule from consideration.²³

The H-4 visa is a dependent visa, which means that it is attached to the principal's H-1B visa and does not confer immigration status on its own. Although H-4 visa holders may be highly educated professionals or otherwise extremely qualified in their chosen careers themselves, the H-4 visa generally does not permit them to work while in the United States, which renders most H-4 visa holders completely dependent on the H-1B visa holder's income.²⁴

As a result of financial dependency, H-4 visa holders who suffer abuse within their relationships are extremely vulnerable during their time in the United States.²⁵ Without an independent income, H-4 visa domestic violence survivors may be unable to take necessary steps to leave their relationship, such as file for divorce, pay for legal services, or receive custody of minor children.²⁶ Additionally, a divorce from the H-1B visa holder revokes the H-4 visa holder's immigration status, which may force the H-4 visa holder to leave the United States without their children.²⁷ However, under a special statutory provisions for domestic violence survivors, they may be eligible to apply for work authorization.

IV. INA § 106 and Employment Authorization for Domestic Violence Survivors

The 2005 Reauthorization of the Violence Against Women Act created INA § 106, which allows spouses of H-1B temporary workers who have been subjected to battery or extreme cruelty to apply for an EAD and earn an income that is separate from the H-1B holder's.²⁸ The provision also extends similar benefits to spouses of A, E-3, G, and other H nonimmigrants, which are discussed in Section V. On March 8, 2016, USCIS issued a policy memorandum outlining the eligibility criteria for employment authorization under INA § 106 and revising the Adjudicators Field Manual.²⁹ Survivors of domestic abuse who were admitted on an H-4 visa can apply for a two-year EAD and may be able to renew it at two-year intervals so long as certain conditions are met.

The application for the EAD is on Form I-765V, a modified version of the EAD application form introduced in 2017 for nonimmigrants spouses who have survived abuse.³⁰ There is currently no fee to file the I-765V.³¹ Approved EAD applicants have unrestricted work authorization and are free to work for any employer.³² This provides an opportunity for the H-4 visa holder to gain financial independence from their abuser. If their EAD application is granted, the survivor will receive a two-year work permit that is independent from the H-1B visa holder.³³ However, in order for the spouse to be eligible to renew the EAD, the principal H-1B visa holder must maintain their H-1B status.³⁴ If the principal is no longer in status, the H-4 survivor may still be able to renew their EAD within two years of the principal's death or within two years of their loss of status if they lost status as a result of an incident of domestic violence, as discussed below.³⁵

Unfortunately, not all spouses of temporary workers are eligible for work authorization. Although spousal abuse is a necessary requirement, that alone is insufficient for EAD approval without meeting the additional criteria. In order to be eligible for employment authorization an H-4 spouse must submit any credible evidence demonstrating that they:

1. Are the qualifying spouse who accompanied or followed to join a nonimmigrant spouse;
2. Were admitted to the United States on a H nonimmigrant status;
3. Are or were in a qualifying marital relationship to a H nonimmigrant;
4. Were battered or subjected to extreme cruelty (or applicant's child was battered or subjected to extreme cruelty) perpetrated by applicant's nonimmigrant spouse during the marriage and after admission to the United States as an H nonimmigrant status; and
5. Currently reside in the United States.³⁶

Although the applicant must provide evidence of U.S. residence, may use a P.O. Box on the application or another safe mailing address if they do not feel safe receiving communication from USCIS at their home address.³⁷

NOTE: Evidence of Qualifying Marriage: An applicant can show a qualifying marital relationship either by demonstrating that they are married to a qualifying nonimmigrant spouse who was admitted to the United States in H nonimmigrant status and remains in status; or that they were married to a nonimmigrant who was admitted to the United States in H nonimmigrant status, and

1. their spouse died within the two years prior to filing Form I-765V;
2. their spouse lost qualifying nonimmigrant status due to an incident of domestic violence within the two years prior to the filing of Form I-765V;³⁸ or
3. the marriage was terminated within the two years prior to the filing of Form I-765 V and there is a connection between the termination of the marriage and the batter or extreme cruelty perpetrated by the applicant's former spouse; last admitted to the United States in A, E-3, G, or H nonimmigrant status.

If a marriage certificate is unavailable, the applicant can submit an affidavit as evidence of the qualifying marital relationship.³⁹

In addition to submitting Form I-765V, the applicant must include supporting documentation. They must present evidence of the principal's admission to the United States in H nonimmigrant status as well as their own admission in H-4 status.⁴⁰ They must show evidence of their qualifying marital relationship to the principal nonimmigrant. The principal nonimmigrant must maintain

their H-1B status subject to the exceptions listed above. Note, that if the applicant remarries before the I-765V is adjudicated, they will be denied work authorization.⁴¹

The applicant must also submit any credible evidence of abuse, such as police reports, court records, medical records, reports from social service agencies, or affidavits. If the applicant obtained a protective court order against their spouse, they should submit a copy as well.

Finally, they must show evidence of their current residence in the United States. The applicant is not required to reside with the principal H-1B visa holder.⁴² Moreover, the H-1B visa holder will not be notified that their spouse has applied for work authorization under this provision.⁴³

NOTE: Evidence of Principal's Status: If no documentary evidence of the H-1B visa holder's immigration status is available, USCIS will attempt to verify their status based on the basic information provided by the applicant by searching the appropriate electronic systems. The applicant must provide some identifying evidence such as name, place of birth, country of birth, date of birth, date of entry into the United States, I-94 number, employer, etc.

If approved, the applicant will receive a category (c)(30) EAD. The EAD will have a validity of two years.⁴⁴ Additionally, the EAD can be renewed for two-year intervals so long as the principal nonimmigrant maintains their H-1B status.⁴⁵ They may also apply for renewal within two years of the date of the principal nonimmigrant's death or within two years of the principal nonimmigrant's loss of status if the loss of status was due to an incident of domestic violence.⁴⁶ Once the H-1B loses status and any two-year extension is over, however, the H-4 can no longer renew their EAD.

V. Other Nonimmigrant Visas Covered by INA § 106

Although INA § 106 employment authorization often comes up in the context of H-4 derivatives of H-1B visa holders, it also extends the same benefits to spouses of A, E-3, G, and other H nonimmigrants. Spouses of nonimmigrants in these statuses who have suffered domestic violence can obtain employment authorization under INA § 106 as well, as discussed in Section IV above.

A. A Visa

The A visa is for foreign diplomats or government officials who are solely engaged in official duties on behalf of their national government.⁴⁷ There is an exception for heads of state or government who qualify for an A visa regardless of the purpose for their travel. The applicant's position within their home country's government determines whether they require an A-1 or A-2

visa. Immediate family members of the applicant may also apply for A-1 or A-2 visas. Personal employees, attendants, and domestic workers of A visa holders may apply for an A-3 visa.⁴⁸

B. E-3 Visa

The E-3 visa is a special classification for workers who are nationals of Australia and who are coming to the United States solely to perform services in a specialty occupation.⁴⁹ Applicants must be nationals of Australia, have a legitimate offer of employment in the United States, possess the necessary academic or other qualifying credentials, and must be filling a position that qualifies as a specialty occupation. Spouses and unmarried children under twenty-one years of age may also apply for dependent E-3 classification. E-3 dependent spouses may apply for work authorization, but E-3 dependent children cannot.⁵⁰

C. G Visa

The G visa is a special diplomatic visa specifically for diplomats who will work for designated international organizations, such as the United Nations, while in the United States.⁵¹ As with A visas, immediate family members of G visa holders may apply for a visa in the same category as the principal. G-5 visas may be issued for personal employees or domestic workers of G visa holders.⁵²

D. Other H Nonimmigrants

INA § 106 also applies to the spouses of other H nonimmigrants who are also H-4 visa holders. This includes the H-1B1 program, a special version of the H-1B visa for nationals of Chile and Singapore who work in specialty occupations; H-2A visas for temporary agricultural workers; H-2B visas for temporary non-agricultural workers; and H-3 visas for trainees or special education visitors. Spouses and unmarried children under the age of twenty-one of nonimmigrants in these categories may apply for an H-4 visa like the spouses and children of H-1B holders.

VI. Additional Resources

This section contains additional resources on H-4 employment authorization and H-1B visas. It also includes our document gathering guide for VAWA self-petitioners, which contains helpful tips and examples of evidence that can also be used to demonstrate EAD eligibility in the H-4 context.

For more in-depth information on immigration provisions for survivors of domestic violence, the ILRC provides numerous trainings, practices advisories, and comprehensive practice manuals. Please visit our resources at <https://www.ilrc.org/u-visa-t-visa-vaawa>.

- USCIS, PM-602-0130, Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants, Mar. 8, 2016, https://www.uscis.gov/sites/default/files/document/memos/2016-0308_PM-602-0130_Eligibility_for_Employment_Authorization_for_Battered_Spouses_of_Certain_Nonimmigrants.pdf.
- American Immigration Council, The H-4 Visa Classification, Mar. 26, 2018, <https://www.americanimmigrationcouncil.org/research/h-4-visa-classification>.
- American Immigration Council, The H-1B Visa Program, Apr. 2, 2020, <https://www.americanimmigrationcouncil.org/research/h1b-visa-program-fact-sheet>.
- ILRC, Document Gathering Guide for VAWA Self-Petitioners, Jan. 2021, https://www.ilrc.org/sites/default/files/resources/document_gathering_guide_for_vawa_petitioners.pdf.

End Notes

¹ Selena, Mary, and Marian wrote this advisory as part of the Berkeley Anti-Trafficking Project, under the supervision of Alison Kamhi. We also thank Sameera Hafiz for her review.

² U.S. Dep't of Labor, H-1B Program, <https://www.dol.gov/agencies/whd/immigration/h1b> (last accessed Feb. 5, 2021).

³ *Id.*

⁴ 8 U.S.C. § 1101(a)(15)(H)(i)(b) (defining the requirements for an H-1B visa for those coming to the United States to perform a “specialty occupation”); USCIS, H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion> (last accessed May 19, 2021).

⁵ The required wage rate is the higher of the actual wage rate (the rate the employer pays to all other individuals with similar experience and qualifications who are performing the same job), or the prevailing wage (a wage that is predominantly paid to workers in the same occupational classification in the area of intended employment at the time the application is filed). U.S. Dep't of Labor, Fact Sheet #62G: Must an H-1B worker be paid a guaranteed wage?, <https://www.dol.gov/agencies/whd/fact-sheets/62g-h1b-required-wage> (last accessed May 19, 2021).

⁶ USCIS, H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers and Fashion Models, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion> (last accessed May 19, 2021).

⁷ *Id.*

⁸ U.S. Dep't of Labor, Employment and Training Administration, Foreign Labor Certification Questions and Answers, <https://www.foreignlaborcert.doleta.gov/qa.cfm#q2> (last accessed May 19, 2020).

⁹ See e.g., James A. Bach, *How to Secure Your H-1B Visa: A Practical Guide for International Professionals and Their US Employees* (2013).

¹⁰ USCIS, Direct Filing Addresses for Form I-129, Petition for a Nonimmigrant Worker, <https://www.uscis.gov/i-129-addresses> (last accessed May 19, 2021).

¹¹ U.S. Dep't of State, Temporary Worker Visas, <https://travel.state.gov/content/travel/en/us-visas/employment/temporary-worker-visas.html> (last accessed Feb. 5, 2021).

¹² USCIS, Historical National Average Processing Time (in Months) for All USCIS Offices for Select Forms By Fiscal Year, <https://egov.uscis.gov/processing-times/historic-pt> (last accessed Feb. 5, 2021).

¹³ *Id.*

¹⁴ U.S. Dep't of State, Temporary Worker Visas, <https://travel.state.gov/content/travel/en/us-visas/employment/temporary-worker-visas.html> (last accessed Feb. 5, 2021).

¹⁵ *Id.*

¹⁶ USCIS, H-1B Specialty Occupations, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion> (last accessed Feb. 5, 2021).

¹⁷ U.S. State Dep't., Directory of Visa Categories, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/all-visa-categories.html> (last accessed May 25, 2021).

¹⁸ U.S. State Dep't., Directory of Visa Categories, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/all-visa-categories.html> (last accessed May 25, 2021).

¹⁹ *Id.*

²⁰ 8 C.F.R. § 214.2(h)(9)(iv).

²¹ Beyond INA § 106, an H-4 nonimmigrant spouse of an H-1B nonimmigrant may be eligible for employment authorization “only if the H-1B nonimmigrant is the beneficiary of an approved Immigrant Petition for Alien Worker, or successor form, or the H-1B nonimmigrant’s period of stay in H-1B status is authorized in the United States under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000.” *Id.*

²² The White House, Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize our Immigration System, Jan. 20, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system>.

²³ American Immigration Lawyers Association, Practice Alert: Proposed H-4 EAD Rescissions Rule Withdrawn from Review at OMB, Jan. 28, 2021, https://www.aila.org/advo-media/aila-practice-pointers-and-alerts/practice-alert-proposed-h-4-ead-rescission?utm_source=Recent+Postings+Alert&utm_medium=Email&utm_campaign=RP+Daily.

²⁴ See Humaa Siddiqi, *Building the Invisible Wall against Legal Immigration: The Trump Administration’s Revocation of Work Authorization for H-4 Visa Holders*, 29 TRANSNAT’L L. & CONTEMP.. PROBS. 193, 198, 213 (2019).

²⁵ *Id.* at 213.

²⁶ Andrew Grzegorek, *Two Year Work Permits for Spouses of Abusive H-1B Visa Holders Now Available*, (Apr. 5, 2018) <https://www.sggimmigration.com/two-year-work-permits-for-spouses-of-abusive-h-1b-visa-holders-now-available/>.

²⁷ *Id.*

²⁸ 42 U.S.C. 13701 § 801 (2005) (Violence Against Women and Department of Justice Reauthorization Act); (USCIS, I-765V, Application for Employment Authorization for Abused Nonimmigrant Spouse <https://www.uscis.gov/i-765v> (last accessed Feb. 5, 2021); INA § 106.

²⁹ USCIS, PM-602-0130, Eligibility for Employment Authorization for Battered Spouses of Certain Nonimmigrants, Mar. 8, 2016, (hereinafter PM-602-0130) https://www.uscis.gov/sites/default/files/document/memos/2016-0308_PM-602-0130_Eligibility_for_Employment_Authorization_for_Battered_Spouses_of_Certain_Nonimmigrants.pdf.

³⁰ *Id.*

³¹ Instructions for Application for Employment Authorization for Abused Nonimmigrant Spouse, 2, <https://www.uscis.gov/sites/default/files/document/forms/i-765vinstr.pdf> (hereinafter “Form I-765V Instructions”) (last accessed May 19, 2021)

³² USCIS, H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models, Family of H-1B Visa Holders, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion> (last accessed Feb. 5, 2021).

³³ USCIS, Employment Authorization for Certain Abused Nonimmigrant Spouses, <https://www.uscis.gov/forms/employment-authorization-for-certain-abused-nonimmigrant-spouses> (last accessed Feb. 5, 2021).

³⁴ See USCIS, Adjudicators Field Manual 30.13(g).

³⁵ *Id.*

³⁶ *Id.* at 30.13(d).

³⁷ Form I-765V Instructions at 4.

³⁸ Evidence of abuse does not need to be resubmitted for renewal employment authorization requests. *Id.* at 9.

³⁹ *Id.* at 8.

⁴⁰ While the applicant must have been admitted in H-4 status, they are not required to remain under that status. EAD eligibility under INA § 106 is based on the principal spouse maintaining their status.

⁴¹ USCIS, Adjudicators Field Manual 30.13(g)

⁴² See USCIS, Instructions for Application for Employment Authorization for Abused Nonimmigrant Spouse at 4.

⁴³ 8 U.S.C. 1367 § 384 Penalties for Disclosure of Information (2011); USCIS Policy Manual, Chapter 7 Privacy and Confidentiality, <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-7> (last accessed Feb. 5, 2021); See also, USCIS, Instructions for Application for Employment Authorization for Abused Nonimmigrant Spouse, 2, <https://www.uscis.gov/sites/default/files/document/forms/i-765vinstr.pdf>.

⁴⁴ USCIS, Adjudicator's Field Manual 30.13(f).

⁴⁵ *Id.* at 30.13(g).

⁴⁶ *Id.*; PM 602-0130 at 4.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ USCIS, E-3 Specialty Occupation Workers from Australia, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/e-3-specialty-occupation-workers-from-australia> (last accessed May 25, 2021).

⁵⁰ *Id.*

⁵¹ See 9 FAM 402.3-7.

⁵² *Id.*



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