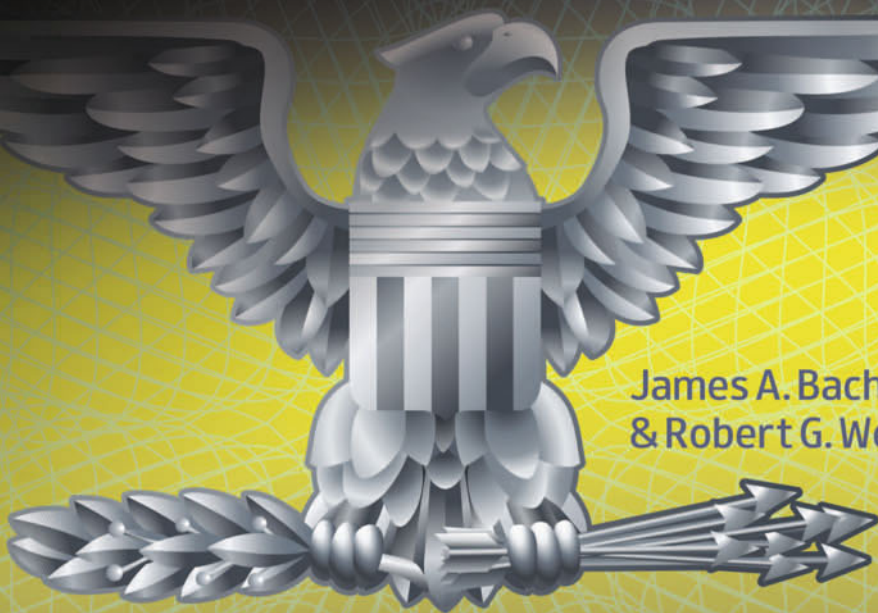


A Practical Guide for
International Professionals
and Their US Employers

Apress®



James A. Bach
& Robert G. Werner

HOW TO SECURE YOUR H-1B

VISA

For your convenience Apress has placed some of the front matter material after the index. Please use the Bookmarks and Contents at a Glance links to access them.



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Introduction

With a combined 60 years of experience handling H-1B visas, we have worked with hundreds of employers and thousands of H-1B professionals. These thousands of H-1B cases have brought benefits to all concerned. Employers are able to find the best and brightest workers from a potential applicant pool of 7 billion people (the population of the world) instead of 312 million (the population of the United States, representing less than 5% of the world's population). The United States is revitalized through the presence of hard-working, law-abiding, highly educated, and very smart immigrants. And immigrants are able to share the wonderful gift of living in America: a place of prosperity, civil order, justice, freedom, beauty, and integrity.

US immigration laws do not allow everyone who wants to live in America to do so, but they do provide for temporary and permanent residence in the United States for the best and the brightest scientists, engineers, professors, physicians, researchers, and other professionals. And the H-1B visa is the gateway.

We have written this book with several purposes in mind:

- To provide a guide through the maze of H-1B laws and policies
- To help you ensure the success of your application, from H-1B petition to visa issuance
- To help you avoid the pitfalls, liabilities, and disasters that are sometimes associated with H-1B status

This book is written for both H-1B employers and H-1B employees. When we use the term “you,” we are addressing both employers and employees, except where navigation icons (see key below) indicate that a given section preferentially addresses one rather than the other.



Navigation Key To assist you in navigating through the book, we mark chapter titles and section headings as follows:



Sections that might be of more interest to *employers* have an icon of an empty chair to be filled by an H-1B employee!



Sections that are directed mostly to *employees* have an icon of the H-1B employee with his passport out, waiting to be stamped with an H-1B visa.



Sections that equally concern *both employers and employees* have both icons.



What Is an H-1B Visa?

An H-1B visa provides the authorization for foreign professionals to work for certain employers in the United States for six years (and even longer). The initial H-1B visa normally is issued for three years; the H-1B status can then be extended for at least another three years. Those with H-1B visas can travel freely into and out of the United States, but they can work only for employers who have submitted H-1B petitions for them.

Most H-1B workers are engineers, IT workers, scientists, and teachers, but anyone with a bachelor's degree (or equivalent education and experience) may be eligible for H-1B status. H-1B visas have been granted to a wide range of professionals, including accountants, medical technologists, logistics experts, business managers, statisticians, doctors, nurses, and marketing professionals.

There are three basic requirements for H-1B eligibility:

- The worker must have a bachelor's degree in a specialty field (or equivalent training and experience).
- The job normally must require that degree.
- The employer must pay the H-1B employee a salary that is consistent with the average salaries paid for the occupation and consistent with the salaries paid to other workers in the company.

There are many other types of temporary (“nonimmigrant”) visas, as well as a permanent visa (called a “green card” or “immigrant” visa). The H-1B visa has many advantages over these other types of visas for both employers and employees.



Advantages and Disadvantages of H-1B Status for Employers

For employers, the **advantages** of H-1B status over other types of visas include the following:

- **Certainty.** For most scientific, engineering, teaching, and IT positions, the H-1B petition is typically successful.
- **Speed.** Often a new H-1B visa can be obtained within a month or so of the job offer. Employees who are already in the United States in H-1B status can often begin the employment within a week or two of the offer.
- **Longevity.** Professionals can work in H-1B status for up to six years, and indefinitely if the green card application process is started by the end of their fifth year.

For employers, the **disadvantages** of H-1B status compared with other types of visas include the following:

- **Quota restrictions.** One disadvantage of the H-1B visa is that it is not available at certain times of the year when the annual quota has been filled. However, that quota does not apply to those who have already been granted H-1B status, and many employers, such as universities, are exempt from the quota.
- **Labor cost.** The H-1B visa is a way to recruit and secure the best and brightest employees and to be more competitive, not a way to save money immediately. In fact, employers often pay their H-1B employees more than they pay their other workers, because they are more qualified. As discussed in Chapter 8, the Department of Labor has devised an elaborate (and often perplexing) system to ensure that H-1B employees are not underpaid.
- **Fees.** The employer must pay certain upfront costs to get the H-1B visa. Those costs, which involve a combination of

filing fees and legal fees, normally total between \$4,000 and \$6,000 (depending on several factors, including the size of the company, whether it is the first H-1B petition, whether “Premium Processing” is used, and the legal fee charged by the attorney).

- **Liability to penalties.** Another disadvantage for employers is the liability for fines and other penalties if the H-1B worker is underpaid or if the employer fails to follow formal requirements for ensuring a competitive salary. However, employers can avoid those fines and penalties by carefully following the guidance in this book and the advice of their immigration attorneys. In Chapter 8, we will discuss in detail how employers can comply with the H-1B requirements to avoid fines and penalties.
- There may be alternatives to H-1B status, summarized in Chapter 12, if any of these restrictions prevent or delay H-1B status.




Benefits and Challenges of H-1B Status for Employees

For the H-1B employee, the **advantages** of H-1B status include the following:

- **Predictability.** You are assured of being able to work and live in the United States for six years or longer, as long as you keep your H-1B employment.
- **Portability.** You can easily transfer from one employer to another.
- **Ability to immigrate.** An intent to later immigrate to the United States (i.e., get a “green card”) does not invalidate your H-1B visa or create problems in getting it. In contrast, most other nonimmigrant visas (for example, a student visa) require evidence that you intend to return to your home country and have no intention to immigrate.

There are some **disadvantages** to life in the United States in H-1B status, and those should be considered before you make the decision to emigrate from your home country:

- **Spouse work restrictions.** Spouses of those in H-1B status are not authorized to work in the United States unless they can independently qualify for H-1B or another visa status. However, they are eligible to attend college or pursue other education such as English or cooking classes. Most H-1B employees are young (in their 20s and 30s), and many spouses spend their time taking care of children—often a full-time job!
- **Work relocation restrictions.** A new application must be filed each time the employee changes jobs and each time the work location changes. That makes it cumbersome not only to change employers but also to change job locations with the same employer. In Chapter 8 we will discuss the requirements for changing job locations, which can be particularly challenging for the traveling consultant. Those considerations, however, are primarily the employer's concern.
- Other than these restrictions, a person in H-1B status has almost all of the rights and freedoms of US permanent residents. They can pursue their careers, travel abroad, and even purchase a home.

 **Chapter Takeaway** The H-1B program helps US employers to become more productive, innovative, and competitive. It enables highly skilled professionals to live and work in the United States and can be a first step to later US permanent residence.



Overview of the H-1B Petition Procedure

The H-1B petition can be prepared as soon as the prospective employee¹ has accepted a job offer.





US Government Agencies Involved in the H-1B Visa Process

The H-1B visa process normally involves applications to four different US government agencies, in the following order:

1.  **US Department of Labor.** The *employer* will file a *Labor Condition Application (LCA)*² with the US Department of Labor. Approval of the LCA takes approximately one week.
2.  **US Citizenship and Immigration Services.** The *employer* will file the **H-1B petition** with US Citizenship and Immigration Services (USCIS). Processing typically takes two weeks or so with “Premium Processing” (discussed in Chapter 6).

¹ In this book we use the term *employee* loosely to refer to prospective as well as actual H-1B employees, depending on context.

² Not to be confused with a *Labor Certification Application*, used to obtain a green card.

3.  **US embassy or consulate.** The *employee* will apply for the **H-1B visa** at a US embassy or US consulate. This process can take from one to six weeks, depending on the backlog at the embassy or consulate.
4.  **US Customs and Border Protection.** The *employee* will present the **H-1B visa** at a US port of entry (international airport or land border) to obtain admission into the US.

Not all of these agencies are involved in every H-1B case. For example, someone who is already in H-1B status with another employer may not need to follow the last two steps.

By adding up these various processing times and accounting for the time required to prepare the various applications, we can estimate that the time it takes to obtain an H-1B visa or status ranges from one to two months for an employee who has never been in H-1B status, and from one to two weeks for someone who is already employed in H-1B status by another employer.



US Department of Labor

Historically, the Department of Labor (**DOL**) was not involved in the H-1B visa process. However, in 1998, Congress introduced the Labor Condition Application (LCA), to be issued by the Department of Labor before an H-1B petition could be filed.

Essentially, the LCA was designed to make sure that the H-1B program does not depress the salaries and benefits of American workers. Congress was concerned that the H-1B program was undercutting the salaries of professionals in the US because employers were paying the H-1B employees less than they paid American workers. To address this perceived problem, Congress required all employers filing H-1B petitions to promise to pay any H-1B employee a **competitive salary**.

In the language of the LCA rules, a “competitive salary” has three conceptual components:

Actual Wage: the amount paid by the employer to others with similar experience and qualifications for the specific position.

Prevailing Wage: the weighted average salary for that specific occupational classification paid by all employers in the geographic area of intended employment.

Required Wage: the **higher** of the *Actual Wage* and the *Prevailing Wage*.

The H-1B employer must agree to pay the **Required Wage**. The employer may pay more than the Required Wage, but the LCA and the H-1B petition must indicate the Required Wage, and employers are subject to penalties if they pay less than that.

The role of the DOL is to make sure that employers pay the Required Wage and to investigate and penalize employers who do not. The investigations and prosecutions are led by the *Wage and Hour Division* of the DOL—the same entity that investigates and prosecutes federal minimum wage and overtime violations. The Wage and Hour Division is well funded, with aggressive investigators and attorneys on its staff. Employers are therefore well advised to pay close attention to the LCA requirements. In Chapter 8, we will discuss ways to achieve compliance with those requirements.

The government does not vet the truth of an LCA prior to approval, which is automatic provided all the formal requirements of the LCA filing are met. However, it is subject to a later audit by the DOL, which will assess penalties if the statements on the LCA are not accurate.

There are essentially four statements that the employer must make on the LCA, as follows:

- *The employer will pay the H-1B employee the Required Wage for the entire period of H-1B employment.*
- *The employment of the H-1B worker will not have an adverse impact on the working conditions of other workers.* Examples of factors that could create an adverse impact would be making salaried H-1B employees work longer hours than other employees, or making them travel more.
- *There is no strike or labor dispute in progress.* This is usually not an issue for H-1B employees, who are usually in professions that are not unionized. However, some professional occupations, such as teachers or nurses, might be involved in organized labor disputes.
- *Notice of the LCA was given to the employer's other employees* (normally by posting notices at the place where the H-1B employee will work).

Failure to comply with any of these LCA conditions can subject the employer to monetary and other penalties. In addition, with certain exceptions, failure to file an LCA for *each place* the H-1B employee will work will also subject the employer to penalties.

In sum, the role of the DOL in the H-1B process is to process and approve the LCA, investigate the approved LCAs on a post-audit basis, and conduct civil prosecutions if there are violations.



US Citizenship and Immigration Services

US Citizenship and Immigration Services (**USCIS**) is part of the *US Department of Homeland Security* (DHS). It is the agency that processes and approves applications for immigration benefits, including H-1B petitions. USCIS maintains two different offices on opposite sides of the country, the *Vermont Service Center* (VSC) and the *California Service Center* (CSC), to process H-1B and other employment-based immigration petitions.

Where the employer should file the H-1B petition depends on the location of the proposed employment. Generally, petitions for employment in the eastern half of the United States are filed with the VSC in St. Albans, Vermont, and petitions for employment in the western half of the United States are filed with the CSC in Laguna Niguel, California.

The H-1B petition essentially consists of:

- the filing fee
- the H-1B petition form (Form I-129)
- the approved LCA
- the employer's letter explaining the proposed employment
- evidence of the employee's qualifications and professional background (such as a copy of college degrees and transcripts)

The role of USCIS is to determine whether

- the proposed employment normally requires a specialty college degree or equivalent education and experience
- the employee has that background
- it is likely that the proposed employment will take place as described
- the employer actually exists and can pay the offered salary (that is, whether it is a real job offer and not a fake)

Although those items may appear to be simple to determine, H-1B eligibility can be a complex issue, as we will explain in Chapter 4.

If USCIS determines that the employee and the job will support H-1B status, it will issue an *approval notice (I-797)*, which it will mail to the employer and the employer's attorney. It will also notify the US State Department of the approval, and provide a copy of the H-1B petition to the State Department via a secure system called **PIMS** (*Petition Information Management System*). The PIMS system is administered by a State Department office, the Kentucky Consular Center (KCC).



US Department of State

The US Department of State (**DOS**), through its worldwide *embassies and consulates*, is responsible for *granting the H-1B visa*, which is a *stamp in the employee's passport*. The application for the visa is made directly to the embassy or consulate, which requires the applicant to have an **interview with a consular officer** before the visa can be granted. The embassy or consulate will obtain a copy of the H-1B petition and its approval from the PIMS system.



Caution There is no system for alerting the employee, the employer, or the employer's attorney as to whether the H-1B petition approval has been entered in PIMS, so occasionally an employee will apply for the H-1B visa only to find that the PIMS notification was not made. That circumstance results in delays in visa issuance until the problem can be corrected. However, problems with PIMS are becoming increasingly rare, and generally, employees can assume that the *US embassy or consulate has notice of the approval within a week or so of petition approval*.

The application for the H-1B visa by the employee is a separate process from the employer's H-1B petition and normally proceeds without the employer's involvement.



Exception for India Consulates in India often require additional documents from the *employer*.

Usually, the H-1B visa applicant will apply at the US consulate or US embassy closest to his or her residence (but that is not always required). The **H-1B visa application** consists of:

- an online application form
- a visa application fee

- a passport-sized photograph that is uploaded with the application

The applicant must also present a *valid and unexpired passport*.

⇒ **Tip** If your passport will expire soon, we recommend you obtain a new passport before applying for the visa.

Presenting a passport that will not expire for several years is advisable, because US Customs and Border Protection (CBP) inspectors may limit the period of admission in H-1B status to the expiration date of the passport (or the expiration date plus six months). By first securing a passport that will not expire for several years, you can avoid a limited initial admission period that you would be required to extend at a later date.

💣 **Caution** CBP inspectors are inconsistent in this regard. Sometimes they will limit the period of admission based on the passport expiration date, but often they will admit you for the entire period of your H-1B approval notice (Form I-797), despite an earlier passport expiration date.

The best place to start the visa application process is on the embassy or consulate website. A link to all of the US embassies and consulates in the world can be found at <http://www.usembassy.gov/>. Once you are on the embassy or consulate website, you will find a link to “Visas,” then a further link to “Nonimmigrant visas” that will contain instructions for completing the H-1B visa application.

🇮🇳 **Exception for India** The US diplomatic posts in India are different from most other US embassies and consulates because they have contracted with a private company, CGI Group Inc., to handle the visa applications (although the consular officers at the embassy or consulates still conduct the interviews). Information and application forms for applying for a US visa in India can be found on the CGI Group website, at <http://www.ustraveldocs.com/in>.

The **spouse and minor children** of the H-1B employee can obtain **H-4 visas**. You would normally apply for any H-4 visas at the same time as you apply for the H-1B visa, but you do not have to do this. Sometimes the H-1B employee may obtain her visa first, and her family members may apply for

their H-4 visas later. Since the H-4 visa is dependent on the H-1B visa, you can never obtain it *before* obtaining the H-1B visa or status.

 **Tip** Consular officers, especially in India, often prefer that the H-1B and H-4 applications be submitted together.

Before issuing the H-1B visa, the consular officer must make sure that the H-1B employee is **admissible** into the US. Evidence of illegal drug use, even without a criminal conviction, could make you inadmissible. One arrest or conviction for drunk driving during the previous three years, or two drunk-driving arrests or convictions at any time, will require you to be evaluated by a doctor (to determine whether you are inadmissible because of alcoholism, a medical condition) before a visa will be issued.


If you previously violated any immigration law or status, you could be denied a visa. There are many other **grounds of inadmissibility**, as discussed in Chapter 7. If you believe you may be inadmissible, you should discuss the matter with an attorney before applying for the visa.

If there is any doubt as to your admissibility, the embassy or consulate may delay issuing the visa until it conducts a background check. This background check, called **Administrative Processing**, may involve:

- A criminal background check via CIA, FBI, and Interpol databases
- A local investigation using embassy or consulate local resources

Often, Administrative Processing is triggered because:

- The visa applicant has the same name and birth date as a criminal or terrorist
- There is doubt as to whether documents such as college degrees are genuine
- There is doubt as to whether there is a genuine job offer or employer

 **Caution** Although relatively rare, Administrative Processing can upset and delay the plans of both employer and employee for a very long time.



US Customs and Border Protection

The final agency involved in the H-1B process is US Customs and Border Protection (**CBP**). As its name implies, CBP is charged with making sure that only those with the right to do so enter the United States. For most H-1B employees, that means having a *valid, unexpired H-1B visa* and a *valid, unexpired passport*.

➡ **Exception for Canada** The one exception to this rule is that citizens of Canada are not required to have a visa (but they are required to have a valid passport or other acceptable evidence of Canadian citizenship). However, landed immigrants of Canada (those who have the right to live permanently in Canada, but who are not Canadian citizens) *are* required to have a visa.

Upon arrival in the United States, you—the H-1B employee—will present yourself for **inspection** at the **port of entry** (usually the international section of the first airport arrived at in the US, or at a land port if you drive across the border). CBP will inspect your passport, H-1B visa, and a copy of your H-1B approval notice (Form I-797, issued previously by USCIS) and will capture your biometrics (always digital or ink fingerprints and increasingly iris and facial recognition scans, too). CBP will then issue an **Arrival-Departure Record (Form I-94)**, which will be *stamped by the CBP officer and stapled into the passport*. The I-94 will indicate your date of arrival and the expiration date of your authorized stay in H-1B status.

➡ **Note** Form I-94 is a small white card that is attached to the visa page of your passport at the port of entry. Currently, CBP is in the process of eliminating the I-94 and will soon move to an all-electronic entry/departure tracking system.

As noted above, the expiration date of your authorized stay on your I-94 will *usually* be the expiration date of your H-1B approval notice (I-797), which is normally the same date as the expiration date of your H-1B visa, plus 10 days. However, the CBP inspector *might* limit your authorized stay on the I-94 because your passport will expire early or because of an error.



Caution It is prudent to check the expiration date of your Form I-94 immediately when it is issued and challenge the CBP inspector (in a nice way!) if the expiration date appears to be wrong.

➡ **Preclearance Exceptions** At certain international airports, CBP inspects H-1B visa holders and other nonimmigrants³ *before they travel to the United States*. These airports include Heathrow Airport in London and the international airports in Canada and Ireland. A complete list of these “preclearance” airports can be found at http://www.cbp.gov/xp/cgov/toolbox/contacts/preclear_locations.xml.

In addition to determining whether you have the proper documents to enter the US in H-1B status, CBP will, like the US embassy or consulate, make its own determination as to whether you are admissible to the United States. The CBP officer will almost certainly ask you if you intend to work for the H-1B employer named on the H-1B approval notice (Form I-797) or, if you are returning to the US, whether you are still employed with the H-1B sponsor.



The Importance of Being Earnest

As noted in our introduction, American governmental institutions are famous for their integrity, and that is one of the attractions of living and working in the United States. To preserve that integrity, government agencies are strenuously proactive in uncovering fraud or lies in the visa process. In fact, the employer must pay a \$500 **fraud fee** with every initial H-1B petition: money that goes into a fund for investigating and prosecuting fraud.

Each stage of the H-1B application process, summarized above, requires **truthful statements** to the various government agencies: **DOL**, **USCIS**, **DOS**, and **CBP**. Failure to be honest in any of the applications has the potential to undermine the H-1B system, and for that reason fraud incurs severe consequences if detected. In Chapter 9, we will detail the penalties both employers and employees face if they are not truthful in the various stages of the H-1B petition procedure.



Chapter Takeaway *Any sort of dishonesty* could lead both employer and employee to wish that they had never started the H-1B procedure in the first place.

³ A nonimmigrant is a person who is not an immigrant (i.e., who has a temporary visa instead of a green card).