

Demystifying the H-1B Process

What Higher Education
Supervisors Need to Know



Visa vs. Status

What is the difference?

Visa

- gives a foreign national the right to request legal entry to the United States in a particular status.

Status

- defines allowable activities: studying, working, volunteering, etc.



Types of Status in Higher Ed

- Students in F-1 status, including CPT and OPT
- Students, Professors, Research Scholars in J-1 status
- Staff and Faculty in H-1B, TN, O-1, or E-3 status
- EAD card holders including J-2, L-2, E-3D, and DACA (Dream Act)
- Permanent Residents (Green Card holders)



H-1B Philosophy

- H-1B allows the temporary employment of qualified individuals who are not otherwise authorized to work in the United States.
- Employers may hire nonimmigrant aliens in specialty occupations, defined as those that require specialized knowledge and the attainment of at least a bachelor's degree or its equivalent.
- The H-1B program is complex, with multiple regulations intended to protect both U.S. and nonimmigrant workers.

H-1B Advantage: Dual Intent

- Most nonimmigrant classifications require aliens to prove they do not intend to immigrate permanently to the United States.
- Initiating a U.S. permanent residence application can jeopardize the foreign national's visa status.
- The H-1B category, however, allows "dual intent." The foreign national can continue in a nonimmigrant status even though steps may have been taken towards obtaining U.S. permanent residence.

H-1B Basics

- Employer-sponsored.
- Up to 3 years per filing and 6 years total unless a petition for permanent residency has been filed.
- Job must require specialized knowledge or training, and a bachelor's degree or higher.
- Beneficiary must hold required degree or foreign equivalent at time of application.
- Employer must meet local prevailing wage and internal equity requirements.
- Dual-intent allowed. May apply for Permanent Residency.
- Universities are **not** subject to the annual cap on hiring.

H-1B Process: Fees and Timeline

- Sponsoring department should start early. The process can take up to 6 months to complete.
- Cost and time considerations make 3-year filing desirable, but funding uncertainties may require shorter H-1B periods.
- Required fees:
 - \$325 application fee (all H-1Bs)
 - \$500 for new H-1B or transfer
 - Premium Processing costs an additional \$1,225 and guarantees USCIS case resolution within 10 business days.

Prevailing Wage

- Job will be benchmarked to the Department of Labor Occupational Information Network (O*NET) site to match duties, education and experience required for the job.
- Once a match has been found, a search of the Foreign Labor Data Center Online Wage Library is done to get Prevailing Wage for one's area. This salary data is updated annually.
- The Prevailing Wage must next be compared with employees in similar jobs for internal equity purposes.

H-1B Process: LCA Filing

- A Labor Condition Application (LCA) will be filed with the Department of Labor for the employer information, salary, FTE, job title and dates of work.
- The LCA contains no beneficiary information and is solely for the purpose of verifying appropriateness of salary and working conditions.
- University must post notice of filing the LCA for two weeks.
- LCA Approval (certification) takes 1-2 weeks. During this time, the petition cannot be filed.



H-1B Petition

- After LCA certification email is received, the LCA and petition forms can be signed.



- Petition packet is copied, filing fees attached, and the packet is mailed to USCIS. Overnight courier is strongly recommended for speed and tracking purposes.
- If Premium Processing is requested, USCIS will send an email upon receipt.
- With regular processing, there will be no communication that the packet has been received unless a courier service was used.

H-1B Process: RFE and Approval

- USCIS may request additional information. This is known as a Request for Evidence (RFE). The request is often very detailed, requiring additional internal and external benchmarks and more specific information about the beneficiary.
- Official approval notice will be sent by regular mail in 1-2 weeks or via express courier if the department provided a return label.
- With Premium Processing, USCIS will send email when case decided, but this is a courtesy only and not official approval.
- Beneficiary should be given a copy of their filed packet, their original I-797 and a letter detailing terms of their H-1B status.
- Employee should update their I-9 form based upon the new H-1B approval.

Types of H-1B Processing

- Consular
- New Employment (already in US)
 - Extension/Amendment
 - Transfer (Portability)

Consular Processing

- Takes the longest.
- Beneficiary must schedule meeting at the consulate; appointments not always easy to get.
- Beneficiary might not be using same consulate as city/country of origin.
- Cannot begin working before first day of status
- Upon arrival in the U.S. beneficiary will find a place to live, get an SSN, driver's license, etc., which can delay start date.

New to H-B but Already in U.S.

- In higher education, a status change is typically OPT to H-1B, but not always.
- Salary increase is often required in order to meet prevailing wage requirements.
- Coordinate dates closely. H-1B approval notice must be received before beneficiary can work.

Extension/Amendment

- Can begin working under new terms as soon as petition received by USCIS.
- On extension, the main reason for filing date concern, other than employment gaps, may be driver's license or financial matters such as a mortgage.
- Beneficiary should not travel while a petition is in progress.

H-1B Portability



- “Portability” allows an H-1B holder to be sponsored by a new employer. This is often referred to as a “transfer.”
- A transfer petition must be received by USCIS prior to the beneficiary’s first day of work under new terms.
- Coordination between employers must be precise. An H-1B cannot have gaps in employment.
- Leave without pay can be used to close employment gaps, but beneficiary must request it in writing.

Other H-1B Considerations

- Any change in employer, duties, working conditions, or FTE requires filing an amendment. Salary changes must also be filed if the new salary is lower than previous.
- If the changes constitute promotion or salary change, additional HR approvals may be needed.
- USCIS will not accept petitions filed over 6 months in advance of the requested start date.
- More than one H-1B petition may be in effect, allowing the beneficiary to work concurrently for multiple employers.
- If employment terminated before end of the H-1B period, the department must offer to pay beneficiary's return to home country.

Spouses of H-1B Workers

- Filing on behalf of a spouse is handled differently by different employers. There is no legal obligation to assist in the process and there are potential pitfalls:
 - University is spending time and money on legal matters pertaining to a non-employee.
 - Errors could create problems for the employee and his/her family.
- Prior to this year, a dependent spouse of an H-1B could not work. Recent changes make H-4 spouses eligible for an EAD card if the H-1B worker has an approved permanent residency application.



Permanent Residency

- Most universities will consider sponsorship only when there is a strong likelihood of continuing employment at the university.
- Sponsorships are complex, and require a significant commitment of time and resources.
- Faculty: Sponsorship of full-time, tenure-track faculty is fairly common, since tenured faculty are usually long-term.
- Research: The specific nature of some types of research may make sponsorship desirable if the alternative is to lose the employee.
- Staff: One must demonstrate that no citizens or existing permanent residents can fill the job. Once they have their green card, there is no reason for a permanent resident to stay if a higher salary is available in the corporate world.

Permanent Residency

- Timing is everything. It can take well over a year to get a PERM sponsorship filed. If the beneficiary's H-1B expires before their PERM is accepted, they will have to leave the country.
- Once their PERM has been approved, it will be another wait for a green card opening to become available.
- For countries with many applicants, such as India and China the wait can be as long as ten years.
- An H-1B status can be extended beyond the 6-year maximum if the PERM has been accepted.
- H-1B time can also be “recovered.” Any time spent out of the country (visits home, vacations, etc.) can be documented and added to an H-1B extension.

Other Income

While in H-1B Status

- Honorarium: Persons in H-1B may only receive an honorarium if sponsored by the host institution
- Expense Reimbursement: H-1B may accept reimbursement for costs associated with brief speaking engagements.
- Summer Employment: Faculty may work a summer teaching or research job only if it is at their host institution and in full alignment with their usual duties.
- Royalties: An H-1B who has a book or invention may accept associated royalties.

The I-9 Form



- The I-9, or Employment Eligibility Verification form is required of all employees by federal law. This law has been in effect since 1986.
- The form's purpose is to verify the employee's identity and employment authorization, thereby protecting the university from fines and other legal consequences of employing an undocumented worker.

I-9 Documents

- The most current list of acceptable documents is on USCIS.gov. These are the **only** documents that can be accepted as proof of identity and work eligibility.
- Federal law requires that all documents be original and unexpired. The only exception is the new I-94, which is now issued online.
- In addition to the list of acceptable documents, foreign nationals must show original documentation of their status (F-1, H-1B, etc.).



OMB No. 1615-0047; Expires 08/31/12
Form I-9, Employment Eligibility Verification

Must be available during completion of this form.

Do not work-authorized individuals. Employers CANNOT refuse to hire an individual because the documents have a date expiration.

(Do not sign by employee at the time employment begins.)

Middle Initial	Full Name
Age #	Date of Birth (month/day/year)
Zip Code	Social Security #

Under penalty of perjury, that I am (check one of the following):
Citizen of the United States

I-9 Documents

- The approval notice is the only acceptable H-1B document or I-9 purposes.
- Okay to use previous H-1B approval for transfer. In the margin, note “H-1B portability” and the filing date of new H-1B.
- Update must be done as soon as new approval is received.

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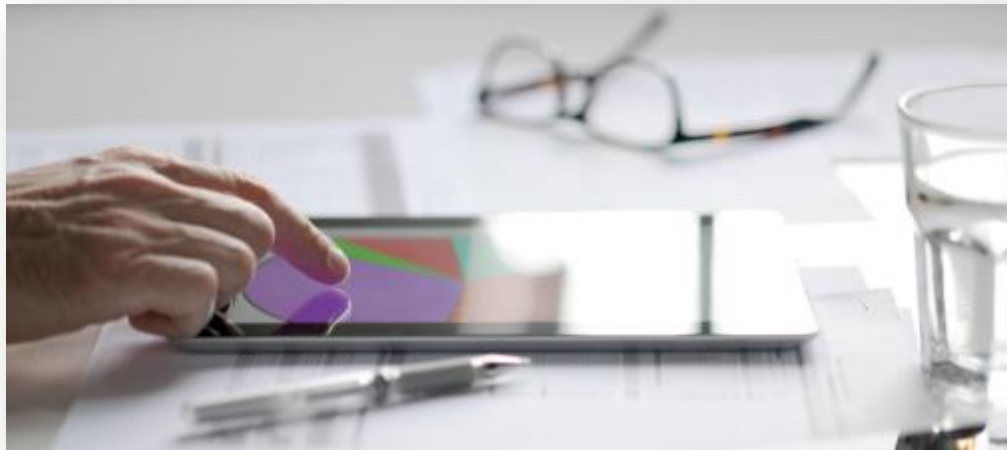
Immigration Audits

- USCIS randomly audits employers across the United States.
- A late or incorrect I-9 can result in a fine to the university.
- Fines are \$1,500 on average, *per violation*.
- If persons are found to be working without valid authorization, fines increase.
- Criminal penalties can be leveraged against employers, and these penalties can include jail time.
- H-1B irregularities can result in fines and criminal penalties. If they are sufficiently egregious, the USCIS may suspend or cancel the university's H-1B program.



Internal Audits

- Audits help protect the university, the foreign national employee and persons in the employing department.
- It is recommended that the employer conduct regular audits of:
 - Work authorization expirations
 - H-1B work assignment compared to filed petition with USCIS
 - Temporary SSNs (if used)
- Faculty whose regular summer assignment was part of H-1B filing will need closer attention.



Recruitment Considerations

- Have all applicants attest to whether or not they require sponsorship.
- Conduct prevailing wage review before making an offer to an H-1B.
- Offer letter must contain statement that employment is conditional upon maintaining valid work status.
- Match start date to allowable employment date:
 - Date of petition receipt by USCIS if H-1B transfer, extension, or amendment
 - Date on or after receipt of original document proving work eligibility I-797

General Data Considerations

- At hire, verify that job is allowable per visa:
 - H-1B: Check dates on I-797, and check the job title, FTE, salary and department on the H-1B petition.
- Regularly audit H-1Bs for salary, title, FTE.
- At termination, audit for voluntary nature of the separation or that status had ended.
- If employee is leaving prior to status end, document that a plane ticket was offered.

Compensation Considerations

- If prevailing wage is 10% or more above pay for same job in department, a more in-depth review of department pay practices may be required, because one cannot **not** pay prevailing wage to the H-1B employee.
- Check visa status of anyone put through for a reclassification, unless the job does not require a Bachelor's degree or higher.
- Do not approve any salary reduction, job change or FTE change for an H-1B until an amendment has been filed and approved by USCIS.

Questions?



Thank You!

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