

Targeted Site Visit and Verification Program – H-1B Training

Statutory Background

Established in 1990, the H-1B program allows US employers to hire foreign nationals to work in *specialty occupations*.¹

- A. The primary statutory basis for this classification is INA § 101(a)(15)(H);
- B. “Specialty occupation” – as this term concerns H-1B workers – is defined at INA § 214(i)(1) and (2). Per this definition, a specialty occupation requires “(A) theoretical and practical application of a body of specialized knowledge and (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.”²

The Department of Labor (DOL) has provided more detail about specialty and non-specialty occupations in its Occupational Outlook Handbook (OOH), which can be found online (<http://www.bls.gov/ooh/>). The OOH offers a layman’s definition of each occupation and a description of the duties and educational requirements for the various occupations that it addresses. While USCIS recognizes DOL’s OOH as one authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses, it is not always determinative. USCIS also considers other sources provided by the petitioner. Additionally, the DOL provides information regarding the prevailing wages for various occupational classifications.³ Prevailing wage information, grouped together with summaries of the OOH job definitions, can be found online at the website of the Foreign Labor Certification (FLC) Data Center, <http://www.flcdatacenter.com/>.

- C. There is no requirement that companies employing H-1B workers first attempt to recruit U.S. citizens or lawful permanent residents *unless the respective company is H-1B dependent or a willful violator*.

An H-1B dependent employer is defined at INA § 212(n)(3). It means:

- The employer has 25 or fewer full-time equivalent employees who are employed in the U.S., of whom eight or more are H-1Bs, or;

¹ The H-1B classification also includes certain fashion modes and Department of Defense workers, but those subtypes will not be discussed here.

² See also 8 CFR § 214.2(h)(4)(iii).

³ Note that a petitioner may also rely upon other authoritative sources to establish the prevailing wage, such as private wage surveys based on the “median wage of workers similarly employed in the area of intended employment.” 20 CFR 656.731(b)(3)(iii)(B) and (C).

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- The employer has 26 to 50 full-time equivalent employees who are employed in the U.S., of whom 13 or more are H-1Bs, or;
- The employer has more than 50 full-time equivalent employees who are employed in the U.S. and 15% or more are H-1B nonimmigrants.

H-1B-dependent employers and willful violators have more procedures to go through, and more obligations to comply with, before filing a petition for an H-1B worker unless the worker is considered an exempt worker as defined at INA § 212(n)(3)(B)(i)(I) and (II):

- The employer will compensate the H-1B worker at \$60,000 or more per year, or;
- The H-1B worker has attained a master's degree or higher in a field related to the specialty occupation.

Note that the "\$60,000 exception" mentioned above is statutory and has not changed since 1998, meaning it also has not been adjusted for inflation or otherwise in almost 20 years. This means a wage of \$60,000 is now worth much less in real dollars than in 1998, especially considering that many areas with high concentrations of IT workers, such as Silicon Valley, Irvine, CA, Schaumburg, IL, Fairfax, VA, etc., have a much higher than average cost of living.

Further statutory language to keep in mind when considering abuses of the H-1B nonimmigrant visa classification is found at INA § 212(n)(1)(A)(ii). This language reads:

No alien may be admitted or provided status as an H-1B nonimmigrant...unless the employer has filed with the Secretary of Labor an application stating...[it] will provide working conditions for such a nonimmigrant ***that will not adversely affect the working conditions of workers similarly employed.*** [Emphasis added]

Filing Procedures

Before a petitioner can employ an H-1B worker, three things must happen:

- A. There must be a position available in a specialty occupation and the beneficiary must be qualified for that position;
- B. The employer must file a Labor Condition Application, aka LCA (Form ETA-9035), with the Department of Labor (DOL) and the DOL must certify (approve) this form. By filing the LCA, the employer is attesting to various obligations per INA § 212(n);
- C. The employer must file a Petition for Nonimmigrant Worker (Form I-129) with USCIS and USCIS must approve this form, unless the H-1B workers is eligible for H-1B portability under INA § 214(n) (if eligible under H-1B portability, the H-1B worker can commence new employment upon the filing of the H-1B petition with USCIS);

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Note: there is no charge for filing an LCA, which a potential employer can do electronically. USCIS charges a \$460 filing fee for the I-129 petition. In some instances, an additional \$500 “Fraud Detection and Prevention” fee applies. There is also a fee of either \$750 or \$1,500 associated with the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) for initial I-129 filings and first extensions. If the employer has fewer than 26 employees, it pays \$750; if 26 or more, it pays \$1,500. Finally, Public Law 114-113 imposes a \$4,000 fee on certain employers seeking initial H-1B status for a worker or obtaining authorization for a worker to change employers. This \$4,000 fee only applies to employers who have 50 or more workers in the United States and half of those workers are in H-1B, L-1B, or L-1A status. The total amount an employer must pay to obtain authorization to employ an H-1B worker will thus vary depending on the type of filing (initial, first extension, second extension) and the employer’s size.

Processing/adjudication times for LCAs and I-129s vary. The DOL strives for a five-to-seven-business-day processing time for LCAs. USCIS takes longer, which has led many employers to use the premium processing option, when available. For an additional \$1,225, an I-129 can be accompanied by a Form I-907 (the premium processing form) and USCIS will take adjudicative action on the I-129 in 15 calendar days. If USCIS cannot meet this deadline, it must refund the premium processing fee. Note: premium processing and the 15-day deadline are regulatory, see 8 CFR Part 103.7(e)(2). Also note that premium process may sometimes be temporarily suspended. Be sure to check the USCIS public website to see if premium process is currently available for H-1B filings.

Abuses of the H-1B Program and How to Check for Them

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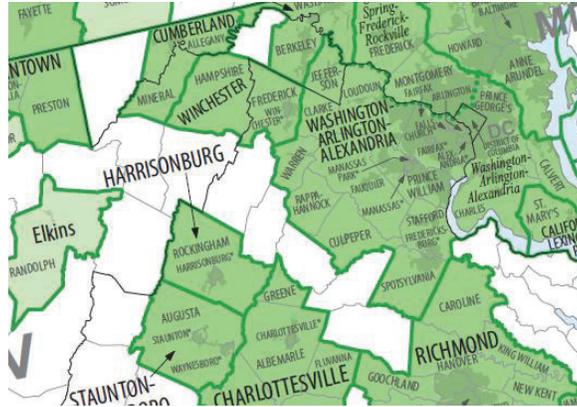
Below are some tools to help you determine the geographic area of employment and corresponding prevailing wage.

An MSA map:

http://www2.census.gov/geo/maps/metroarea/us_wall/Feb2013/cbsa_us_0213.pdf

Here is a close-up view of Northern Virginia taken from the MSA map:

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The thick green lines represent an MSA's borders. (Informational: dark green areas represent Metropolitan Statistical Areas and light green areas, like Elkins, WV, represent Micropolitan Statistical Areas. This distinction can be ignored for the purpose of reviewing prevailing wages.)

Note: areas outside of MSAs (the white areas on the MSA map) are listed in the Foreign Labor Certification Data Center Online Wage Library as "nonmetropolitan areas." Also, some areas have similar names, and this has caused confusion for officers. For example, in Virginia there is both a Richmond County (nonmetropolitan area) and a completely different City of Richmond. There may be other instances like this in other states, so be careful when reviewing the worksite location.

Wages sometimes vary within MSAs. For help determining what the correct prevailing wage should be, you can turn to the FLC Data Center Online Wage Library, <http://www.flcdatacenter.com/OesWizardStart.aspx>. The screen captures below should help you learn to navigate this website.

A screenshot of the Foreign Labor Certification Data Center Online Wage Library website. The header includes the title "Foreign Labor Certification Data Center Online Wage Library" and the website URL "www.flcdatacenter.com". Below the header, there is a navigation menu with options like "Wage Library", "Quick Search", "Search Wizard", "Case Disclosure Data Archive", "H1B Data", "H2A Data", "H2B Data", and "Perm Data". The main content area features the "Online Wage Library - FLC Wage Search Wizard" section. It displays a message: "Data for 7/2015 - 6/2016 has been added to the download page and is effective 7/1/2015." Below this, there is a "Select a State/Territory:" dropdown menu with "Virginia" selected and a "Continue" button. A red arrow points from the "Continue" button to a "Choose the state" button. Below the dropdown, there is a note: "If you know the BLS Area Code and the OES/SOC Occupation Code or Title try using the faster OES Quick Search."

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Wage Library
Quick Search
Search Wizard

Case Disclosure Data Archive
H1B Data
H2A Data
H2B Data
Perm Data

Online Wage Library - Quick Search [New Quick Search](#) [New Search Wizard](#)

Data for 7/2016 - 6/2017 has been added to the [download page](#) and is effective 7/1/2016.

Select a Data Source: 

- 7/2016 - 6/2017 All Industries Database
- 7/2016 - 6/2017 ACWIA - Higher Education Database
- 7/2015 - 6/2016 All Industries Database
- 7/2015 - 6/2016 ACWIA - Higher Education Database
- 7/2014 - 6/2015 All Industries Database
- 7/2014 - 6/2015 ACWIA - Higher Education Database
- 7/2013 - 6/2014 All Industries Database
- 7/2013 - 6/2014 ACWIA - Higher Education Database

Choose your database. It will usually be the All Industries one. The ACWIA database is used for individuals seeking employment at colleges, universities, or research institutions. 20 CFR 656.40(e) defines what represents a college, university, and research institution.

Foreign Labor Certification Data Center
Online Wage Library www.flcdatacenter.com



Wage Library
Quick Search
Search Wizard

Case Disclosure Data Archive
H1B Data
H2A Data
H2B Data
Perm Data

Also available:
File Archive

Skill Level
Explanation

SVP Explanation

FLC Wage Data
updated
July 1, 2016

Job Zones updated
August 26, 2016
See change
history

Technical Support
& Help [FAQ page](#).

FLC Data Center - FLC Wage Search Wizard [New Quick Search](#) [New Search Wizard](#)

Data for 7/2016 - 6/2017 has been added to the [download page](#) and is effective 7/1/2016.

You have requested data for Virginia

Next, choose the area in which the H-1B worker's *worksite* is or will be located. The worksite, not the petitioner's business or mailing address, determines the prevailing wage. For the purposes of this example, we have chosen Fairfax, VA.

Select a Data Source: 

7/2016 - 6/2017 All Industries Database

Select an area based on County/Township BLS Areas 

- BUENA VISTA CITY - Northwest Virginia nonmetropolitan area
- CAMPBELL - Lynchburg, VA MSA
- CAROLINE - Richmond, VA MSA
- CARROLL - Southwest Virginia nonmetropolitan area
- CHARLES CITY - Richmond, VA MSA
- CHARLOTTE - Southside Virginia nonmetropolitan area
- CHARLOTTESVILLE CITY - Charlottesville, VA MSA
- CHESAPEAKE CITY - Virginia Beach-Norfolk-Newport News, VA-NC MSA
- CHESTERFIELD - Richmond, VA MSA
- CLARKE - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
- CLIFTON FORGE CIT - Northwest Virginia nonmetropolitan area
- COLONIAL HEIGHTS CITY - Richmond, VA MSA
- COVINGTON CITY - Northwest Virginia nonmetropolitan area
- CRAIG - Roanoke, VA MSA
- CULPEPER - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
- CUMBERLAND - Southside Virginia nonmetropolitan area
- DANVILLE CITY - Southside Virginia nonmetropolitan area
- DICKENSON - Southwest Virginia nonmetropolitan area
- DINWIDDIE - Richmond, VA MSA
- EMPORIA CITY - Southside Virginia nonmetropolitan area
- ESSEX - Northeast Virginia nonmetropolitan area
- FAIRFAX - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
- FAIRFAX CITY - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
- FALLS CHURCH CITY - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
- FAUQUIER - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division

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Foreign Labor Certification Data Center
Online Wage Library
www.flcdatacenter.com

Wage Library
[Quick Search](#)
[Search Wizard](#)

Data for 7/2016 - 6/2017 has been added to the [download page](#) and is effective 7/1/2016.

You have requested data for Virginia

Select a Data Source: 7/2016 - 6/2017 All Industries Database

Select an area based on: County/Township BLS Areas

FAIRFAX - Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Divisi

Enter a keyword or phrase:

OR Select an occupation from the list:

- 13-2072 | Loan Officers
- 13-2081 | Tax Examiners and Collectors, and Revenue Agents
- 13-2082 | Tax Preparers
- 13-2099 | Financial Specialists, All Other
- 15-1111 | Computer and Information Research Scientists
- 15-1121 | Computer Systems Analysts
- 15-1122 | Information Security Analysts
- 15-1131 | Computer Programmers
- 15-1132 | Software Developers, Applications
- 15-1133 | Software Developers, Systems Software
- 15-1134 | Web Developers
- 15-1141 | Database Administrators
- 15-1142 | Network and Computer Systems Administrators
- 15-1143 | Computer Network Architects
- 15-1151 | Computer User Support Specialists
- 15-1152 | Computer Network Support Specialists
- 15-1199 | Computer Occupations, All Other
- 15-2011 | Actuaries
- 15-2021 | Mathematicians

Locate the Standard Occupational Classification (SOC) on the LCA and choose it from the drop-down menu. For the purposes of this example, we have chosen Computer Programmers.

Informational: the SOC can be found on p. 1 of the LCA. It should align with the specialty occupation listed on Part 5 of the I-129.

A. Employment-Based Nonimmigrant Visa Information	
1. Indicate the type of visa classification supported by this application (<i>Write classification symbol</i>): *	H-1B
B. Temporary Need Information	
1. Job Title * PROGRAMMER ANALYST	
2. SOC (ONET/OES) code * 15-1131	3. SOC (ONET/OES) occupation title * COMPUTER PROGRAMMERS
4. Is this a full-time position? * <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Period of Intended Employment
	5. Begin Date * 09/12/2013 (mm/dd/yyyy)
	6. End Date * 09/10/2016 (mm/dd/yyyy)

Once you have input the database (All Industries, usually), location (Fairfax County, not City, for the purposes of our example), and SOC (Computer Programmer in our example), click on 'Search'. This provides the following result:

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Foreign Labor Certification Data Center Online Wage Library
www.flcdatacenter.com

Wage Library
Quick Search
Search Wizard

Case Disclosure Data Archive
H1B Data
H2A Data
H2B Data
Perm Data

Also available:
File Archive
Skill Level Explanation
SVP Explanation
FLC Wage Data updated July 1, 2016

FLC Wage Results New Quick Search New Search Wizard

You selected the All Industries database for 7/2016 - 6/2017.

Your search returned the following: [Print Format](#)

Area Code: 47894
Area Title: Washington-Arlington-Alexandria, DC-VA-MD-WV Metropolitan Division
OES/SOC Code: 15-1131
OES/SOC Title: Computer Programmers
GeoLevel: 1

Level 1 Wage: \$31.98 hour - \$66,518 year
Level 2 Wage: \$39.68 hour - \$82,534 year
Level 3 Wage: \$47.38 hour - \$98,550 year
Level 4 Wage: \$55.08 hour - \$114,566 year
Mean Wage (H-2B): \$47.38 hour - \$98,550 year

This wage applies to the following O*Net occupations:
15-1131.00 Computer Programmers

Create, modify, and test the code, forms, and script that allow computer applications to run. Work from specifications drawn up by software developers or other individuals. May assist software developers by analyzing user needs and designing software solutions. May develop and write computer programs to store, locate, and retrieve specific documents, data, and information.

Where you discover that the H-1B worker is not employed in the geographic area listed on the I-129 and in the certified LCA submitted in support of the petition, you need to check to see if a new or amended I-129 petition and a certified LCA for the new area of employment were filed to report the change in work location. See *Matter of Simeio Solutions*, 26 I&N Dec. 542 (2015).

If the respective petitioning employer has a history of filing I-129s for H-1B workers in “cheap” geographic areas but these workers are consistently found during later reviews in “expensive” areas, prevailing wage fraud by falsely-reported worksite location may be occurring.

- B. **Prevailing Wage Abuse – the Wage Level Aspect:** The DOL recognizes four wage levels, which are based on a worker’s job responsibilities, education, and/or experience. The DOL’s Employment and Training Administration (ETA) issued revised guidance about wage levels in November 2009 (see p. 7 of the DOL guidance found at http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf). The higher the wage level, the higher the prevailing wage – as you can see from the FLC Data Center’s website screen capture above for Computer Programmers in Fairfax, VA.

You can find the wage level listed on p. 3 of the LCA:

Prevailing Wage Information (corresponding to the place of employment location listed above)	
7. Agency which issued prevailing wage \$ N/A	7a. Prevailing wage tracking number (if applicable) \$ N/A
8. Wage level * <input checked="" type="checkbox"/> I <input type="checkbox"/> II <input type="checkbox"/> III <input type="checkbox"/> IV <input type="checkbox"/> N/A	
9. Prevailing wage * \$ 45864.00	10. Per. (Choose only one) * <input type="checkbox"/> Hour <input type="checkbox"/> Week <input type="checkbox"/> Bi-Weekly <input type="checkbox"/> Month <input checked="" type="checkbox"/> Year

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USCIS Policy Memorandum 602-0142 of 03/31/2017 provides the following guidance about wage levels: “USCIS officers must also review the LCA to ensure the wage level designated by the petitioner corresponds to the proffered position. If a petitioner designates a position as a Level I, entry-level position, for example, such an assertion will likely contradict a claim that the proffered position is particularly complex, specialized, or unique compared to other positions *within the same occupation.*” [Italics in original]

- Wage-level abuse occurs when a company lists an H-1B worker at a lower wage level even though that worker’s job responsibilities correspond to a higher level.
 - An LCA might list a worker as a level-one Systems Analyst or Computer Programmer because these are lower-paid occupations in the hi-tech field (see the FLC Data Center for confirmation).
 - A site visit may reveal, however, that the worker is performing his or her duties with little supervision – in other words, the worker appears to be doing level-two or higher work.
 - Looking at the difference between a level-one and a level-three Computer Programmer in the Washington, DC area, one can see the incentive to report a lower wage level on the LCA: the difference in wages is more than \$30,000 per year.

Asking the H-1B worker’s immediate supervisors, including end-client supervisors, about the level of supervision can help verify that the wage level on the LCA and compensation listed on both the LCA and I-129 match the H-1B worker’s actual duties. An immediate supervisor’s responses can also be checked against responses provided by the H-1B worker himself or herself. If an H-1B worker’s contact with a supervisor occurs once a week or less, the appropriate wage level may be higher than level one. Additional questioning should reveal the relative complexity of the H-1B worker’s duties and the amount of responsibility this worker has. Responses to this additional questioning should help to determine if the H-1B worker is being employed in the occupation and at the wage level stated in the certified LCA and I-129 petition.

The previously cited USCIS Policy Memo 602-0142 of 03/31/2017 reminds USCIS personnel that the wage level “reflects the job requirements, experience, education, special skills/other requirements, and supervisory duties.”

- C. **Standard Occupational Classification (SOC) Abuse:** each occupation is defined in layman’s terms by the DOL through the OOH, as discussed above. Through its “Standard Occupational Classifications,” or SOCs, DOL provides codes to facilitate classification of occupations. For our purposes, we can use “SOC” and “occupation” interchangeably.

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1. SOC abuse is straightforward: as mentioned earlier, Systems Analysts and Computer Programmers are among the lower-paid SOCs. FDNS officers conducting compliance reviews may encounter H-1B workers who are supposed to be working as Systems Analysts or Computer Programmers per their LCAs and I-129s but who actually perform duties associated with other, higher-paid SOCs, such as Software Developers.
2. Looking at the FLC Data Center website, you can see the incentive: rather than paying a level-two Software Developer (Applications) located in the Fairfax area \$90,646, an employer only has to pay a level-two Programmer \$82,534. This is a savings to the employer of \$8,112.

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- Conduct research into fundamental computer and information science as theorists, designers, or inventors. Solve or develop solutions to problems in the field of computer hardware and software.
- Convert project specifications and statements of problems and procedures to detailed logical flow charts for coding into computer language. Develop and write computer programs to store, locate, and retrieve specific documents, data, and information. May program web sites.
- Develop, create, and modify general computer applications software or specialized utility programs. Analyze user needs and develop software solutions. Design software or customize software for client use with the aim of optimizing operational efficiency. May analyze and design databases within an application area, working individually or coordinating database development as part of a team.
- Research, design, develop, and test operating systems-level software, compilers, and network distribution software for medical, industrial, military, communications, aerospace, business, scientific, and general computing applications. Set operational specifications and formulate and analyze software requirements. Apply principles and techniques of computer science, engineering, and mathematical analysis.
- Provide technical assistance to computer system users. Answer questions or resolve computer problems for clients in person, via telephone or from remote location. May provide assistance concerning the use of computer hardware and software, including printing, installation, word processing, electronic mail, and operating systems.
- Analyze science, engineering, business, and all other data processing problems for application to electronic data processing systems. Analyze user requirements, procedures, and problems to automate or improve existing systems and review computer system capabilities, workflow, and scheduling limitations. May analyze or recommend commercially available software. May supervise computer programmers.
- Coordinate changes to computer databases, test and implement the database applying knowledge of database management systems. May plan, coordinate, and implement security measures to safeguard computer databases.
- Install, configure, and support an organization's local area network (LAN), wide area network (WAN), and Internet system or a segment of a network system. Maintain network hardware and software. Monitor network to ensure network availability to all system users and perform necessary maintenance to support network availability. May supervise other network support and client server specialists and plan, coordinate, and implement network security measures.
- Analyze, design, test, and evaluate network systems, such as local area networks (LAN), wide area networks (WAN), Internet, intranet, and other data communications systems. Perform network modeling, analysis, and planning. Research and recommend network and data communications hardware and software. Includes telecommunications specialists who deal with the interfacing of computer and communications equipment.
- Plan, coordinate, and implement security measures for information systems to regulate access to computer data files and prevent unauthorized modification, destruction, or disclosure of information.

Each of the descriptions above corresponds to a SOC (Systems Analyst, Computer Programmer, Software Engineer, Database Administrator, etc.) – see the attached Computer Skills Key.

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D. H-1B Workers’ Payment of Certain Fees Associated with I-129 filings: this is unlawful, but it happens.

1. INA § 212(n)(2)(C)(vi)(II) stipulates that employers cannot require H-1B workers to pay any part of the ACWIA fee;
2. INA § 214(c)(12)(A) stipulates that the fraud fee is imposed on the employer;
3. 20 CFR 655.731(c)(9) stipulates that an employer may not recoup H-1B costs if these are considered a “business expense.” So if an employer declares the I-129 form-filing fee of \$460 or the premium processing fee of \$1,225 as a business expense for tax purposes, the employer cannot deduct these sums from the H-1B worker’s pay or otherwise require the H-1B worker to pay these fees if such deduction would reduce the H-1B worker’s pay below the required wage.

The table below is a visual aid for the H-1B fee structure:

Fee	Amount	Who Pays?
Form Filing Fee	\$460	Generally employer
American Competitiveness and Workforce Improvement Act (ACWIA) Fee	\$750 (if employer has fewer than 26 employees) \$1,500 (if 26 or more)	Employer <i>only</i> – see INA § 212(n)(2)(C)(vi)(II)
Fraud Fee	\$500	Imposed “on an employer” – see INA § 214(c)(12)(A)
Attorney’s Fee	Vary	Employer or H-1B Worker
Premium Processing Fee	\$1,225	Generally employer

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1. If there was no position available from the start, the petitioner may have willfully misrepresented its need for the H-1B worker and the I-129 may be subject to revocation. The worker could find him/herself without status in this situation and thus removable per INA § 237(a)(1)(C).
2. If an H-1B worker is not being paid while in the United States as he or she is waiting for projects or work, he/she is generally considered “benched.” Because the H-1B worker is in the U.S. to work, benching makes him or her a status violator (not necessarily willful) and possibly removable.
 - a. There are exceptions to this definition of benching: for example, a worker may be on extended unpaid leave, such as unpaid leave under the Family and Medical Leave Act. FDNS officers who encounter a suspected instance of benching should ensure that no exception applies. Officers should also ensure that, where (b) (7)(E)

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Here it is important to note that an alien worker is generally not able to change or extend nonimmigrant status or adjust through an immigrant worker petition if s/he has violated the terms of his or her underlying nonimmigrant visa (H-1B, F-1, L-1A, etc.).

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