Comprehensive 2025 H-1B Visa Filing Guide

How to Navigate a More Challenging H-1B Landscape

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INTERNATIONAL LEGAL AND BUSINESS SERVICES GROUP

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After several years of a more relaxed immigration landscape, U.S. policy is now shifting back to stricter scrutiny and increased enforcement actions. The 2025 H-1B visa program has been a major focus in the past and we can expect that it will again be under a microscope. While the current administration has been vocal about its support of the H-1B program in general, the immigration agencies (which include USCIS, ICE, and CBP) have been instructed to strictly enforce immigration law and combat fraud. The H-1B program will not be an exception.

On January 17, 20205, a new H-1B rule went into effect which formally codified many existing USCIS adjudicatory practices. The rule focuses on strengthening the definition of specialty occupation, providing greater power to USCIS to deny/revoke approvals for employers who do not cooperate during site visits, as well as streamlining approvals for extension petitions where deference to a past decision is warranted. The rule also eliminates any ability for employers to file H-1B petitions for speculative work, requiring employers to prove there is a bona fide specialty occupation available for the beneficiary as of the requested start date. In other words, for IT consulting companies, there must be a project in place at the time of filing. While the rule itself is not a major departure from existing practices, we can expect increased scrutiny for all H-1B petitions in light of the current administration's hardline stance on immigration.

This will mean that 2025 H-1B visa employers and employees alike should anticipate a higher likelihood of inquiries from USCIS (through requests for evidence, notices of intent to deny/revoke, etc.), increased compliance checks through FDNS site visits, greater challenges during visa stamping at the consulates, and increased scrutiny during initial entry or reentry at U.S. ports of entry.
This guide contains comprehensive recommendations for H-1B employers and employees, to help navigate this more challenging immigration landscape and ensure the best possible outcomes.

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H-1B Petition Considerations – Filing Stage

Documentation Requirements

We can expect increased scrutiny during the adjudication of H-1B petitions for new employment, change of employers, and amendment petitions. While USCIS will grant deference to prior approvals at the H-1B extension stage (meaning documentary requirements will be more relaxed), all other petitions will be subject to a higher level of review.

Because the new H-1B rule requires employers to show there is a bona fide specialty occupation position available, it will be increasingly important for employers to provide concrete evidence of the work to be performed. For third-party placements, this will mean providing a detailed end client letter confirming the job title, job duties, and degree requirement, as well as the contracts between all parties involved in the project. Speculative work will not be sufficient – there must be a project in place, and it must be well documented. It is important to note that if the end client or project documentation confirms a shorter duration than the requested validity period, the H-1B approval will likely be shortened to match the end date confirmed in the documentation.

The new rule is clear that for third party placements, it is the end client's requirements for the position that will establish if it is a specialty occupation, not the petitioner's requirements. This means H-1B employers will need to provide evidence that the end client requires a bachelor's degree or higher in a specific specialty directly related to the position. This can be done through an end client letter or the end client's job postings, where available. Without this evidence, USCIS may find a specialty occupation has not been proven.

Finally, when filing H-1B amendments or transfers, USCIS will evaluate whether the H-1B employee has been maintaining valid H-1B status. It is imperative that paystubs for the prior H-1B period are provided, which reflect the LCA wages were paid each pay period.

LCA Considerations

USCIS is also going to scrutinize wage levels, a practice we have seen increase over the past few months. USCIS will be targeting employers it believes are intentionally using weaker SOC codes or selecting wage levels below what the actual position requires in an effort to lower the required wage rate.

Both the DOL and USCIS rules require an H-1B employer to select the SOC code that best aligns with the position. Where a position entails job duties which may fall under more than one code, the DOL requires the employer to select the code with the highest wages. What this means is that if the position is a software developer role, employers must use the software developer SOC code. While the computer programming code may allow lower wages, if the role is truly software development, you must use the software developer code. The O*NET was recently updated to downgrade several IT-related SOC codes from Job Zone Four to Job Zone Three, which means they cannot be used to support a specialty occupation. As such, there are now limited SOC codes which can be used to support IT-related positions. It is critical employers are consistently choosing the strongest codes. There has been a sharp increase in RFEs targeting this specific issue and employers should be on notice.

Wage levels are also being highly scrutinized. If a position requires experience, special skills, or entails supervisory duties, the wage level must reflect this. It is important to remember that the end client's requirements control per the new H-1B rule– so if the end client confirms the position requires a bachelor's degree and five years' experience, you must file the LCA with Wage Level III or higher, regardless of the experience requirements at your company. FDNS is also regularly targeting this issue, completing site visit checks with the employer, employee, and end client to confirm the requirements and establish whether the LCA was properly designated.

In the past, there have been instances where USCIS found publicly available job postings from the end client to confirm the position requirements, subsequently issuing RFEs or denial notices where inconsistencies were found. We can expect a similar level of scrutiny under the current administration – USCIS may consult publicly available sources and investigate outside the actual petition documents submitted. Thus, it is imperative that at the filing stage, the SOC code and wage level are carefully selected to ensure the LCA is properly certified.

Beneficiary-Owners & Entrepreneurs

While the new H-1B rule largely codified existing adjudicatory practices, one notable change is that an H-1B employer may now include a business where the H-1B employee holds a controlling interest. In other words, entrepreneurs will now be permitted to sponsor their own H-1B petition through the company they own, without facing challenges related to the employer-employee relationship requirement. A controlling interest means owning more than 50 percent of the company and holding majority voting rights. Under the new rule, the H-1B beneficiary-owner must spend more than half of their time performing specialty occupation duties, but they are also permitted to perform duties related to owning and directing the business.

For H-1B petitions filed for beneficiary-owners, it will be very important to include a detailed job description which breaks down the job duties with a percentage of time for each duty, showing that the ownership duties are incidental, and that the majority of the work being performed is still specialty occupation work. The ownership stake must be disclosed in the form and the initial approval and first extension approval will be limited to 18 months only, rather than the usual 36 months. This will allow USCIS to more frequently evaluate and ensure complete program compliance.

For owners of IT consulting companies, filing an H-1B petition for a beneficiary-owner may be more nuanced, since you will be required to show what specialty occupation work the beneficiary-owner will be performing. If the company does not produce a product, but instead provides consulting services, this will entail providing evidence of the IT project to which the beneficiary-owner is assigned (documented with letters and contracts) and explaining how the beneficiary-owner completes their specialty occupation duties while also directing the business. The feasibility of this approach will vary case-by-case and entrepreneurs interested in filing a beneficiary-owner petition should consult with an experienced immigration attorney on the best path forward.

If you have questions about the 2025 H-1B Visa, please reach out to an ILBSG attorney today.

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