Comprehensive 2025 H-1B Visa 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.

H-1B Petitions -Material Changes After Approval

The rules regarding H-1B amendments remain unchanged, but H-1B employer and employees should be on high alert and conservatively file H-1B amendments any time there is a material change in employment. While Matter of Simeio did not outline every possible change USCIS may consider material, we know from RFEs and site visits that USCIS considers end client or project changes to be material, thereby requiring an amendment before the change takes place. This is true even when the work location is not changing. What this means is that even if an H-1B employee is working remotely from their residence, if the project or end client changes, an H1B amendment must be filed before the employee begins working on the new project/with the new end client. Other material changes include salary changes, location changes, title changes, and increases or changes in responsibilities.

Notably, we have also seen USCIS targeting situations where an H-1B employee is between projects, but an amendment was not filed to notify USCIS the original project ended. In other words, it is USCIS' position that if the project ends, an amendment needs to be filed notifying USCIS. Once the employee is placed on a new project, another amendment is then required. This is official policy, which can be found in USCIS' policy memorandum published following the ITServe lawsuit (PM-602-0114, published June 17, 2020). Both the ITServe lawsuit and USCIS' subsequent policy memo address this common situation within the IT industry, where an employee is in between projects and considered to be in "nonproductive" status.

In the ITServe lawsuit, Judge Collyer held that “periods without work are now allowed for H-1B visa holders as long as they continue to be paid.” ITServe Alliance, Inc. v. Cissna, No. CV 12-02350 (RMC), 2020 WL 1150186, Footnote 15 (D.D.C. March 10, 2020). The court held that the itinerary requirement, as imposed by the CIS interpretation of the INS 1991 Regulation and applied to Plaintiffs by the CIS 2018 Policy Memo, was incompatible with the 1998 ACWIA that addresses the same subject, in immediately related administrative schemes, and “authorizes employers to place H-1B visa holders in paid non-productive status”

In its subsequent policy memo, addressing this specific point, USCIS stated:

“Guidance concerning benching remains unchanged. The officer may issue a Notice of Intent to Deny (NOID) for failure to maintain status or a Notice of Intent to Revoke (NOIR), as appropriate, if evidence in the record indicates that there has been a material change in the terms and conditions of employment that may affect eligibility. Lack of work may be a material change in the terms and conditions of employment that could affect eligibility for H-1B nonimmigrant classification and could require the filing of an amended petition.

The regulations further state that being “no longer employed in the capacity specified in the petition” is a basis for revocation on notice. Being placed in non-productive status or training for an extended time period, even if paid, may qualify as being “no longer employed in the capacity specified in the petition.” If a beneficiary is in non-productive status because of a lack of work, that could indicate that the beneficiary no longer is in a specialty occupation and there has been a material change in the terms and conditions of employment that may affect eligibility.”

Accordingly, when a project ends, H-1B employers should quickly place the employee on a new project and timely file an amendment. If the beneficiary will be between projects for more than 30 days, employers should consider filing an H-1B amendment with USCIS to notify USCIS that the beneficiary is no longer working on the previously approved project. If the time in nonproductive status is less than 30 days, it can be defended under the Matter of Simeio guidance as a short-term placement, but anything longer than 30 days can raise an issue that there was a material change in employment which USCIS was not notified of. When filing an amendment petition for the time in between projects, it will be very important to work with an attorney to determine how the role should be presented, to ensure it still meets the available specialty occupation criteria.

H-1B Compliance – Responding to Site Visits

We have seen a notable uptick in site visits over the last few years, which we can expect will only increase. Under the new H-1B rule, while employers can still choose not to participate, USCIS will now have the authority to deny or revoke the H-1B petition outright based on the information they have in the record at that time, without first issuing a Notice of Intent to Deny (NOID) or Notice of Intent to Revoke (NOIR). As such, employers should plan to fully cooperate during site visits.

It is imperative that H-1B employers and employees seek advice of counsel before submitting any response. Often, a site visit or compliance check entails a list of questions emailed to the employer/employee by the FDNS officer, so the responses are recorded in writing and become the official record. Many of the questions will appear seemingly innocuous but are actually targeting a specific issue. For example, we have seen many site visits recently which simply ask the employer to confirm the job title, duties, degree requirement, years of experience, special skills, or supervisory duties. Many employers will respond and, in a misguided effort to clearly establish a specialty occupation, confirm a higher level of experience than included with the initial petition or list special skills not previously accounted for. Later, the employer will receive a NOIR finding that based on the years of experience confirmed during the site visit, the LCA was filed with the incorrect wage level. This is an issue that cannot be overcome. After this information has been confirmed in writing during the site visit, it cannot be taken back.

There are two takeaways from this increasingly common occurrence: first, it is critical that the LCA is filed for the proper wage level, considering the actual position requirements, even if it means higher wages. Second, if you do not consult counsel before responding during a site visit and you confirm new details about the position which were not contained in the original filing or disclosed to your attorney at that time (level of experience, special skills, supervisory duties), your attorney will not be able to overcome any adverse action by USCIS later. As such, always consult with counsel during a site visit, to make sure your answers align with the filed petition and that you understand the implications of each question and its answer.

H-1B Visa Processing Abroad & Travel Considerations

Under the current administration, H-1B holders and H-1B hopefuls alike should anticipate increased scrutiny at both the consulate stage for visa stamping and during initial entry or reentry at U.S. ports of entry. For the past few years, we have experienced an increased incident of 221G notices during visa stamping and we can expect that this will continue. While USCIS largely stopped requiring client letters following the ITServe lawsuit, the consulates never really did – often, 221G notices have been issued because the consular officer sent a verification email to the end client and either did not receive a response or received a negative response, confirming that the services were not expected. We can expect continued end client verification during visa stamping for IT workers assigned to third-party client projects. To avoid delays, H-1B beneficiaries should carry an employment verification letter from the H-1B employer as well as the end client where applicable, confirming the services are expected. Contracts between all parties should also be presented where possible. Carrying strong documentation during visa stamping will be crucial to approval.

H-1B visa holders can also expect increased scrutiny during initial entry or reentry. H-1B holders should anticipate they will be asked for their documentation, endure often intense questioning, and that CBP may call their employer/end client from the airport to confirm they are expected. H-1B visa holders should be aware that CBP can go through their phones, laptops, messages, emails, etc. and if any information is discovered which contradicts their approved employment or purpose in coming to the U.S., they will be denied entry and returned to their home country. Where possible, it may be best to avoid or minimize travel.

Final Thoughts

While the H-1B rules have not dramatically changed, the rules will be more strictly enforced. Employers and employees should plan accordingly. As long as H-1B petitions are supported by strong documentation and each position is a bona fide specialty occupation with actual work to be performed, processing will remain smooth and largely unaffected. More than ever, it will be important that H-1B employers and their employees consult with experienced immigration attorneys on any changes to the approved employment or unique situations that may arise.

H-1B employers and employees should strive for complete compliance and maintenance of status, which means ensuring the LCA is properly filed to align to the actual position, that the LCA wages are paid each pay period even during any period of unproductive status, and that any material changes in employment are accompanied by a timely filed H-1B amendment to notify USCIS. If there is ever a question or any uncertainty, seek advice of counsel to ensure complete and total compliance with all relevant immigration laws, regulations, and policies.

At ILBSG, we have years of experience navigating challenging immigration landscapes under various administrations and we are prepared to face any obstacles that arise with strategic solutions, careful advice, and a focus on our clients' continued success in this space. We're here to help.

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

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