



A Primer for Employers to Navigating the Trump Administration's H-1B VISA Policies

Jul 07, 2026

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The Evolving Legal Landscape for H-1B Visas

The Trump Administration, in an effort to protect American workers as part of its America First agenda, has made enforcement and tightening of the rules for H-1B nonimmigrant visas for specialty occupations a priority. The U.S. Citizenship and Immigration Services closely examines whether the position is a specialty occupation, and whether the worker qualifies as a member of that specialty occupation. Furthermore, it is not enough that the worker holds a bachelor's degree, for the bachelor's degree must be in a field directly related to the worker's job duties.^[1]

On September 19, 2025, the U.S. Department of Labor announced the launch of Project Firewall.^[2] Under this program the Wage and Hour Division of the DOL will conduct investigations of employers to maximize H-1B program compliance. The Secretary of Labor will personally certify the initiation of investigations for the first time in the DOL's history. This action leverages existing authority granted to the Secretary if reasonable cause exists that an H-1B employer is not in compliance. The DOL will lead Project Firewall in collaboration with the Civil Rights Division of the Department of Justice, the Equal Employment Opportunity Commission, and the U.S. Citizenship and Immigration Services.

On November 19, 2025, the U.S. Equal Employment Opportunity Commission released new and updated educational materials on national origin discrimination.^[3] EEOC Chair Andrea Lucas stated that unlawful bias against American workers, in violation of Title VII of the Civil Rights Act of 1964, is a large-scale problem in multiple industries nationwide. Many employers have policies and practices preferring illegal aliens, migrant workers, or nonimmigrant guest workers over American workers. National origin discrimination can include preferring foreign workers, including workers with a

particular visa status, over American workers.

Discrimination against American workers might include discriminatory job advertisements, such as ads that say the employer prefers or requires applicants from a particular country or with a particular visa status, for example, “H-1B preferred” or “H-1B only.” Discrimination can also include disparate treatment related to firing, such as a company terminating American workers who are on the bench between job assignments at a much higher rate than employees who are visa guest workers. Evidence of disparate treatment related to hiring can include an employer making it more difficult for applicants from one national origin to apply for positions, such as subjecting U.S. workers to more laborious application methods than H-1B visa holders during the PERM labor certification process.[\[4\]](#)

Department of State Social Media Review Policy

On December 3, 2025, the U.S. Department of State announced that beginning on December 15, 2025, applicants for H-1B visas and their H-4 dependents (spouses and minor children) must set their social media profiles to public so consular officers can review their online activity.[\[5\]](#) This requirement applies to new applications and cases processed from that date forward. It extends the same social media review policy introduced in June 2025 for applicants for F (academic students), M (vocational students), and J (exchange visitors) visas to applicants for H-1B and H-4 visas. The purpose of this requirement is to assist in identifying applicants who pose a threat to national security or public safety.

Making the profiles public means consular officers can see posts, likes, shares, comments, bios, job history, and connections that would otherwise remain hidden behind privacy settings. Consular officers will pay close attention to applicants whose backgrounds or jobs entail online content moderation or control, disinformation and misinformation work, fact checking, and digital safety. Consular officers will also look for efforts to steal technical information and exploit U.S. research and development.

Wage-Weighted Lottery of Department of Homeland Security

On December 23, 2025, the U.S. Department of Home-land Security issued its final rule for replacing the random lottery for H-1B visas with a wage-weighted selection system.^[6] The rule went into effect on February 27, 2026 and applied to the H-1B registration cycle that opened on March 4, 2026 and closed on March 19, 2026. Each registrant is entered into one lottery pool, but registrants with higher wage levels are entered into the pool multiple times.^[7]

The wage levels reflect the codes for the DOL's Standard Occupational Classification System ("SOC"). Since the SOC code for each registrant must accurately reflect the job duties for the registrant's position, the employer must ensure that the wage level and job duties are aligned.

The U.S. Citizenship and Immigration Services weights each registration by the highest Occupational Employment and Wage Statistics ("OEWS") wage level that the registrant's offered salary equals or exceeds the SOC code in the area of intended employment.^[8] This weighting reflects where the offered salary falls within the OEWS distribution for the particular occupation.

These rules establish the following analytical framework. First, the employer determines the worker's job duties, the skills required for the position, and the level of supervision involved. Second, the employer determines the SOC code. Third, the employer determines the wage level.

Employers should calculate the wage level using the Office of Foreign Labor Certification's foreign labor application gateway system's search tool. They should use the SOC code and area of intended employment as the search terms, and perform this calculation for each potential SOC code before submitting the registration. Wage distributions vary across occupations, and the same salary can produce different wage levels for different occupations.^[9]

The OEWS wage level calculation for registration is separate from the prevailing wage determination for the labor condition application. The prevailing wage for the labor condition application is based on the position's requirements. The wage level determination for registration is based on where the offered salary

comes within the OEWS distribution for the applicable SOC code. For example, a position can be Level I for the labor condition application, yet register at a higher level wage level if the offered salary is high enough.

Each SOC code has four wage levels: (1) Level I wages for entry-level positions involving routine tasks, close supervision, or training components; (2) Level II wages for fully qualified, mid-level professionals with some experience for positions that require more independent decision-making and complex tasks; (3) Level III wages for senior-level roles performing complex tasks with significant autonomy and responsibility and who may supervise others; and (4) Level IV wages for supervisory or managerial positions requiring the highest level of experience and independent judgment, often involving leadership, strategy, or recognized expertise.

A worker at Level I wages is entered into the pool one time; a worker at Level II wages two times; a worker at Level III wages three times; and a worker at Level IV wages four times.

The registrations must include the offered position's SOC code, area of intended employment that served as the basis for the wage level on the registration, and OEWS wage level.^[10] Once a registrant is selected, the labor condition application, H-1B petition, and wage paid must match the information in the registration. In addition, the H-1B petition must provide evidence of how the employer determined the wage level submitted on the registration as of the date of submission.^[11] The U.S. Citizenship and Immigration Services will carefully review whether the information submitted at registration for wages, job duties, SOC code, and location matches that in the H-1B petition.

Notifications of selection in the lottery go out by March 31, and the H-1B petition filing window on Form I-129 opens on April 1 and closes on June 30.

Under these rules and procedures, employers should take the following steps:

- The employer prepares the appropriate documentation before submission of the registration to show that the SOC code reflects the job duties.

- The employer runs the wage level calculation against the Office of Foreign Labor Certification wage tool for each potential SOC code.
- The labor condition application and H-1B petition match the SOC code, area of intended employment, and wage level submitted in the registration.
- If the H-1B worker will work at multiple worksites, the registration uses the lowest applicable OEWS wage level for the worksites.[\[12\]](#)

The process used to determine the appropriate SOC code wage level for the lottery is similar to the process employers use to determine the prevailing wage. One way to determine the prevailing wage is for the employer to file an ETA Form 9141 prevailing wage request with the Office of Foreign Labor Certification's National Prevailing Wage Center. The DOL uses data from the OEWS wage survey administered by the DOL's Bureau of Labor Statistics.

Since the DOL can take up to a year to make this de-termination, employers often use the following alternative procedure. The employer first determines which of the DOL's SOC codes the job qualifies for by consulting the DOL's Occupational Information Network (O*NET) Online. The employer then consults the Office of Foreign Labor Certification National Prevailing Wage Center to determine the prevailing wage for the SOC code in the geographic location of the proposed job. There are four different wage levels for each SOC code. The employer determines the prevailing wage for the SOC code by using the wage level worksheet on the DOL's 2009 Prevailing Wage Guidance. If there are multiple worksites, the employer uses the highest wage for the worksites.

On March 26, 2026, the DOL issued a notice of pro-proposed rulemaking to revise how the prevailing wage is determined for foreign workers under H-1B, H-1B1, and E-3 nonimmigrant visas, and permanent labor certification under the Program Electronic Review Management ("PERM") for EB-2 and EB-3 employment-based immigrant visas.[\[13\]](#) The proposed rule would apply to prevailing wage determination applications pending with the Office of Foreign Labor Certification National Processing Center as of the effective date of the final rule, and to new labor condition applications and

prevailing wage determination requests filed on or after that date. The rule would not retroactively apply to previously approved PERM prevailing wage determinations, permanent labor certifications, and labor condition applications.

The proposed rule uses data from the OEWS wage survey to establish the prevailing wage for both the labor condition application and PERM. The OEWS survey uses a four-tiered wage structure that seeks to ensure that wages paid for foreign nationals meet industry standards and do not depress the wages of similarly employed U.S. workers.

The proposed rule provides for significant increases in the OEWS percentile levels for the four prevailing wage levels. Wage Level I increases from the 17th percentile to the 34th percentile; Wage Level II increases from the 34th percentile to the 52nd percentile; Wage Level III increases from the 50th percentile to the 70th percentile; and Wage Level IV increases from the 67th percentile to the 88th percentile. The DOL estimates that these increases would increase the average wage by approximately \$14,000 per year per worker.

The \$100,000 H-1B Petition Fee and Litigation

On September 19, 2025, President Trump issued Presidential Proclamation No. 10973 that imposed a \$100,000 fee on H-1B visa petitions through September 21, 2026 unless extended.^[14] On October 20, 2025, the U.S. Citizenship and Immigration Services issued guidance on the proclamation.^[15] The fee applies to new H-1B petitions filed on or after September 21, 2025 for workers outside the U.S. who do not have currently valid H-1B visas, and to new H-1B petitions filed after September 21, 2025 that request consular or port-of-entry processing. Thus, the fee applies to change of status, amendments, and extensions that request consular or port-of-entry processing for workers outside the U.S.

The employer pays the fee when it files the petition using the same electronic payment portal for the regular filing fee.

The fee does not apply to workers who have approved H-1B petitions as of September 21, 2025, petitions filed and pending as of

September 21, 2025, or holders of valid H-1B visas as of September 21, 2025.

Under this framework, employers should endeavor to file petitions for workers already in the U.S. and classify the petition as an in-country change of status, amendment, or extension, rather than consular processing.

It is not always clear what a new petition is. For example, does a new petition include a new employment for a worker already cap-exempt and between jobs?

It is also not always clear what a currently valid visa is. For example, does a currently valid visa include individuals who are lawfully in the U.S. with an unexpired I-94 entry record but an expired visa stamp? These individuals do not need a new visa to remain in the U.S.

The USCIS guidance also provides that the fee applies to a worker initially in the U.S. if a petition filed on or after September 21, 2025 requests a change of status, amendment, or extension of stay for a worker in the U.S., but the USCIS denies the petition because the worker does not qualify for the benefit, such as due to a violation of nonimmigrant status, leaving the U.S. before adjudication of a change of status, or exceeding his or her period of stay.

Under this guidance, the fee can apply in the following situations. First, a new employer files an H-1B transfer application, and while the application is pending the worker leaves the U.S. to attend to a family emergency. The transfer is approved with consular processing. Second, an H-1B worker is terminated, near the end of the sixty-day grace period obtains a new job, and leaves the U.S. at the end of the grace period. The new employer files an H-1B transfer application outside the grace period, which is approved with consular processing.

Both the proclamation and USCIS guidance provide an exception for H-1B petitions that are in the national interest. The guidance provides that the Secretary of Homeland Security will grant the exception only when the Secretary has determined that the alien worker's presence in the U.S. as an H-1B worker is in the national interest, that no American worker is available to fill the position, that the alien worker does not pose a threat to the security or welfare of

the U.S., and that requiring the employer to make the payment on the alien's behalf would significantly undermine the interests of the U.S.

On December 23, 2025, the Honorable Beryl A. Howell of the District Court for the District of Columbia granted the government summary judgment and rejected a challenge by the plaintiffs Chamber of Commerce and Association of American Universities (a coalition of research institutions) to the President's imposition of the additional \$100,000 fee.^[16]

Under 8 U.S.C. §1182(f), Congress granted the President broad power to restrict entry of noncitizens whenever the President finds that such entry would be detrimental to the interests of the U.S. In addition, under 8 U.S.C. §1185(a), Congress granted the President broad authority to order restrictions and prohibitions on entry and to adopt reasonable rules, regulations, and orders governing entry or removal of noncitizens. The President exercised his discretion to find that the additional fee was necessary to impose higher costs on companies seeking to use the H-1B program to address the abuse of the program while still permitting companies to hire the best of the best temporary foreign workers.

The case is currently before the United States Court of Appeals for the District of Columbia Circuit. The court heard oral argument on March 10, 2026.^[17]

In addressing the validity of the \$100,000 fee, the Court of Appeals will need to address the effect of *Learning Resources, Inc. v. Trump*,^[18] the case in which the United States Supreme Court struck down the tariffs unilaterally imposed by President Trump under the International Emergency Economic Powers Act (the "IEEPA"). Under the IEEPA, the President had the power in an emergency to "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest."

The majority opinion was authored by Chief Justice Roberts who was joined by Justices Sotomayor, Kagan, Gorsuch, Barrett, and Jackson. The Court held that the tariffs were a tax, rather than a regulatory measure. Under Article I, Section 8, clause 1 of the Constitution, only the legislature was granted the power to lay and collect taxes, duties, imposts, and excises. The taxing power included the power to impose tariffs. The powers the Constitution granted to the legislature and judiciary were separate from the grants of powers to the executive. The executive was not vested with any part of the taxing power.[\[19\]](#)

The Court rejected the argument that the grant of the power to regulate importation includes the implementation of tariffs as a regulatory tool. Authorizing the President to set tariff policy denies that regulation and taxation impose distinct financial burdens that the Constitution separates. If Congress were to assign an Article I enumerated legislative right to the executive, it would have to be with overwhelming clarity.

Chief Justice Roberts and Justices Barrett and Gorsuch wrote separately in a plurality opinion that relied on the major questions doctrine. The power to impose tariffs was a Congressional power of vast significance and could not be delegated to the President without clear Congressional authorization. Even if the IEEPA was ambiguous in its grant of powers to the President, the IEEPA gave the President emergency authority only to regulate importation, and not impose tariffs.

Justices Kagan, Jackson, and Sotomayor wrote separately in a plurality opinion that the major questions doctrine did not apply because the IEEPA was unambiguous in not granting the President the power to impose tariffs.

Under *Learning Resources*, the issue is whether the \$100,000 fee is a tax, and if so, whether the Immigration and Nationality Act grants the President the power to impose the tax. The argument that the fee is a tax is that it raises revenue, and it remains a tax regardless of its regulatory effect. The fee is no different from a tax for the failure to buy health insurance and thereby induce individuals to buy health insurance under *National Federation of Independent Business v. Sebelius*.[\[20\]](#)

The argument that the INA does not grant the President the power to tax is as follows. Under 8 U.S.C. §1182(f), the President may suspend entry or impose on the entry of aliens any restrictions he may deem appropriate. Under 8 U.S.C. §1185(a), the President may prescribe reasonable rules, regulations, and orders, and limitations and exceptions on a noncitizen's departure from and entry into the U.S. Neither statute explicitly provides for fees or other charges.

Furthermore, under the major questions doctrine, the government cannot claim broad, expansive power on an uncertain statutory basis. When the purported delegation involves the Congressional power of the purse, Congress must delegate it clearly, and not through ambiguous statutory text.

In addition, the INA has provisions that explicitly pro-vide for or authorize the Attorney General, Secretary of Homeland Security, and Secretary of State to impose fees on H-1B employers.^[21] These provisions show that when Congress establishes fees and fee-setting authority, it does so clearly and within defined parameters.

These arguments were largely adopted by the Honorable Leo T Sorokin of the District Court for the District of Massachusetts in *State of California v. Mullin*.^[22] The court granted the plaintiffs summary judgement and struck down the fee as an impermissible exercise of the taxing power by President Trump and a violation of the Administrative Procedure Act.

First, the court held that the fee was a tax under *National Federation of Independent Business v. Sebelius*. An obvious purpose of the fee is to raise revenue, and the decline in total revenue from H-1B petitions does not mean that raising revenue was not a purpose of the fee. Rather, it means that such a purpose was not achieved. Purpose and effect are different. Moreover, a tax does not lose its identity as a tax because its ultimate aim or effect is to reduce revenue.

Second, the court held that under *Learning Resources* the provisions of 8 U.S.C. §§1182(f) and 1185(a) granting the President discretionary powers to restrict the entry of noncitizens do not delegate Congress's taxing power. The grant of the power to restrict, by its ordinary meaning, does not include the power to tax.

The 2024 edition of *Black's Law Dictionary* defines "restriction" as "[c]onfinement without bounds or limits; a limitation or qualification." Furthermore, both separation of powers principles and a practical understanding of legislative intent suggest Congress would not have delegated highly consequential power through ambiguous language.

The court also held that the fee violated the Administrative Procedure Act in three ways. First, the agency materials implementing the fee were legislative rules that required notice-and-comment rulemaking.^[23] Second, in the absence of any statute that empowered the agencies to impose the fee, the agencies exceeded their statutory authority.^[24] Third, the agency action was arbitrary and capricious since the agencies did not reasonably consider the relevant issues and reasonably explain their decision.^[25] Moreover, they did not assess whether there were reliance interests, determine whether these interests were significant, and weigh any such interests against competing policy concerns.

When agency action is arbitrary and capricious or contrary to law, the Administrative Procedure Act authorizes a court to hold that action unlawful and set it aside.^[26] This remedy authorizes vacatur of unlawful agency rules. Accordingly, the court vacated the agency materials implementing the Proclamation's \$100,000 fee.

The government has appealed Judge Sorokin's ruling to the First Circuit Court of Appeals.^[27]

The H-1B Process

To obtain an H-1B visa for a worker who is not a U.S. citizen or lawful permanent resident, an employer must engage in a complicated and cumbersome process. The employer must take the following steps:

- Submit an initial registration for the worker in an electronic lottery. The employer must provide the worker's passport or travel document information and attest to the legitimacy of its submission. The foreign worker may be registered under only one passport or travel document, and if the worker is abroad, the passport or travel document must be the one the

worker intends to use to enter the U.S.^[28] If the worker is selected, the employer then files a labor condition application with the Department of Labor and an H-1B petition with U.S. Citizenship and Immigration Services.

- Post a Notice of Filing Labor Condition Application at the H-1B worker's place of employment, which is the worksite where the work will be performed. The notice must inform similarly situated employees at the worksite that a labor condition application will be filed for an H-1B worker. The notice must set forth the number of H-1B workers sought; job titles; wages to be paid; start and end dates; work locations; and the way similarly situated employees can make a complaint to the DOL regarding the labor condition application.^[29] The notice must be posted for ten business days at the worker's place of employment. If the labor condition application lists multiple worksites, the notice must be posted at each worksite. If the worker will be placed at a third-party worksite, the posting must occur at that worksite. The employer can post a hard copy in two conspicuous locations, or electronically if accessible to all similarly situated employees.^[30]
- File a labor condition application on Form ETA-9035 to attest to wage and worksite conditions. The labor condition application describes the H-1B worker's title, start date, worksite location, wage to be paid, prevailing wage for the SOC code, wage level selected by the employer, and the location of the public access file. The employer must provide the following four attestations: (a) it will pay the required wage of the higher of the prevailing wage for the occupational classification in the area of intended employment, and the actual wage paid to all other employees in the same occupation in the same worksite; (b) it will offer the H-1B worker the same working conditions as its U.S. workers, and the working conditions offered to the H-1B worker will not adversely affect the working conditions of similarly situated U.S. workers; (c) when the application is filed, the worker is not being hired to fill a position that is the subject of a labor dispute during a strike, lockout, or other work stoppage; and (d) it will provide a copy of the labor condition application to

the H-1B worker, and that within thirty days before filing the labor condition application, it gave notice of the filing to the collective bargaining representative if the position is unionized, or if not, to employees in the same or similar occupation at the worksite in a ten-day posted notice.[\[31\]](#)

- Pay H-1B workers the higher of the prevailing wage for similarly situated workers in the geographic area, and actual wage paid to similarly situated employees.
- Maintain a public access file for each certified labor condition application that shows the employer satisfied its attestations. The key items to be kept in the file are: (a) the filed labor condition certification and the covert page; once the labor condition application is certified, the signed, certified labor condition application and the cover page; (b) documentation of the wage to be paid and the documentation used to establish the prevailing wage; (c) a memorandum from the employer documenting that the H-1B worker will be paid the required wage and explaining the system used to determine the actual wage; (d) a summary of the benefits offered to the employer's U.S. workers in the same occupational classification as the H-1B worker, and any differences in benefits are explained; and (e) documentation that the labor condition application has been provided to the collective bargaining representative or was posted at the worksite or provided to employees electronically.[\[32\]](#)
- Once the labor condition application has been certified by the DOL and the public access file created, the employer files the H-1B petition with the U.S. Citizenship and Immigration Services on Form I-129. USCIS implemented a new Form I-129 effective April 1, 2026 with an edition date of 02/27/26. If the new form is not used or is used with pages from prior versions of the form, the petition will be rejected. Once the petition is approved, workers who are outside of the U.S. must apply for a visa at a U.S. embassy or consulate in the worker's country of nationality or residence. The visa is a travel document that allows the worker to travel to a port of entry and request permission to enter the U.S.

- Complete the Form I-9. The employer and employee must complete Section 1 at the time of hire, which can precede the first day of work as long as the employer and employee have agreed on the employment. The employer must complete the rest of the form and review the identity and work authorization documents within three business days of hire.

An H-1B worker who changes employers may begin working for the new employer as soon as that employer files a Form I-129 petition for the worker. The employer must make the I-129 filing before the worker begins employment and worker's period of authorized stay ends.^[33] The employer must also complete a new Form I-9. The worker's unexpired Form I-94 issued for employment with the prior employer, along with the worker's foreign passport, qualifies as List A documents. The employer should write "AC-21" and enter the day it filed the Form I-129 in the Additional Information Field in Section 2.^[34] The employer may also provide a copy of the H-1B Form I-797 filing receipt with the Form I-9 to show temporary work authorization until the H-1B petition is approved.

- Keep accurate records of wages paid, job duties performed, and worksite locations.
- Pay reasonable return transportation costs to the worker's last foreign residence if the employer terminates the worker before the end of the authorized employment period and the worker departs the U.S. within a reasonable period after termination.^[35] The employer does not have this obligation if the worker voluntarily resigns. In addition, the employer must continue to pay the worker's wages until the employer notifies the U.S. Citizenship and Immigration Services of the worker's termination.^[36] The employer should make the notification once it takes the worker off its payroll by sending a letter requesting withdrawal of the H-1B petition with a copy of the approval notice.

The worker has a sixty-day grace period after termination to find a new employer or change his or her nonimmigrant status, which the U.S. Citizenship and Immigration Services may limit in its discretion.^[37] The employer should advise the worker in writing that it will pay

the worker's reasonable return transportation costs if he or she returns to his or her last foreign residence within sixty days of termination.

Validity of the Employer-Employee Relationship

The fundamental premise of an H-1B visa is a bona-fide employer-employee relationship between the petitioner-employer and the H-1B worker. Showing this relationship is especially important for a staffing company that as-signs the worker to a third-party client worksite. The petitioner-employer must show that it has the right to control the work performed, job responsibilities, and pay, and the right to terminate the worker. The petitioner-employer should consider submitting copies of the following documents with its I-129 nonimmigrant visa petition:

- Signed employment agreement or offer letter, and other evidence showing that the petitioner-employer will have control over the H-1B worker.
- Master service agreement, work order, or statement of work.
- Correspondence between the employer and authorized representatives of end-client company at which the worker will perform work.
- Schedule of performance reviews by the petitioner-employer.
- Petitioner-employer's organizational chart showing the H-1B worker's supervisory chain.

When the petitioner-employer is a start-up, it must show that it actively operates a business and it needs the specialty occupation work to be performed by the H-1B worker. In addition to the required documents of the certificate of incorporation or formation and IRS-issued EIN letter, the petitioner-employer should consider submitting copies of the following documents:

- Lease agreement for its business location.
- Interior and exterior photos of its office showing the company name, workstations, and equipment.
- Utility bills.

- Client contracts.
- Marketing materials, such as website screenshots and brochures.
- Work orders or contracts supporting the work to be performed by the H-1B worker.
- Strategic plan supporting the work to be performed by the H-1B worker.
- W-2s and job descriptions of similarly situated employees.

Violations to Be Sought Out in Project Firewall

The Wage and Hour Division of the U.S. Department of Labor and the Fraud Detection and National Security Directorate (“FDNS”) of the U.S. Citizenship and Immigration Services enforce the labor condition application rules and the H-1B rules through unannounced site visits, audits, and document requests.[\[38\]](#)

Wage and Hour Division investigators will request and review: (1) public access files, H-1B petitions, and other records; and (2) payroll records, the employer’s quarterly wage reports, and evidence of payment of the required wages. The investigators will also conduct in-person inter-views of the employer’s officers, managers, and employees, and inspect the worksite.[\[39\]](#) The employer is entitled to have legal counsel manage any document production, be present during interviews, and communicate with the investigators.

FDNS investigators will request and review: (1) documents reflecting the H-1B worker’s employment; (2) payroll records, the employer’s quarterly wage reports, and evidence of payment of the required wages; and (3) documents verifying the information submitted with the H-1B petition.

FDNS investigators will also conduct in-person inter-views with employees and the H-1B worker. They will interview these persons at the worksite and review the H-1B worker’s work location, physical work space, hours, salary, and job duties.

FDNS investigators may conduct interviews at the employer’s headquarters, satellite locations, or the worksite where the H-1B worker currently works, has worked, or will work, including third-

party worksites. The interviews may also be conducted at a neutral location agreed to by the agency and the interviewee.[\[40\]](#)

Best practices for an employer to handle an FDNS site visit are discussed in detail below in the section, Proactive Steps Employers Should Take to Address Project Firewall.

If the employer or any other person refuses or fails to cooperate with DOL or FDNS, USCIS may deny or revoke the petition for the H-1B workers who are the subject of the investigation.[\[41\]](#)

The DOL and FDNS will seek to determine whether:

- The wages, duties, titles, and work locations, as set forth in the labor condition applications and H-1B petitions, match the actual wage, duties, titles, and work locations.
- Downgrading of roles to reduce wage costs has occurred.
- The required wages of the higher of the prevailing wage for similarly situated workers in the geographic area and actual wage paid to paid to similarly situated employees match the wages actually paid.
- Wage levels are updated for promotions, location changes, and market shifts.
- Benching without payment of wages during assignment gaps of H-1B workers has occurred, unless the nonwork status was due to voluntary action by the worker, such as personal leave.
- Required posting of notices at each worksite has occurred.
- The public access file requirements for wage data, notices, and accurate and up-to-date information are satisfied.
- Employers offered return transportation to the H-1B worker's last foreign residence if the employer terminates the worker before the end of the authorized employment period.

A site visit or audit can lead the U.S. Citizenship and Immigration Services to reopen the approval of an H-1B petition, or to a referral to the Department of Justice for criminal charges if fraud is suspected. If a site visit or audit uncovers evidence of discrimination, the EEOC may further investigate.

Red Flags and Fraud and Abuse Indicators

Key red flags and fraud and abuse indicators are:

- Layoffs of U.S. workers followed by new H-1B hires, especially for jobs equivalent to the jobs for which H-1B workers are sought.
- Significant differences between wages certified on labor condition applications and actual wages paid.
- Significant wage disparities between H-1B workers and U.S. workers performing the same or similar duties.
- H-1B workers not performing the duties specified in the H-1B petition if the duties are at a lower or higher level than the job description.
- Assigning H-1B workers to client sites not certified on the labor condition applications.
- H-1B workers have less experience than U.S. workers in similar positions in the same company.[\[42\]](#)

Proactive Steps Employers Should Take to Address Project Firewall

Most importantly, employers should ensure that H-1B workers are paid at least the wage certified on the labor condition application, which must be the higher of the prevailing wage for similarly situated workers in the geographic area and the actual wage paid to similarly situated employees. Employers should avoid wage disparities between H-1B workers and U.S. workers performing the same or similar duties. Employers should also ensure that bonuses and benefits are paid to H-1B workers on terms no less favorable than those paid to similarly situated U.S. employees.

Employers should also:

- Assign H-1B workers only the duties and at the locations certified in the labor condition application and H-1B petition, and not assign duties at a higher or lower level or at different locations.
- Keep clear and accurate records of job duties and work locations that are readily accessible.

- Accurately track changes to H-1B workers' terms and conditions of employment, such as changes to salary, work location, and position, and transfers to a new entity. These changes are often a material change to the terms and conditions of employment that require the employer to make new postings and file an amended labor condition application and H-1B petition.

For example, the relocation of an H-1B worker to a worksite outside the Metropolitan Statistical Area or regular commuting area that was not previously provided on the labor condition application and H-1B petition requires a new certified labor condition application and an amended H-1B petition.^[43] Other examples are the worker goes from full-time to part-time and vice versa, or the wage goes below what was stated in the labor condition application and H-1B petition. Raises, promotions, and normal job progressions do not require an amended labor condition application and H-1B petition.

- Promptly advise the Department of Labor and U.S. Citizenship and Immigration Services of H-1B terminations.^[44]
- Maintain job banks with clear and uniform job descriptions and minimum requirements.

With respect to FDNS site visits, the best practices for employers to follow are:^[45]

- The employer should establish a protocol that is circulated monthly to reception, staff at points of entry, and other public-facing employees at each worksite. These persons, as the first point of contact for any government investigator, should know the person to immediately contact at the worksite and how to reach him or her. The protocol should also establish a chain of communication to contact the compliance point persons at the worksite and the employer generally, human resources, security, in-house and outside counsel, the H-1B worker's manager, and the H-1B worker.
- The compliance point person should: (a) take the name, title, and contact information of each investigator, make a copy of his or her badge, or otherwise request and review his or her government ID; and (b) request the investigator's business

card and determine which agency the investigator represents. The agency involved will usually enable the employer to determine whether the site visit is administrative or criminal.

- The compliance point person should have the following information readily available: (a) the number of employees at the worksite and the entire employer; (b) how many H-1B and L-1 workers are employed at the worksite and the entire employer; and (c) the employee breakdown by citizen, green card, and nonimmigrant status at the worksite and the entire employer.
- The employer should keep immigration petition records, I-9s, and E-Verify confirmations separate from other personnel and business records and have them readily available to produce to the investigators.
- The employer should not allow investigators to roam the worksite unaccompanied. Although the investigators can tour public areas of the worksite and take photographs, the employer can reasonably take the position that they cannot enter non-public areas without the employer's consent or a judicial warrant.^[46] Non-public areas are generally areas restricted to employees and not accessible by ordinary customers or the general public, such as private workspaces, back offices, and storage areas. The employer should demarcate non-public areas where members of the public are not allowed by labelling entrances and access points as private or restricted access areas. If the investigators have a judicial warrant, the compliance point person and counsel should review it to determine whether it is signed by a judge or magistrate, has the correct address for the worksite to be searched, provides a duration for the search, and describes the scope of the search. The investigators may only search the non-public areas specified in the warrant, and if they try to enter non-public areas beyond those specified in the warrant, the employer should refuse entry.
- The employer should have counsel attend the investigator's interviews in-person or by phone, Microsoft Teams, or Zoom.

The employer can call counsel before an interview begins or documents are produced, but cannot require the investigator to wait for counsel to arrive.

- The compliance point person should make photo-copies of all documents made available for inspection or provided to the investigator.

Proactive Steps Employers Should Take to Address the Department of State Social Media Review Policy

Employers should instruct their H-1B and H-4 applicants to review every active account and switch all privacy settings from private or friends only to public. Applicants should not delete accounts shortly before the visa interview, as the State Department will use artificial intelligence to monitor online activity. Employers should ensure that profile facts, especially education, employment history, job title, and duties, are accurate and match the H-1B petition and online nonimmigrant visa application. LinkedIn will be an important site. Employers and applicants should review and remove or reconcile any public posts or connections that may be problematic.

Employers should also advise applicants to use care when using AI prompts on platforms such as ChatGPT and Claude. The government can subpoena an applicant's AI logs and use the prompts against the applicant.^[47] As a matter of prudence, an applicant should avoid asking questions such as, "how can I bypass this visa requirement," or "what can I say to the consular officer to sound more convincing."

The additional online presence review by consular officers will likely lead to delays in visa processing, which can adversely affect project schedules. Furthermore, since obtaining new visas will likely take longer, foreign nationals considering international travel without current visas should consider postponing their trips.

Proactive Steps Employers Should Take to Address the Wage-Weighted Lottery

Employers should review H-1B eligible positions for appropriate SOC codes and wage levels. They should also review job descriptions as

small changes can affect the wage level determination. If an employer increases the wages of foreign workers in an effort to obtain higher wage levels and as a result causes an adverse impact on U.S. workers, the employer may need to make an across-the-board increase in wages.

Consequences of Violations

Violations of the H-1B visa rules come with serious consequences. First, employers must pay back wages for the difference between wages actually paid and the required wage of the higher of the prevailing wage and actual wage. Employers must also pay back wages if the employer did not pay wages for periods of benching in which H-1B workers did not work but were still employed unless their nonwork status was for voluntary reasons, such as personal leave.[\[48\]](#) Back wage orders often include interest.

Employers are also subject to the following three-tier civil monetary penalty and disqualification schedule:

- \$2,364 maximum penalty per violation and at least a one-year disqualification from approval of immigrant and nonimmigrant visa petitions for a substantial violation pertaining to notification, labor condition application specificity, or recruitment of U.S. workers; or a misrepresentation of material fact on the labor condition application.[\[49\]](#)
- \$9,624 maximum penalty per violation and at least a two-year disqualification from approval of immigrant and nonimmigrant visa petitions for a willful failure pertaining to wages/working conditions, labor condition application specificity, displacement, or recruitment; a willful misrepresentation of a material fact on the labor condition application; or discrimination against an employee.[\[50\]](#)
- \$67,367 maximum penalty per violation and at least a three-year disqualification from approval of immigrant and nonimmigrant visa petitions if an employer displaced a U.S. worker employed by the employer beginning 90 days before and ending 90 days after the filing of an H-1B petition in conjunction with a willful violation of the provisions pertaining to wages/ working conditions, notification, labor condition

application specificity, displacement, or recruitment; or in conjunction with a willful misrepresentation of a material fact on the labor condition application.[\[51\]](#)

Violations of the Form I-9 requirements also come with serious consequences. Employers are subject to the following civil monetary penalties:

- \$288 to \$2,861 per violation for Section 1 errors.[\[52\]](#)
- \$288 to \$2,861 per violation for Section 2 errors.[\[53\]](#)
- \$288 to \$2,861 per violation for Supplement A errors.[\[54\]](#)
- \$288 to \$2,861 per violation for Supplement B errors.[\[55\]](#)
- \$288 to \$2,861 per violation for completing Form I-9 or any component later than required; completing a Spanish language version outside of Puerto Rico; or failing to meet the standards for electronic completion, documentation, retention, reproduction, security, or electronic signatures for the employee, employer, recruiter, referrer for a fee, or representative.[\[56\]](#)

Violation of State Wage and Hour Statutes

In *Lopez v. Marmic LLC*,[\[57\]](#) the New Jersey Supreme Court unanimously held that if an employer hires an undocumented worker in violation of federal law, the employer must nevertheless compensate that worker in a manner consistent with state law for work actually performed. Otherwise, unscrupulous employers would be incentivized to hire undocumented workers in violation of federal law and pay them less than what state law requires.[\[58\]](#)

The federal immigration statutes provide that it is unlawful to hire for employment in the U.S. an alien knowing the alien is an unauthorized alien for such employment.[\[59\]](#) It is also unlawful to continue to employ an alien knowing the person is or has become an unauthorized alien.[\[60\]](#) An unauthorized alien is an individual not lawfully admitted for permanent residence or authorized to be employed.[\[61\]](#)

The court held that these provisions do not preempt state workers' compensation and labor laws. First, the immigration statutes do not

expressly preempt the New Jersey wage and hour statutes. Second, federal law is not meant to occupy the field of state employment laws. Third, federal law does not actually conflict with New Jersey's wage and hour statutes. An employer can comply with both sets of laws.[\[62\]](#)

Furthermore, the holding of the United States Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB*[\[63\]](#) did not require a different result. The Court held that an award of back pay to an illegal alien for work not performed was prohibited by the immigration laws. Backpay seeks to make an employee whole by awarding wages that would have been earned but for an unlawful firing. The New Jersey Supreme Court distinguished *Hoffman Plastic* from the case before it, which dealt with a claim for wages for work that had already been performed. Unlike an award of backpay for work not performed, payment for work already completed does not condone or continue an immigration violation; rather it ensures that the employer does not take advantage of the violation.

Finally, the New Jersey Supreme Court addressed the role of an invalid social security number in a wage payment claim. Like inquiries into a person's immigration status, testimony about the use of an invalid social security number to obtain employment may inject undue prejudice into a case about wage and hour claims. As a result, such evidence can serve as a proxy for a person's immigration status. It is widely known that undocumented workers who were not lawfully admitted to the U.S. or permitted to work cannot obtain a social security number.[\[64\]](#) A person's immigration status and lack of a valid social security number are commonly intertwined.

Going forward, courts must carefully assess the use of an invalid social security number. If there is no legitimate purpose other than to provide a link to a person's immigration status, the evidence should be excluded.

The holding of the New Jersey Supreme Court in *Lopez* does not provide a carte blanche on the use of invalid Social Security numbers. An individual's use of an invalid Social Security number is a civil and criminal offense under federal law.[\[65\]](#)

Immigration Due Diligence in Corporate Transactions

In light of the Trump Administration's increased enforcement policy, due diligence for immigration compliance in corporate transactions has taken on increased importance.^[66]

One of the most important steps in immigration due diligence is for buyers to conduct a privileged review of a risk-based sample of the seller's I-9s and review E-Verify compliance. The consequences of violations of the I-9 rules have significantly increased under the guidance issued in a fact sheet by the U.S. Immigration and Customs Enforcement on March 16, 2026, "Form I-9 Inspection Under Immigration and Nationality Act §274A."^[67] Under this guidance, a number of violations are no longer treated as technical or procedural failures made in good faith that are eligible for penalty-free correction within ten days of issuance of a notice of technical or procedural failures absent a pattern or practice of knowing hire or continuing employment violations.^[68] Rather, they are substantive violations subject to immediate penalty.

The following violations are now substantive violations for Section 1 of the I-9: (1) failure to ensure the employee provides his or her date of birth; (2) failure to ensure the employee provides his or her alien number for an employee attesting to lawful permanent residence; (3) failure to ensure the employee provides his or her alien number, I-94 number, or foreign passport information for an employee attesting to work authorization; (4) failure to ensure the employee provides an employment authorization expiration date in Box 4 regardless of whether the expiration date is listed in Section 2, List A or an Employment Authorization Document; and (5) failure to ensure the employee provides a date next to his or her signature.

The following violations are now substantive violations for Section 2 of the I-9: (1) missing the name and title of the employer representative; (2) List A, B, or C data not fully or correctly recorded, such as the name or number of the document, issuing authority, or expiration date, regardless of whether the employer retained a legible copy of the document and presented it at inspection; (3) failure to verify a replacement document within the 90-day period after a document receipt; (4) failure to provide the

first day of employment; and (5) failure to provide the employer or authorized representative signature date.

The following is now a substantive violation for Supplement A of the I-9: failure to ensure that the preparer or translator's name, address, signature, and date are provided at the time of completion of the I-9.

The following violations are now substantive violations for Supplement B of the I-9: (1) missing the rehire date; (2) no document title, number, or expiration date of a List A or C document, including a replacement document; and (3) failure to verify a replacement document within the 90-day period after a document receipt.

Other substantive violations are the following: (1) the use of a Spanish-language I-9 outside of Puerto Rico; (2) when using remote verification, the employer representative fails to check the alternative procedure box in Section 2;[\[69\]](#) (3) when stating that remote verification was used as an alternative procedure in Supplement B, failure to be an active E-Verify participant or registered in a DHS Non-E-Verify Remote Document Examination Form I-9 program;[\[70\]](#) and (4) failures of an electronic I-9 system to meet the standards of the Department of Homeland Security for audit trails, electronic signature protocols, and security documentation.

The buyer should determine whether the seller has a system to track expirations of employment authorizations and conduct reverifications.[\[71\]](#) The failure to maintain a system can be used to show that the seller had knowledge of the employment of unauthorized workers.

When conducting due diligence buyers should be wary of the following indicia of fraudulent green cards: inconsistent fonts; poor fine line printing; lack of quality detail; inconsistent holograms or authentication features; inconsistent spacing between names; and poor-quality photographs.[\[72\]](#)

Buyers should be wary of the following indicia of fraudulent social security cards: a social security number with other than nine digits; and a social security number with an area of 000, in the 800 or 900

series, or with a OO group or OOO serial number.

When a buyer uncovers immigration law compliance issues, it can address potential violations in the following ways: purchase price reductions; exceptions for immigration violations to floors, caps, and sunsets for indemnifications; exceptions for immigration violations to sunsets for representations and warranties; larger post-closing escrows; and longer release dates and smaller amounts of releases of funds on release dates from post-closing escrows. When the potential for immigration violations is egregious, the buyer should walk away from the acquisition.

Buyers must decide whether to adopt legacy Forms I-9 or treat employees as new hires.^[73] Adopting legacy Forms I-9 means that a buyer inherits all compliance issues with the forms. The buyer risks monetary penalties and acquiring an unauthorized workforce in whole or in part. In addition, buyers generally cannot create E-Verify cases for existing employees.

Treating employees as new hires reduces the risks of adopting legacy Forms I-9. However, the buyer must complete new Forms I-9 for all acquired U.S. employees without regard to citizenship or national origin status. The new employee must complete Section 1 on the first day of employment, which is generally the date of closing. The employee may complete this section in advance if there is a signed offer letter. The employer must complete Section 2 within three days of closing.

In addition, employers who are voluntarily enrolled in E-Verify or are required to use E-Verify by federal, state, or local law must run all acquired employees through E-Verify within three business days after closing. The buyer may also have to address tentative nonconfirmations, which usually means that the Form I-9 data entered does not match the records E-Verify checks against. Since the records can contain errors or outdated information, nonconfirmations do not necessarily mean that the employees are not authorized to work in the U.S. Therefore, the buyer should be careful not to take premature adverse action, or it may face a claim for discrimination by a disgruntled employee.

Employers who are required to use E-Verify by the Federal Acquisition Regulation have the option to verify their entire workforce. An employer that uses this option has 180 days to create E-Verify cases for non-exempt employees.[\[74\]](#)

Sellers often resist pre-closing disclosure of the transaction to its employees because of confidentiality and union obligations, the risk of employee flight, and the desire to maintain good customer and vendor relations. In this situation, the buyer will not have advance access to the seller's employees and must be prepared to deploy a rapid, post-closing onboarding process.

Buyers should also review agreements with the seller's third-party subcontractors for the adequacy of immigration compliance representations; indemnification against liabilities for immigration violations; audit rights of the subcontractor's records; obligation to provide access to documentation and cooperate with investigations; termination rights for immigration noncompliance; and notice covenants for government inquiries, audits, and investigations. In the absence of adequate provisions, a buyer may find itself bearing the risk of liability for a third-party subcontractor's compliance failures.

Representation and Warranty for Immigration Compliance

In addition to conducting the appropriate due diligence, buyers should obtain a robust representation and warranty in the transaction agreement for the seller's immigration compliance. The following is an example:

- Except as provided in Disclosure Schedule 1.1(a), since the beginning of the current calendar year and for the five calendar years prior thereto, the Company has been in material compliance with all federal, state, and local laws dealing with immigration, worker status, and visas, and all mandatory E-Verify electronic employment verification system obligations. No employees have worked without the required employment authorization from the Department of Homeland Security or any other government agency that must authorize such employment.

- Except as provided in Disclosure Schedule 1.1(b), the Company is in possession of a Form I-9 for each U.S. employee to verify the identity and work authorization of that employee. Each Form I-9 has been timely and correctly prepared, retained, and reverified in accordance with the requirements of the Immigration Reform and Control Act of 1986 and its subsequent amendments, the Immigration Act of 1990, and the Illegal Immigration Reform and Immigration Responsibility Act of 1996.
- Except as provided in Disclosure Schedule 1.1(c), the Company has not received any letters from the Social Security Administration regarding the failure of an employee's Social Security number to match the employee's name in the Social Security Administration database. The Company has not received any letters or other correspondence from the Department of Homeland Security or any other government agency regarding any employee's employment authorization. If the Company operates in a state or has contracts with a federal or state agency that requires or provides a safe harbor for participation in the Department of Homeland Security's E-Verify electronic employment verification system, the Company has participated in E-Verify for the entire period such participation has been required or available as a safe harbor or as long as the Company has been operating in such state or contracting with such agency.
- Except as provided in Disclosure Schedule 1.1(d), there is no pending or to the knowledge of the Company threatened, action, administrative proceeding, arbitration, audit, charge, claim, complaint, investigation, or lawsuit brought by or on behalf of, or otherwise involving, any current or former employee, any person alleged to be a current or former employee, any applicant for employment, or any class of the foregoing persons, or any government agency, that involves the laws described in subsections (a) and (b) that could reasonably be expected to result, whether individually or in the aggregate, in any material liability to the Company.^[75]

Treatment of H-1B Workers in Corporate Transactions

The treatment of H-1B workers in corporate transactions turns on whether the buyer as the successor employer is a successor-in-interest, and whether there is a material change in the H-1B worker's job.^[76]

A successor-in-interest is an entity that acquires ownership of the assets of a business and assumes the rights and obligations necessary to carry on the business in the same manner. The successor must continue to operate the same type of business, and the way the business is controlled and carried on must be substantially the same as it was before the ownership transfer. The buyer is permitted not to assume liabilities unrelated to the H-1B job, such as pending or potential sexual harassment litigation or other tort liabilities.^[77]

Partial transfers or spin-offs can qualify as long as the business unit being transferred is a clearly defined, stand-alone operational division; the buyer acquires that unit in its entirety; and the job offered must have been and continues to be within that unit.

An example of a qualifying transfer is the sale of a manufacturing division with its own plant, equipment, and management. Another example is the sale of a branch office of a bank to another entity engaged in banking services as a member organization of the banking industry.

An example of a non-qualifying transfer is the sale of a patented chemical formula by Company A to Company B that allows Company B to manufacture a product using the chemical formula regardless of whether Company A ceases to manufacture the product and starts to buy the product from Company B. Company A did not transfer a clearly defined business unit; rather, Company A only sold the manufacturing rights for a given product to Company B without the transfer of other related assets of the business unit.

There are three possible outcomes for the treatment of H-1B workers in corporate transactions. First, if the buyer is a successor-in-interest and there are no material changes in the H-1B worker's job, no new labor condition application and H-1B petition are required. Rather, before closing the successor employer prepares a dated memorandum that it executes at closing, and which is then

placed in each H-1B worker's public access file. The memorandum contains a list of the affected labor condition applications and their numbers, the visa validity dates of the employees affected by the transaction, a description of the successor employer's actual wage system, and its federal employer identification number. Finally, the successor employer must affirm that it assumes and will continue to comply with the labor condition application attestations.^[78]

Second, if the successor employer is a successor-in-interest but there are material changes in the H-1B worker's job in the transaction, a new labor condition application is required for that H-1B worker. For those H-1B workers who do not have material changes to their jobs, the prior analysis applies.

Examples of material changes are changes in the job description, job requirements, Metropolitan Statistical Area of the worksite, and rate of pay. An increase in the rate of pay due to the passage of time is permissible.

When the successor employer files an extension application post-closing, it should disclose the transaction and submit proof of the closing with copies of the provisions in the transaction agreement that describe the type of transaction, such as an asset sale, stock sale, merger, or spin-off, the treatment of the target's employees, and the signed signature pages.

Third, if the successor employer is not a successor-in-interest, the successor employer must file a new labor condition application and H-1B petition. The worker can commence work for the successor employer only after the successor employer has filed a change of employer H-1B petition.

If an employee must travel abroad post-closing but before a new H-1B petition or visa is approved, the successor employer should provide the employee with a letter that explains the transaction and reaffirms the employee's continued H-1B employment and the employer's continued compliance with the labor condition application attestations.

^[1] INA §§212(n)(1) and 214(i)(1)-(2); 8 U.S.C. §§1182(n)(1) and 1184(j)(1)-(2); 8 C.F.R. §214.2(h)(1)(ii)(B) and (4)(ii) and (iii)(A).

[2] <https://www.dol.gov/newsroom/releases/osec/osec20250919>.

[3] <https://www.eeoc.gov/newsroom/eeoc-releases-new-and-updated-educational-materialsnational-origin-discrimination>

[4] See, e.g., Complaint of the U.S. Department of Justice in the Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer, *United States v. Cloudera, Inc.* 8 U.S.C. §1324b Proceeding, Case No. 2026B00044 (April 28, 2026) (company did not consider the applications some U.S. worker candidates submitted because the company earmarked certain lucrative tech jobs for workers on temporary employment visas; job advertisements invited U.S. worker candidates to submit applications to a dedicated email address that did not accept any messages from external email accounts, and external applicants received an error message saying that their email could not be delivered).

See *generally* Gina Kim, “DOJ Accuses Cloudera of Favoring Temporary Visa Workers,” *Law360* (Portfolio Media April 28, 2026) (describes settlements the DOJ has obtained in enforcement actions against companies alleged to discriminate against U.S. workers in favor of foreign visa workers or H-1B visa holders).

[5] <https://travel.state.gov/content/travel/en/News/visas-news/announcement-of-expandedscreening-and-vetting-for-h-1b-and-dependent-h-4-visa-applicants.html>.

[6] Weighted Selection Process for Registrants and Petitioners Seeking to File Cap-Subject H-1B Petitions, 90 F.R. 60,865 (Dec. 29, 2025).

[7] 8 C.F.R. §214.2(h)(8)(iii)(A)(2) and (4).

[8] 8 C.F.R. §214.2(h)(8)(iii)(A)(4)(i).

[9] Jimmy Lai, “H-1B Registration Tips For New Wage-Weighted Selection,” *Law360* (Portfolio Media March 10, 2026).

[10] 8 C.F.R. §214.2(h)(8)(iii)(A)(4)(i).

[11] Weighted Selection Process for Registrants and Petitioners Seeking to File Cap-Subject H-1B Petitions, 90 F.R. 60,865, 60,868 (Dec. 29, 2025).

[12] Jimmy Lai, “H-1B Registration Tips For New Wage-Weighted Selection,” *Law360* (Portfolio Media March 10, 2026).

[13] Notice of Proposed Rulemaking, Improving Wage Protection for the Temporary and Permanent Employment of Certain Foreign Nationals in the United States, 91 F.R. 15,454 (March 27, 2026).

[14] Proclamation 10973, Restriction on Entry of Certain Nonimmigrant Workers, 90 F.R. 46,027 (Sept. 24, 2025) (available at <https://www.whitehouse.gov/presidential-actions/2025/09/restriction-on-entry-of-certain-nonimmigrantworkers/>).

[15] <https://www.uscis.gov/working-in-the-unitedstates/h-1b-specialty-occupations>.

[16] *Chamber of Commerce v. Department of Homeland Security*, 815 F. Supp. 3d 73 (D.D.C. 2025).

[17] *Chamber of Commerce v. Department of Homeland Security*, Case No. 25-5473.

[18] 2026 WL 477534 (Feb. 20, 2026).

[19] See also Marie Sapirie, “The Chief Justice and the Taxing Power,” *Tax Notes Federal* (May 4, 2026) (“The chief justice’s opinion in *Learning Resources* underscores that the taxing power is a very substantial one. That much is consistent with his opinion in *Sebelius*, which expanded the power’s breadth to allow Congress to tax inactivity. Permitting Congress to delegate so extensive a power to the executive branch presents clear risks, which Roberts sees as especially great without specific language and guidance from Congress on how the delegated power is to be exercised. But the recognition that the taxing power is so great should also be a reason to expect Congress to be transparent when it uses that ‘birth-right’ power to make law.”).

[20] 567 U.S. 519, 567 (2012) (“[T]axes that seek to influence conduct are nothing new.”); see also *Sonzinsky v. United States*, 300 U.S. 506, 513 (1932) (every tax is in some measure regulatory, and a tax is not any the less a tax because it has a regulatory effect).

[21] See, e.g., INA §214(c)(9)(A)–(C), 8 U.S.C. §1184(c)(9)(A)–(C) (\$1,500 filing fee for H-1B applicants imposed by Attorney General); INA §214(c)(11)(A)–(C), 8 U.S.C. §1184(c)(11)(A)–(C) (\$1,500 visa fee for H-1B applicants imposed by Department of Homeland Security or Department of State); INA §214(c)(12)(A)–(C), 8 U.S.C. §1184(c)(12)(A)–(C) (\$500 fraud prevention fee for H-1B applicants imposed by Department of Homeland Security); INA §286(m), 8 U.S.C. §1356(m) (Attorney General may set fees for providing adjudication and naturalization services at a level to ensure recovery of the full costs of providing the services, including the costs of similar services provided without charge to asylum applicants or other immigrants; such fees may also be set at a level that will recover any additional costs associated with the administration of the fees collected).

[22] 2026 WL 1649160 (D. Mass. June 8, 2026).

[23] 5 U.S.C. §§553(b)–(c) and 706(2)(D); *Children’s Health Care v. Centers for Medicare and Medicaid Services*, 900 F.3d 1022 (8th Cir. 2018).

[24] 5 U.S.C. §706(2)(C).

[25] 5 U.S.C. §706(2)(A).

[26] 5 U.S.C. §706(2).

[27] See generally Lawrence Peter “Yogi” Berra, “It ain’t over ‘till it’s over” (July 31, 1973) (Yogi Berra’s answer to reporters when the Mets trailed the St. Louis Cardinals in the National League East by 1½ games; Mets rebounded from 13 games under .500 in September to win the National League pennant but lost to the Oakland Athletics in seven games in the World Series).

[28] 8 C.F.R. §214.2(h)(8)(iii)(A)(4)(i).

[29] INA §212(n)(1)(C); 8 U.S.C. §1182(n)(1)(c).

[30] 20 C.F.R. §655.715; DOL Wage and Hour Division Field Assistance Bulletin No. 2019–3 (March 15, 2019).

[31] 20 C.F.R. §655.734.

[32] 20 C.F.R. §655.760.

[33] INA §214(n)(1); 8 U.S.C. §1184(n)(1); 8 C.F.R. §214.2(h)(2)(i)(D) and (H).

[34] *U.S. Citizenship and Immigration Services, Handbook for Employers M-274*, §7.5 H-1B Specialty Occupations (July 26, 2023).

[35] INA §214(c)(5); 8 U.S.C. §1184(c)(5); 8 C.F.R. §214.2(h)(4)(iii)(E).

[36] 8 C.F.R. §214.2(h)(11).

[37] 8 C.F.R. §214.1(l)(2).

[38] For a comprehensive analysis of labor condition application (LCA) audits and investigations, see Practical Law Labor & Employment, “Labor Condition Application (LCA) Audits and Investigations” (2026).

For a comprehensive analysis of FDNS site visits, see Practical Law Labor & Employment, “Handling USCIS Fraud Detection and National Security (FDNS) Site Visits” (2026).

[39] 20 C.F.R. §655.800(b)–(c).

[40] 8 C.F.R. §214.2(h)(4)(i)(B)(2).

[41] 20 C.F.R. §655.800(c); 8 C.F.R. §214.2(h)(4)(i)(B)(2).

[42] U.S. Citizenship and Immigration Services, “Combating Fraud and Abuse in the H-1B Visa Program” (Jan. 24, 2025) (available at <https://www.uscis.gov/scams-fraud-and-misconduct/report-fraud/combating-fraud-and-abuse-inthe-h-1b-visa-program>).

[43] INA §212(n)(1) and (4)(A); 8 U.S.C. §1182(n)(1) and (4)(A); 8 C.F.R. §214.2(h)(2)(i)(E) and (11)(iii)(7); *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO July 21, 2015); USCIS PM 602-0120; USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC* (July 21, 2015).

[44] 8 C.F.R. §214.2(h)(11).

[45] For a comprehensive analysis of FDNS site visits, see Practical Law Labor & Employment, “Handling USCIS Fraud Detection and National Security (FDNS) Site Visits” (2026).

[46] Cf. 8 C.F.R. §287.8(f) (immigration officers of the Department of Homeland Security may conduct site inspections to locate and identify aliens illegally in the U.S. or engaged in unauthorized employment at locations where there is a reasonable suspicion, based on articulable facts, that such aliens are present; an immigration officer may not enter into the non-public areas of a business to question the employees concerning their right to be or remain in the U.S. unless the officer has a warrant or the consent of the owner or other person in control of the site to be inspected; an immigration officer may enter into any area of a business or other activity to which the general public has access without a warrant, consent, or any particularized suspicion to question any person whom the officer believes to be an alien concerning his or her right to be or remain in the U.S.).

[47] See *United States v. Heppner*, 2026 WL 436479 (S.D.N.Y. Feb. 17, 2026) (Rakoff, J.) (written exchanges that a securities and wire fraud criminal defendant had with the publicly available generative artificial intelligence platform Claude were not protected from government inspection by the attorney-client privilege or the work-product doctrine; the written privacy policy to which users of Claude consent provides that Anthropic, the operator of Claude, may disclose personal data to third-parties in connection with claims, disputes, or litigation, regardless of whether there is a subpoena compelling it to do so; AI users do not have substantial privacy interests in their conversations with another publicly accessible AI platform that users voluntarily disclosed to the platform and that the platform retains in the normal course of business).

See generally Justin Pierce & Brandon Phemester, "Trade Secrets Risk Exiting a One-Way Door When Data Is Fed to AI," *Bloomberg Law News* (April 28, 2026) ("Once information enters an AI-enabled system, there is no reliable or practical way to fully withdraw it from most large language models or agent-based workflows. . . . Unlike a one-off prompt, many agent systems retain memory, logs, embeddings, or intermediate summaries across sessions and connected tools. Information disclosed once can be reused in later outputs, propagated to other systems, or incorporated into downstream processes without the user realizing it.").

[\[48\]](#) INA §212(n)(2)(D); 8 U.S.C. §1182(n)(2)(D); 20 C.F.R. §655.810(a).

[\[49\]](#) INA §212(n)(2)(C)(i); 8 U.S.C. §1182(n)(2)(C)(i); 20 C.F.R. §655.810(b)(1).

[\[50\]](#) INA §212(n)(2)(C)(ii); 8 U.S.C. §1182(n)(2)(C)(ii); 20 C.F.R. §655.810(b)(2).

[\[51\]](#) INA §212(n)(2)(C)(iii); 8 U.S.C. §1182(n)(2)(C) (iii); 20 C.F.R. §655.810(b)(3).

[\[52\]](#) INA §274A(e)(5); 8 U.S.C. §1324a(e)(5); 8 C.F.R. §274a.10(b)(2).

[\[53\]](#) INA §274A(e)(5); 8 U.S.C. §1324a(e)(5); 8 C.F.R. §274a.10(b)(2).

[\[54\]](#) INA §274A(e)(5); 8 U.S.C. §1324a(e)(5); 8 C.F.R. §274a.10(b)(2).

[\[55\]](#) INA §274A(e)(5); 8 U.S.C. §1324a(e)(5); 8 C.F.R. §274a.10(b)(2).

[\[56\]](#) INA §274A(e)(5); 8 U.S.C. §1324a(e)(5); 8 C.F.R. §274a.10(b)(2).

[\[57\]](#) 263 N.J. 225 (N.J. 2026).

[\[58\]](#) 263 N.J. at 236, 245.

[\[59\]](#) INA §274A(a)(1)(A); 8 U.S.C. §1324a(a)(1)(A).

[\[60\]](#) INA §274A(a)(2); 8 U.S.C. §1324a(a)(2).

[\[61\]](#) INA §274A(h)(3); 8 U.S.C. §1324a(h)(3).

[\[62\]](#) *See also Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011) (requirement of Legal Arizona Workers Act that employers use the federal E-Verify system to check employment eligibility is not impliedly preempted by federal law; state statute did not conflict with the federal scheme, and the federal statute establishing E-Verify did not constrain state action).

[\[63\]](#) 535 U.S. 137 (2002).

[\[64\]](#) 20 C.F.R. §422.104(a).

[\[65\]](#) INA §274C(a)(2) and 8 U.S.C. §1324c(a)(2) (civil document fraud for knowingly using, attempting to use, possessing, obtaining, accepting, receiving, or providing any forged, counterfeit, altered, or falsely made document to violate the INA); 42 U.S.C. §408(a)(7)(B)–(C) (felony to falsely represent with intent to deceive a social security number assigned to him or another person when in fact

such number is not the social security number assigned to him or such other person) (felony to knowingly alter a social security card, buy or sell a card that is, or purports to be, a card issued by the Commissioner of Social Security, counterfeits a social security card or possesses a social security card or counterfeit social security card with intent to sell or alter it).

[66] John W. Mazzeo & Sarah A. Iyer, "Immigration Due Diligence: A Core Requirement in Corporate Transactions," *Business Law Today* (ABA Feb. 13, 2026).

[67] <https://www.ice.gov/factsheets/i9-inspection>.

[68] INA §274A(b)(6)(A); 8 U.S.C. §1324a(b)(6)(A).

[69] 8 C.F.R. §274a.2(b)(1)(ii)(A) (document examination permitted via an alternative procedure authorized by the Secretary of Homeland Security).

[70] Optional Alternative 1 to the Physical Document Examination Associated With Employment Eligibility Verification (Form I-9), 88 F.R. 47,749 (July 25, 2023) (use of remote alternative procedure limited to employers enrolled in E-Verify in good standing).

[71] 8 C.F.R. §274a.2(b)(1)(vii) (when an employee's employment authorization expires, the employer must reverify his or her work authorization in Section 3 of the I-9; employer is not required to reverify identity documents). Since there is no grace period to reverify work authorization the employer must conduct the reverification on the day the employee's work authorization expires. Reverification is not required for U.S. citizens or when U.S. passports, green cards, and List B documents expire.

The only situation in which an employer must reverify the work authorization of a green card holder occurs when that person presents a valid passport with a temporary I-551 stamp and photographic image. The USCIS regulations treat the stamp and image on a Form I-94 or I-94A as a receipt for the Form I-551 lawful permanent resident card that the green card holder must produce to complete the I-9 process. 8 C.F.R. §274a-2(b)(1)(vi)(B). The green card holder must present the Form I-551 by the expiration date of the temporary I-551 stamp. If the stamp does not contain an

expiration date, the green card holder must present the Form I-551 within one year from the date the Form I-94 or I-94A was issued.

When an H-1B worker's H-1B status expires as shown by the expiration date on the Form I-797, the employer must request an extension of stay before that expiration date for the worker to continue to work. Upon the employer timely filing a Form I-129 to extend status, the worker is authorized to continue to work for up to 240 days while USCIS processes the petition, or until USCIS makes a decision, whichever comes first.

When the worker's employment authorization expires, the employer should write "240-Day Ext." and enter the date it submitted the Form I-129 to the USCIS in the Additional Information field in Section 2 of the I-9. The employer must reverify the worker's employment authorization on Supplement B, Reverification and Rehire once it receives USCIS's decision, or by the end of the 240-day period, whichever comes first. U.S. Citizenship and Immigration Services, *Handbook for Employers M-274*, §7.5 H-1B Specialty Occupations (July 26, 2023).

[\[72\]](#) See, e.g., *In the Matter of the Search of Buona Forchetta-South Park, Application for a Warrant by Telephone or Other Reliable Electronic Means*, District Court for the Southern District of California, Case No. 25mj2979-KSC (May 29, 2025).

[\[73\]](#) 8 C.F.R. §274a.2(b)(1)(viii).

[\[74\]](#) FAR §52.222-54(b).

[\[75\]](#) For an insightful discussion of the use of the term material, see Kenneth A Adams, "The Word 'Material' Is Ambiguous in Contracts, Why That's a Problem, and How to Fix It," *21 Scribes Journal of Legal Writing* 83 (2024).

[\[76\]](#) Grace Shie & Morgan Bailey, Mayer Brown, "Mergers & Acquisitions: When Two Companies Tie the Knot, Who's Responsible for the Visas?" (Sept. 2024).

[\[77\]](#) U.S. Citizenship and Immigration Services Policy Manual, Volume 6, Part E, Chapter 3, "Successor- in-Interest in Permanent Labor Certification Cases" (Feb. 3, 2026); Memorandum of Donald Neufeld, Acting Associate Director, Domestic Operations, U.S. Citizenship

and Immigration Services, "Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions" (Aug. 6, 2009).

[\[78\]](#) 20 C.F.R. §§655.730(e) and 655.760(a)(7).

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Issue NO. 2 Summer 2026***

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