

**RENDERING 1-A** U.S. HEADQUARTERS FOR NEW ENTERPRISE INC.

# Start-up Companies Still Fight for H-1Bs

by Ekaterina Powell 

**In January 2011, President Barack Obama called on both the federal government and the private sector to increase the dominance and success of entrepreneurs across the country. More than two years later, despite the government's efforts, there are still a number of barriers to obtaining H-1B approvals for start-up companies.**





U.S. Citizenship and Immigration Services (USCIS) announced more than two years ago its initiative to optimize existing visa options for entrepreneurs and start-up businesses. In a [statement released Aug. 2, 2011](#), USCIS Director Alejandro Mayorkas said, “Current immigration laws support foreign talent who will invest their capital, create new jobs for American workers, and dedicate their exceptional talent to the growth of our nation’s economy. USCIS is dedicated to ensuring that the potential of our immigration laws is fully realized, and the initiatives we announce today are an important step forward.” Department of Homeland Security Secretary Janet Napolitano aided in outlining DHS’s outreach efforts, saying, “The United States must continue to attract the best and brightest from around the world to invest their talents, skills, and ideas to grow our economy and create American jobs.”

The USCIS announcement marked the six-month anniversary of the Obama administration’s [Startup America Initiative](#). In January 2011, President Barack Obama called on both the federal government and the private sector to increase the dominance and success of entrepreneurs across the country.

More than two years later, despite the government’s efforts, there are still a number of barriers to obtaining



H-1B approvals for start-up companies. Below are some specific points for immigration practitioners to keep in mind when preparing H-1B petitions for start-ups.

### Bona Fide Job Offer

With respect to start-ups, USCIS questions a petition if the petitioner has a truly independent existence apart from the beneficiary, and to ensure that the petitioner will comply with the terms of the H-1B petition. The beneficiary also must have a bona fide job offer from the petitioner; it should not be a mere accommodation for a friend.

If the financial condition of the petitioner calls into question whether the business really intends to employ the beneficiary, USCIS officers will request evidence of the petitioner’s financial condition to determine whether there is a bona fide job offer. *Adjudicator’s Field Manual (AFM) ch. 31.3(g)(5)*.

**Practice Pointer:** In order to address USCIS’s concerns upfront, be prepared to provide documentation, such as tax returns, bank statements from the last several months, or other evidence of initial capitalization of the start-up. Also, have documentation pertaining to the business itself, such as a company profile and website printouts.

### Employer Needs and Work Sufficiency

Another point of contention with USCIS in the start-up context is whether the petitioner actually needs the H-1B position. AFM ch. 31.3(g)(4). The agency wants to see that there is enough specialty-occupation work available for the beneficiary throughout the petition’s validity period, and wants to be assured that the beneficiary will not perform nonspecialty occupation tasks. With respect to the latter, USCIS is concerned that H-1B employees in a start-up business will occupy positions with duties that do not require someone with a specialized background, e.g., administrative, sales,

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clerical, or other routine work, such that the position does not qualify for H-1B status.

**Practice Pointer:** Explain why the business requires the services of the H-1B employee, and include supporting documentation showing the proposed projects the H-1B employee is expected to handle. It is a good idea to include an organizational chart of the proposed structure of the company listing the positions for which the business is planning to recruit, and documentation showing who will be responsible for nonspecialty occupation functions. Even if the company has no other employees on the payroll, evidence can be presented to show, for example, that independent contractors are used for bookkeeping, advertising, or secretarial services.

Oftentimes, it makes sense for a start-up company to first sponsor a part-time H-1B position rather than a full-time position because it may be easier to show the need for a part-time position, especially if there are few or no other employees in the business.

### Facilities to Accommodate Work

Another question that USCIS often asks is whether the petitioning business has the facilities to accommodate

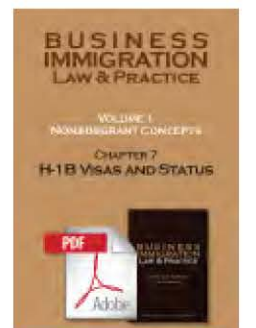


the work of the beneficiary. If the beneficiary is going to work from an office, consider including a lease agreement with a floor plan and photographs of the facilities to show enough production space. If there is no office yet, it is important to explain alternative working arrangements.

Despite USCIS's initiatives to bolster the U.S. economy by encouraging start-up businesses, lots of unpredictability exists in USCIS adjudications. Until new regulations are implemented to address the shortcomings in existing visa options, practitioners should be prepared to supplement H-1B petitions for start-ups with as much documentation as possible.

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