



H-1B FOR ENTREPRENEURS: CAN YOU TRANSFER YOUR H-1B TO YOUR OWN STARTUP?

Posted on July 17, 2026 by Cyrus D. Mehta & Damira Zhanatova

By Cyrus Mehta and Damira Zhanatova*

For years, many H-1B professionals treated a layoff as an immigration emergency and entrepreneurship as something they had to postpone. The January 17, 2025 [H-1B modernization rule](#) changes that somewhat. It gives H-1B workers a clearer path to move into a startup they own, not because USCIS created a special startup visa, but because the rule now expressly recognizes the ability of beneficiary-owned petitioners to file H-1B petitions on behalf of H-1B workers, even when those workers own or control the petitioning entity.

That policy shift was intentional. In the rulemaking just before President Biden left office, DHS acknowledged that existing immigration pathways for entrepreneurs are limited and explained that the beneficiary-owner provisions were designed to promote access to the H-1B program for entrepreneurs, start-up entities, and other beneficiary-owned businesses while also imposing reasonable conditions to protect program integrity. DHS also explained that clarifying how the regulations apply to entrepreneurs would give greater certainty to founders and encourage more beneficiary-owned businesses to participate in the H-1B program. In other words, the goal was not only to modernize the text of the regulation, but to make the H-1B category more realistically usable for startup founders.

That matters most when an H-1B worker anticipates a termination and wants to act quickly, assuming there are no other employers willing to offer the worker a new position and promptly file an H-1B extension petition. The general H-1B [portability](#) framework allows an H-1B worker already in the United States to begin working for a new employer when the new employer

files a nonfrivolous H-1B petition before the worker's authorized stay expires and includes an approved Labor Condition Application covering the offered work. For an entrepreneur, that means a properly formed startup may be able to step in as the new petitioner if it is a real operating business and the offered role is a genuine specialty occupation.

The core legal change is that founder ownership no longer defeats the petition by itself. Under 8 C.F.R. § 214.2(h)(4)(ii)(4), the definition of a "United States employer" now expressly includes an entity in which the H-1B beneficiary has a controlling interest, provided that the entity has a bona fide U.S. job offer, a legal presence in the United States, is amenable to service of process, and has an IRS tax identification number. This means that founder control is no longer treated as disqualifying on its own; the key limitation is that the petition must still be for a genuine H-1B-caliber position. The regulation also allows a beneficiary-owner to perform certain duties related to owning and directing the business, but only if specialty occupation duties remain the majority of the role.

That clarification is significant because DHS expressly rejected the argument that the beneficiary-owner provision constitutes unlawful "self-sponsorship." The rule draws a legal distinction between an individual acting in a personal capacity and a separate business entity filing as a United States employer. It also moves away from emphasizing the traditional common-law control test that previously made founder-owned H-1B petitions difficult and instead focuses the inquiry on whether the petitioning company qualifies as a U.S. employer and offers a bona fide specialty-occupation position. Even when the beneficiary is the sole owner, the company may still file an H-1B petition if it satisfies the regulatory definition of a U.S. employer and offers a bona fide specialty-occupation position. The real question is not whether the founder owns the company, but whether the company is legitimate and whether the position qualifies as an H-1B specialty occupation.

That is the key point for laid-off or at-risk workers. A software engineer, data scientist, product architect, or other professional may be able to form a startup and transfer H-1B employment to that company if the new role is structured as a real specialty-occupation position. The founder can still perform some business-building functions, but specialty-occupation duties must remain the majority of the job. The petition must establish that the founder is not merely "running a business," but is primarily performing the kind of specialized duties that support H-1B classification under 8 C.F.R. § 214.2(h). The startup must

therefore be presented as a real U.S. employer offering a real professional role, not as a shell entity created only to preserve status.

The rule also reflects a practical understanding of how startups actually operate. DHS recognized that founders often need to perform non-specialty duties directly related to owning and directing the business, especially in the early stages of growth. Those duties may include signing leases, finding investors, negotiating contracts, developing a business plan, engaging with potential suppliers and stakeholders, and recruiting talent. DHS also acknowledged that founders, like other H-1B workers, may perform incidental duties from time to time. But the line remains important: apart from incidental duties, any non-specialty work must be directly related to owning and directing the business, and the founder still must spend a majority of the time performing specialty-occupation duties authorized under the petition.

That means founder petitions should be drafted with precision. USCIS will look at all of the job duties described in the petition, the expected percentage of time devoted to each duty, and, in extension cases, the time actually spent performing those duties during the prior petition validity period. A founder case is therefore strongest when the petition clearly separates the specialty-occupation work from the business-building work and shows that the specialty-occupation side of the role remains dominant.

This change is especially important for H-1B workers who want to act before or immediately after termination. Under 8 C.F.R. § 214.1(l)(2), DHS may permit a grace period of up to 60 consecutive days following cessation of employment, or until the end of the petition validity period, whichever is shorter. If the worker can form the company quickly during that window, define a bona fide specialty-occupation position, and document that the role is primarily specialized professional work, the new company may serve as the H-1B petitioner. The founder can still engage in business-building activity, but 8 C.F.R. § 214.2(h)(4)(ii)(4) provides that, where the beneficiary has a controlling interest in the petitioner, the beneficiary may perform duties directly related to owning and directing the business only so long as specialty-occupation duties remain the majority of the role.

There is, however, a time limitation. Under 8 C.F.R. § 214.2(h)(9)(iii)(E), petitions filed by a U.S. employer in which the H-1B beneficiary has a controlling interest are limited to up to 18 months for the initial approval, and the first extension is

also limited to up to 18 months. This means the rule creates a workable founder path on a temporary basis, but not a long-term path. Startup founders using this strategy should expect earlier extensions and should plan to maintain strong evidence showing that the company is active and the position continues to qualify.

The 2025 rule also does not relax the requisite H-1B wage requirements. DHS emphasized that nothing in the final rule changes the Department of Labor's administration and enforcement of Labor Condition Application requirements, including prevailing wage and wage-level rules. That is important for founder cases because some startup roles may involve a combination of technical and business-related duties. Even in those cases, the petitioner still must comply with all applicable wage requirements. The founder-owned structure creates flexibility in ownership and duties, but it does not create an exception to the LCA rules or permit reduced wages.

Some founders may also benefit from concurrent H-1B employment. DHS clarified that the beneficiary-owner provisions do not prevent concurrent H-1B employment with multiple qualifying specialty-occupation roles, including with another entity in which the beneficiary may also have an ownership interest, so long as each petition independently qualifies and the beneficiary is otherwise eligible. That means a founder may, in some situations, continue with one H-1B employer while also obtaining authorization to work for a startup the founder owns.

Workers who already have a pending adjustment application may also have a separate portability option under INA section 204(j). If the Form I-485 has been pending for 180 days or more, and the qualifying immigrant petition has already been approved or was still pending when USCIS was notified of the new job offer after the 180-day mark and was later approved, the applicant may use Form I-485 Supplement J to preserve the adjustment case through a new offer of employment in the same or a similar occupational classification. That framework is implemented in 8 C.F.R. § 245.25(a), which permits continued eligibility through a continuing job offer or a qualifying new job offer, including self-employment. For startup founders, that means a new role with the founder's own company may support adjustment portability if the role remains closely tied to the job described in the underlying immigrant petition. While the adjustment applicant remains authorized to remain and work in the United States through an employment authorization document (EAD), it is prudent to

maintain underlying H-1B nonimmigrant status. An individual with a pending I-485 application remains amenable to removal if they do not maintain an underlying nonimmigrant status.

That issue should be approached carefully. A founder who was sponsored for a technical or professional role should define the startup position in a way that remains connected to that underlying occupation. If the original green-card case was based on a software engineering position, for example, the founder role should continue to emphasize software engineering or similarly aligned technical duties rather than shifting into a purely general executive role. The stronger the connection between the old role and the new one, the stronger the portability argument under INA section 204(j) and 8 C.F.R. § 245.25(a). The pending-I-140 language in 8 C.F.R. § 245.25(a) is also important because it covers cases in which the immigrant petition was still pending when USCIS was notified of the new job offer after 180 days and was later approved. That can be especially helpful for workers whose employment situation changed before the immigrant petition was fully adjudicated.

For long-term permanent residence planning, many startup founders should also consider the National Interest Waiver pursuant to the employment-based second preference (EB-2). Unlike a traditional employer-sponsored green card case, the EB-2 NIW allows self-petitioning and waives the job-offer and labor-certification requirements if the founder first qualifies for EB-2 and then satisfies the three-part [Dhanasar](#) test: the proposed endeavor must have substantial merit and national importance, the founder must be well positioned to advance it, and, on balance, waiving labor certification must benefit the United States. This framework often fits entrepreneurs better than PERM, especially because labor certification can be difficult in self-employment or owner-beneficiary scenarios. Strong founder NIW cases usually include a clear business plan, evidence of the founder's ownership and central role, proof of funding or market traction, intellectual property or other innovation, and letters or other documentation showing why the specific venture has meaningful U.S. impact.

At the same time, founders should avoid relying on broad claims that startups create jobs or that an industry is important in general. USCIS looks for evidence that the particular endeavor has concrete national significance and that the founder is genuinely positioned to carry it forward. The EB-2 NIW may have more limited immediate utility for founders from heavily backlogged countries,

such as India, because visa-number availability may remain years away. Even so, an approved EB-2 NIW petition can still serve as an important anchor for 3-year H-1B extensions under AC21 § 104(c), as implemented in 8 C.F.R. § 214.2(h)(13)(iii)(E), so long as an immigrant visa is not immediately available at the time the H-1B extension is filed.

If the founder qualifies, they may also be eligible for classification as a Person of Extraordinary Ability under the first-preference employment-based category (EB-1A). Similar to the EB-2 NIW, the EB-1A category is particularly advantageous for founders because it does not require a job offer, labor certification, or employer sponsorship. Instead, eligible founders may self-petition, providing greater flexibility and independence in pursuing permanent residence. The standard, however, is higher: the founder must demonstrate sustained national or international acclaim and recognition in the field, either through a one-time major achievement or by satisfying at least three of the regulatory criteria. In addition, the founder must establish an intent to continue working in the area of extraordinary ability and show that such work will substantially benefit the United States. For an H-1B founder, EB-1A may therefore be a powerful long-term pathway where the record includes strong evidence such as significant awards, published material about the founder, original contributions of major significance, participation as a judge of the work of others, a leading or critical role for distinguished organizations, high remuneration, or other comparable evidence demonstrating that the founder is among the small percentage of individuals who have risen to the very top of the field.

The practical takeaway is straightforward. The January 17, 2025 H-1B modernization rule does not give every laid-off worker a free pass to preserve status through a paper startup. What it does do is create a much clearer path for genuine founders to move their H-1B to a company they own, so long as the company is a real U.S. employer, the offered position is a bona fide specialty occupation, and specialty-occupation duties remain the majority of the role. For workers who need an immediate status solution, that can turn layoff risk into a realistic transition to entrepreneurship, even if founder-owned petitions require earlier extension planning because of their shorter approval periods. For workers who already have a pending adjustment application, there may also be a separate green-card protection strategy through INA section 204(j) and Form I-485 Supplement J if the new founder role remains in the same or a

similar occupational classification as the underlying immigrant position. And for longer-term residence planning, the EB-2 National Interest Waiver and, where the founder can meet the higher extraordinary ability standard, the EB-1A may both serve as important pathways for entrepreneurs because they allow self-petitioning and may be better suited to founder-led cases than the conventional labor certification model.

Finally, the H-1B entrepreneur rule remains viable even under a Trump administration that has otherwise moved aggressively to limit immigration options, most recently through a rule replacing duration-of-status admissions for F-1 students, J-1 exchange visitors, and representatives of foreign information media with fixed periods of admission and formal extension procedures. This broader restrictive environment makes it all the more important for the administration to recognize the role that H-1B entrepreneurs can play in innovation, job creation, and economic growth. We hope the administration will preserve and fairly implement this pathway so that qualified founders who satisfy the H-1B requirements can continue building businesses in the United States.

** Damira Zhanatova is an Associate at Cyrus D. Mehta & Partners PLLC.*