DHS issues Final Rule modernizing H-1B program

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The U.S. Department of Homeland Security issued its H-1B modernization Final Rule this morning. The rule is intended to improve the H-1B program by providing clarifications to make the program more efficient, improving the benefits for petitioners and beneficiaries, and strengthening the integrity of the program.

The updates include changes to the regulatory definition of "specialty occupation"; confirming that "normally" does not mean "always" regarding degree requirements; and clarifying that a range of degrees may be accepted for a role, but that they must relate to the sponsored position. Additionally, DHS is formalizing its current policy of allowing adjudicators to defer to prior determinations by the U.S. Citizenship and Immigration Services when petitions involve the same parties and same facts.

Benefits from the rule include certain flexibilities for nonprofit and governmental research organizations, and for certain beneficiaries who spend a majority of their time providing essential work for these cap-exempt organizations. The DHS is also extending "cap-gap" employment authorization for certain F-1 students until April 1 of the fiscal year while an H-1B change of status petition is pending.

The rule also includes provisions intended to strengthen the program's integrity. These include requiring the petitioner to prove the availability of a *bona fide* specialty occupation, ensuring the Labor Condition Application corresponds to the petition, defining "U.S. employer," and authorizing the USCIS to conduct site visits.

Each of these categories of changes will be discussed in more detail below.

Modernization and efficiencies
Specialty occupation definition and criteria. For a degree to be "directly related" to the job, the DHS clarifies that there must be a "logical connection" between the degree requirement and the position's duties. Although a position may allow for a range of qualifying degree fields, each field must directly relate to the position's duties.

After issuing the proposed rule in October 2023, commenters expressed their concerns that USCIS was targeting the degree fields "business administration" and "liberal arts" as overly

broad. The Final Rule removes the references to those degrees and recognizes that "the title of a degree alone is not determinative."

The DHS has also dropped provisions from the proposed rule that would have expressly prohibited related entities from submitting multiple H-1B registrations for the same beneficiary. Instead, the DHS will rely on a Final Rule issued last February – "Improving the H-1B Registration Selection Process and Program Integrity" – to limit multiple registrations. Initial data from the Fiscal Year 2025 H-1B cap registration process, which focused on beneficiaries rather than petitioners (meaning that beneficiaries did not benefit from multiple registrations), indicates that attempts to "game the system" are down.

The Final Rule also defines "*bona fide*" employment offers and allows the USCIS to review contracts to verify that employment positions are "*bona fide*." These provisions are consistent with current policy guidance and seek to clarify that an H-1B petitioner must establish that the proposed employment exists at the time of filing. The petitioner must also "establish that it has a *bona fide* position in a specialty occupation available for the beneficiary as of the start date of the validity period as requested on the petition." The rule does not require specific day-to-day assignments.

"Controlling interest" regarding beneficiary-owners is defined to mean that the beneficiary owns more than 50 percent of the petitioner.

Amended petitions. The Final Rule codifies policy guidance on when an H-1B amended petition is required. Petitioners are required to file an amendment before material changes occur. Any change in work location requiring a new LCA is considered a material change and requires an H-1B amendment before the move.

Deference to prior USCIS adjudications. The Final Rule instructs officers to refer to previous USCIS adjudications for petitions that involve the same parties and facts, provided that the prior determination had no material errors and there is no new material information or change in eligibility. This applies to all I-129 extension filings for all nonimmigrant classifications.

Evidence of maintenance of status. Evidence of maintenance of status is required for all amended petitions or extension of stay petitions.

Itinerary requirement for H programs is eliminated. The DHS says that most of the information included in itineraries is already in the LCA or elsewhere in the petition. To avoid redundancies, the DHS will no longer require itineraries to be submitted.

Validity expires before adjudication. The DHS will allow H-1B petitions to be approved after the initially requested end date if the USCIS adjudicates and deems the petition approvable. The rule also allows for H-1B petitions to have their requested validity periods extended under this provision.

Benefits and flexibilities

H-1B cap exemptions. The Final Rule permits nonprofit and government entities that conduct research as a "fundamental" activity to be exempt from the H-1B cap. Beneficiaries who spend at least half of their time "providing essential work that supports or advances a fundamental purpose, mission, objective, or function of the qualifying organization" may also qualify for H-1B cap exemption, even if the cap-exempt entity does not directly employ them.

Cap-gap expansion. The DHS has expanded automatic "cap-gap" work authorization until April 1 of the relevant fiscal year for F-1 students with valid OPT or STEM OPT work authorizations and pending H-1B change of status petitions (filed before the expiration of their OPT or STEM OPT work authorizations). In the past, cap-gap bridged work authorization for eligible F-1 students until only October 1, the first day of the relevant fiscal year. The new cap-gap rule is expected to prevent disruption to employment authorization for eligible F-1 students.

("OPT" stands for Optional Practical Training. "STEM" stands for Science, Technology, Engineering, and Mathematics.)

Program integrity

Bona fide *specialty occupation position available/contracts.* The DHS has replaced "non-speculative" employment with "*bona fide*" employment. This is intended to clarify that petitioners must establish that the specialty occupation position offered to the beneficiary is a *bona fide* position available as of the requested start date.

Additionally, the USCIS may request evidence – such as contracts, work orders, or similar documentation – to demonstrate "the *bona fide* nature of the beneficiary's position."

LCA corresponds to petition. The USCIS has the authority to review the information on the Labor Condition Application and determine whether it is consistent with the information in the petition. In its comment on the Final Rule, the DHS confirmed that "USCIS officers would not question whether [the U.S. Department of Labor] properly certified the LCA." The provision in the Final Rule is consistent with current practice.

U.S. employer and legal presence. The DHS is revising the definition of "United States employer" to mean that the petitioner has a "legal presence and is amenable to service of process in the United States." Petitioners must employ beneficiaries within the United States, but the employment can be on site, or by telecommuting or other remote work.

Beneficiary-owners. Beneficiaries who possess an interest in the petitioning entity can still qualify for an H-1B as long as they do not own a "controlling interest." The DHS defines a controlling interest as owning more than 50 percent of the petitioner, or if the beneficiary has majority voting rights. The goal is to expand access to H-1Bs for entrepreneurs, start-ups, and other entities. The first two H-1B petitions of beneficiary-owners are subject to limited validity periods of 18 months.

USCIS site visits. In the past, the USCIS has conducted inspections and compliance reviews, including on-site visits to ensure compliance with immigration regulations. The DHS is codifying its existing authority to conduct site visits at the petitioner's headquarters, beneficiary work locations, satellite offices, and third-party worksites. The Final Rule also includes consequences for refusing to cooperate with site visits, including denying or revoking any H-1B petitions tied to that location.

Third-party employers. In assessing whether employment by a third party other than the petitioner qualifies as a specialty occupation, the USCIS will look at the third party's requirements, rather than the petitioner's requirements. The DHS expressly says that the rule still allows for participation in the H-1B program by staffing companies and other third parties. These provisions are consistent with longstanding USCIS practice as well as a 2000 decision from the U.S. Court of Appeals for the Fifth Circuit.

Final thoughts

The Final Rule is expected to take effect on January 17, 2025.

In response to comments received after publication of the proposed rule, the DHS emphasizes that these "changes made to the definition of specialty occupation and its criteria are intended to codify existing practices and, as such, are not expected to create new restrictions on eligibility or lead to significant changes in adjudications."

The DHS will issue a new version of Form I-129, Petition for a Nonimmigrant Worker. We expect for the new form to be adopted with no grace period, meaning that employers may have to adopt and submit the new form immediately once the rule goes into effect on January 17.