Buchalter
CLIENT ALERT

January 9, 2025

What The H-1B Modernization Rule Means For Employers And Employees

By: Kripa Upadhyay

The U.S. Department of Homeland Security (USDHS) published a final rule regarding significant changes to the H-1 B program in the Federal Register on December 17, 2024.

This article examines these changes and ends with information aimed at dispelling some of the myths surrounding the H-1B program that became the center of controversy last week.

MODERNIZATION PROVISIONS

Changes to the definition of Specialty Occupation include clarifications that an H-1B beneficiary's degree or equivalent must be "directly related" to the position as part of the regulatory definition of specialty occupation and the related criteria. USCIS now defines "directly related" as having "a logical connection." USCIS added specific language stating that a position is not a specialty occupation if attaining a general degree is sufficient to qualify for the position and that a range of degrees is acceptable.

The changes also include an explicit statement that "normally" does not mean "always," which pertains to the degree requirement in the first prong of the regulatory specialty occupation definition. This is specific to amending language where an H-1B petition must meet the statutory and regulatory requirements, which include demonstrating that the position qualifies as a specialty occupation under one of four prongs. Two of these prongs use the term "normally" (i.e., the degree requirement is "normally the minimum requirement for entry into the particular position" and "the employer normally requires a degree or its equivalent for the position."

Codified Agency Deference: The new rule codifies existing internal policy stating that US Citizenship and Immigration Services (USCIS), will defer to its prior determination of eligibility when adjudicating petitions involving the same parties and underlying facts.

During the prior Trump administration, there were multiple instances where applicants applying for renewal of their H-1B whilst employed in the same job and for the same employer were suddenly denied benefits stating that they no longer met the requirements for "specialty occupation". Codifying deference gives employers and employees peace of mind and stability in their highly skilled workforce.

USCIS codifies that it will not defer to a prior approval if there was a material error involved in prior adjudication, or a material change now exists in circumstances or eligibility requirements, or new information that adversely impacts eligibility.

"Maintenance of Status" Requirement: Similar requirements were imposed in the past, and then suddenly stopped being a requirement. This is now a return to those past policies requiring the applicant to demonstrate that the employee maintained immigration status during the course of their H-1B stay. Employers are required to submit this evidence when requesting an extension of stay or amended petition for the worker.

FLEXIBILITY PROVISIONS

Expansion of eligibility for Cap-Exempt H-1B by changing the definition of a "Nonprofit research organization": This provision allows more employers and employees to seek H-1B visas as cap exempt entities. Prior definition allowed entities whose primary activity and primary motive was research, this rule now replaced "primary" with fundamental.

Registered 501(c)(3) entities who conduct research as a fundamental activity, but who are not primarily engaged in research or where research is not their primary mission, may nevertheless qualify under the cap-exempt provisions.

Extension of F-1 Student Visa Status: USCIS now codifies the automatic "cap-gap" extension for a student's status and post-completion Optional Practical Training (OPT) work authorization to avoid lapses while the H-1B petition is in process.

Itinerary No Longer Required: Historically, employers who file for H-1B for an employee who may be partially or permanently placed at a work location outside of the employer's principal place of business were required to provide a detailed itinerary detailing the frequency of such offsite placement.

PROGRAM INTEGRITY

Bona Fide Employment Requirements: The modernized rule brings back USCIS's authority to request contracts, work orders, or other evidence ''showing the bona fide nature of the beneficiary's position.'' This is not intended to be a substantive change but to clarify what DHS means when it uses the term ''non-speculative.''

USCIS will review such evidence to determine if the position is bona fide but codifies that this does not mean petitioners or end-clients must provide evidence of the beneficiary's day-to-day work assignments for the duration of the requested validity period. The new rule clarifies that the petitioner must establish, at the time of filing, that it has a bona fide position in a specialty occupation available for the beneficiary as of the start date of the validity period requested on the petition, the beneficiary will perform the work, and the work will be performed within the United States. Notably, the regulation explicitly allows for telework, remote work, or other off-site work within the United States.

It also requires the employer to be an entity with a physical presence in the United States and one that is amenable to service of process within the U.S.

Third-Party Placement Compliance: Under the modernized rule, USCIS now decides whether a consulting firm is "staffing" visa beneficiaries to third parties or merely "providing their services" to a client. In instances where the beneficiary is "staffed" to a third party—i.e., they become part of that third party's organizational hierarchy by filling a position in that hierarchy—USCIS will consider the third party's degree requirements as determinative of whether the position is a specialty occupation. In other words, when beneficiaries are "staffed" to third parties, USCIS now considers the third party to be more knowledgeable as to the actual degree requirements for the beneficiary's work than the petitioner.

Expanded Site Visit Authority: The modernized rule enhances USCIS's authority at site visits. Under the rule, if USCIS is not able to verify facts, it may deny or revoke the approval of an H-1B petition.

Crucially important is the expansion of this rule to 3rd party placements. USCIS reserves the right to deny or revoke an underlying/ pending petition if the 3rd party site employee refuses to comply or allow access for a USCIS FDNS (Fraud Detection and National Security Directorate) site visit.

USCIS Authority to Review the LCA: This is more a reiteration of what has been their standard practice and authority, but the modernized rule codifies USCIS's authority and obligation to determine whether a Labor Condition Application (the "LCA," which is filed and certified by the US Department of Labor) properly supports and corresponds with the H-1B petition.

Entrepreneurs with Ownership Interest: The modernized rule eliminates the common law employer-employee relationship definition, which means there are fewer impediments for beneficiary-owned employers. The rule now allows entrepreneurs to obtain H-1B visas through petitions filed by their own start-ups and further allows the beneficiaries to perform some non-specialty occupation work so long as the work is directly related to owning and directing the business. DHS wishes to signal that entrepreneurs with more than 50% ownership interest in the petitioning employer *can* seek H-1B visas. This change, however, comes with an 18-month approval validity period for the initial filing and first extension, which is half of the otherwise maximum approval period per petition.

CONCLUSION: H-1B registration and filing season soon will be upon us. The H-1B modernization rule requires employers to take a proactive approach to workforce planning, ensuring streamlined procedures and ensuring that internal policies align with the new requirements. It is crucial that employers leverage legal expertise to mitigate risks; especially in this uncertain climate where additional rules and amendments are expected after the inauguration of the incoming Trump presidency.

If you have follow-up questions on the H1-B Program, please contact Kripa Upadhyay.

Kripa Upadhyay specializes in immigration law, corporate and business law, foreign direct investment, and international trade compliance.

Kripa Upadhyay
Of Counsel
(206) 319-7007
kupadhyay@buchalter.com