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DHS Publishes Proposed H-1B Regulations

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On October 23, 2023, the Department of Homeland Security (DHS) issued a Notice of Proposed Rulemaking (NPRM) that would significantly modify the H-1B visa program. According to the DHS announcement, the proposed rule would "*modernize the H-1B specialty occupation worker program by streamlining eligibility requirements, improving program efficiency, providing greater benefits and flexibilities for employers and workers, and strengthening integrity measures*."

The proposed rule has a 60-day notice and comment period, and the final rule is expected to be published in late December or early January. Interested parties may submit comments to the proposed rule here.

The proposed rule has many provisions, and we break down the most significant into the following categories:

I. H-1B Eligibility

Definition of "Specialty Occupation"

The proposed rule would revise and modernize the definition and criteria for a "specialty occupation," which is the standard used to determine if a position qualifies for H-1B sponsorship. The current regulatory definition requires "the attainment of a bachelor's degree or higher in a specific specialty." This language has been interpreted narrowly in some circumstances, and has created issues for H-1B sponsorship for modern

positions, which may allow a person to qualify based on a number of different degree fields.

The proposed rule would add language to this definition to codify existing USCIS practice that there must be a direct relationship between the required degree field(s) and the duties of the position and that there may be more than one acceptable degree field for a specialty occupation. The proposed rule would still prohibit H-1B sponsorship if the position only requires a “general degree, such as business administration or liberal arts, without further specialization.”

The proposed rule would also clarify the regulatory requirement that a bachelor’s degree in a specific set of fields must “normally” be a requirement for the position to confirm that “normally” does not mean “always.” The term “normally” has been restrictively interpreted by prior administrations when adjudicating H-1B petitions, and the broader definition will now be codified.

Establishment of H-1B Eligibility for Entrepreneurs

The proposed rule would allow H-1B beneficiaries who own the petitioning company that is sponsoring them to be eligible for H-1B status. The rule would create conditions for when a beneficiary who owns a controlling interest in a company may be sponsored for H-1B status by that company.

In addition, the beneficiary-owner would have greater flexibility in their job duties authorized under the H-1 process. A beneficiary who has a controlling interest in the company that petitions for H-1B status “may perform duties that are directly related to owning and directing the petitioner’s business as long as the beneficiary will perform specialty occupation duties authorized under the petition a majority of the time.”

The validity of an initial H-1B petition and for a first extension of H-1B status for a beneficiary-owned entity will be limited to 18 months instead of the standard three years that is allowed for other H-1B petitions.

Clarification of When an Amended H-1B Petition Is Required Due to a

Change in Worksite

The proposed rule consolidates existing policy and would clarify when an amended H-1B petition must be filed due to a change in an H-1B worker's place of employment, as follows:

- A change in worksite within the Metropolitan Statistical Area (MSA) (also known as "area of intended employment") does not require the filing of an amended petition. The MSA is generally considered the area within "normal commuting distance" from the original worksite.
- A change in worksite outside of the MSA does require the filing of an amended H-1B petition, with a new Labor Condition Application (LCA) that includes the new worksite.
- The proposed rule will maintain the DOL definitions of non-worksites and maintain the short-term placement exemption for employment outside of the area of intended employment. The short-term placement exemption generally allows placement of an H-1B worker for up to 30 workdays (for roving employees) and 60 workdays (for employees with a permanent worksite) within a calendar year without requiring an H-1B amendment.

Additional Requirements for Placement of H-1B Workers at Third-Party Worksites

In some circumstances where an H–1B worker provides services for a third-party employer, USCIS will determine if the position qualifies as a "specialty occupation" based on the third-party employer's requirements for the H-1B beneficiary's position, rather than the petitioner's requirements. This is a change to current practice, where the petitioning employer's job requirements determine if the position qualifies as a "specialty occupation." There are some exceptions to this proposed rule.

II. H-1B Cap Lottery Revisions

Improving the Integrity of the H-1B Registration Process

The proposed rule would address the growing issue of having multiple H-1B cap lottery registrations submitted for the same individual, as follows:

- Create a “beneficiary-centric” H-1B registration selection process, where beneficiaries with multiple registrations would only be counted once for selection purposes. Each beneficiary who has a registration submitted on their behalf would be entered into the selection process once, regardless of the number of registrations filed on their behalf. This will remove the advantage of having multiple registrations submitted for a single beneficiary.
- Prevent “related” employers from filing multiple H-1B cap registrations for the same individual unless the related petitioners can establish a “legitimate business need” for filing multiple registrations for the same beneficiary. Examples of “related” employers include a “parent company, subsidiary, or affiliate.”
- Codify USCIS’s ability to deny or revoke H–1B petitions where the underlying registration contained a false attestation or was otherwise invalid. To this end, the proposed rule would allow USCIS to require proof of an employment contract, work order, MSA, or other proof of a bona fide job offer to support an H-1B registration and H-1B petition filing.

Extension of H-1B “Cap-Gap” Eligibility

The proposed rule would expand H-1B “cap-gap” eligibility to extend F-1 OPT employment authorization for eligible beneficiaries through April 1 of the following calendar year, or until a final adjudication is made by USCIS on the H-1B cap petition. Currently, the F-1 OPT “cap-gap” extension is only valid through September 30 of the same calendar year, which can be problematic due to USCIS processing delays and the advent of multiple H-1B registration lottery selections.

By way of background, the F-1 “cap-gap” provides an automatic extension of F-1 OPT work authorization if an H-1B cap petition is filed on behalf of an individual who has a valid, unexpired F-1 OPT on the day the petition is filed to USCIS. The H-1B Petition must request a Change of Status for the beneficiary. The proposed rule would extend “cap-gap” work authorization through April 1 of the following calendar year, or until the validity start date of the approved H–1B petition, whichever is earlier.

III. Expansion of H-1B Quota Exemptions

The proposed rule would expand the definition of employers and H-1B workers that are exempt from the H-1B quota, as follows:

- Revise the definition of an exempt ‘‘nonprofit research organization’’ and ‘‘governmental research organization’’ by replacing ‘‘primarily engaged’’ and ‘‘primary mission’’ with ‘‘fundamental activity.’’ This will allow a nonprofit entity or governmental research organization to be exempt from the H-1B quota if they conduct research as a “fundamental activity,” even if it is not the organization’s primary purpose.
- Revise which H-1B beneficiaries may qualify for H-1B cap exemption when they are not directly employed by a qualifying cap-exempt organization but still provide essential work, even if their duties do not necessarily directly further the organization’s essential purpose. For example, an individual working as an accountant or a software engineer for a university may qualify for an H-1B cap exemption.

IV. Codification of USCIS Site Visit Authority

The proposed rule would codify USCIS’ ability to conduct H-1B site visits under its Fraud Detection and National Security (FDNS) program. The proposed rule states:

“The proposed regulations would make clear that inspections may include, but are not limited to, an on-site visit of the petitioning organization’s facilities, interviews with its officials, review of its records related to compliance with immigration laws and regulations, and interviews with any other individuals or review of any other records that USCIS may lawfully obtain and that it considers pertinent to verify facts related to the adjudication of the petition, such as facts relating to the petitioner’s and beneficiary’s eligibility and continued compliance with the requirements of the H–1B program.

“The proposed regulation would also clarify that an inspection may take place at the petitioning organization’s headquarters, satellite locations, or the location where the beneficiary works or will work, including the beneficiary’s home, or third-party worksites, as applicable. The proposed

provisions would make clear that an H–1B petitioner or any employer must allow access to all sites where the labor will be performed for the purpose of determining compliance with applicable H–1B requirement."

The proposed rule confirms that refusal to cooperate by any of the above parties may result in the revocation of an approved H-1B petition.

V. Codification of USCIS "Deference" Policy for All Nonimmigrant Petitions

Finally, the proposed rule would codify the USCIS "deference" policy to confirm that if there is no material change in the underlying facts of a visa petition filed to USCIS, the agency "generally should defer to a prior determination involving the same parties and underlying facts." This deference policy will give employers more certainty in their ability to extend status for employees with a nonimmigrant visa status.

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