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News & Types: Immigration Monthly Updates

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Practices: Immigration

**USCIS PROPOSES CHANGES TO THE H-1B PROGRAM**

As reported in the September 2023 issue of our Business Immigration Monthly, the U.S. Citizenship and Immigration Services (USCIS) has issued a Notice of Proposed Rulemaking to modify the H-1B program.

Some highlights from the proposed rule are as follows:

- Modifying the definition of “specialty occupation” to require a direct correlation between the H-1B position job duties and the H-1B worker’s degree field/major.
- Clarifying the educational criteria for a specialty occupation – recognizing a “skills-first culture” that an occupation may allow a range of degrees – such as electrical engineering or electronics engineering for an electrical engineer – provided there is a direct relationship between the field of study for the degree and the job duties to be performed by the H-1B worker. Also indicating that what the USCIS considers “general degrees” (such as Business Administration) may not qualify alone for H-1B classification.
- Confirming that an employer would need to file an amended H-1B petition before assigning the H-1B worker to a location not covered by the underlying U.S. Department of Labor’s (DOL) Labor Condition Application (LCA) if the assignment does not qualify for one of the short-term placement exceptions.
- Eliminating the requirement that an employer provide an itinerary of the H-1B worker’s dates and locations of assignment, recognizing that the LCA covers the work locations and providing information about any secondary placements.
- Allowing the USCIS officer’s discretion to accept a new LCA with “fresh” petition validity dates post-filing in instances where the requested H-1B validity period may have expired or may be expiring due to delays in processing a Request for Evidence (RFE) or the administrative review process for denied petitions.
- Expanding the scope of H-1B Cap Exempt employment allowing workers who provide at least half of their worktime to an institution of higher education, nonprofit entity related to or affiliated with an institution of higher education, or to a nonprofit or governmental research organization to also work for an H-1B Cap-subject employer. For example, an H-1B worker who would also perform at least half of their work in support of a fundamental activity of the nonprofit research organization affiliated with the for-profit hospital, could also be approved to work for the for-profit hospital under the H-1B Cap Exemption.

- Extending the Cap-Gap period from October 1st to April 1st of the Cap's Fiscal Year. This will benefit F-1 students who may be selected in a subsequent H-1B selection process, but whose OPT or STEM OPT may expire before the H-1B Cap petition can be filed limiting their continued ability to work.
- Addressing reported abuse in the H-1B quota registration program – noting that 36.5% of the FY 2023 H-1B quota registrations were by multiple employers for the same beneficiary (one beneficiary had 83 registrations filed on his/her behalf). The USCIS proposes to limit all related entities (e.g., parent companies, affiliates, subsidiaries of a corporate conglomerate) to one registration per beneficiary and codify the ability of the USCIS to deny or revoke H-1B petitions when the H-1B registration contains false or invalid information. Additionally, the USCIS proposes to shift the selection process to a beneficiary-centric process whereby each beneficiary will only be considered one time in the selection process, regardless of the number of employers that have filed registrations on his/her behalf. If multiple registrations are submitted on behalf of the beneficiary and the beneficiary is selected in the registration process, the beneficiary will then be able to select the employer from those who submitted registrations on his/her behalf to file the H-1B quota petition. All beneficiaries would be required to have a valid passport to participate in the H-1B registration process. All employers filing the H-1B quota registrations would need to attest to the existence of a bona fide job offer in the United States (including telework, remote work or other off-site work in the United States).
- The USCIS is also proposing regulations to support H-1B workers who are entrepreneurs or who have a controlling (more than 50%) interest or majority voting rights in a business to allow them to perform duties in support of their business endeavor in addition to their "specialty occupation" work. For example, an H-1B software developer worker of an IT startup could perform the executive responsibilities of being the general manager of the business in addition to the primary responsibilities as software developer. As an observation, this proposed acknowledgement of beneficiary-owners may also create an opportunity for such H-1B entrepreneurs, who meet the modernized definition of "U.S. Employer" (*discussed below*), to complete an H-1B Cap registration.
- Clarifying that employers who assign H-1B workers to third-party worksites may need to prove that the third-party company (and not the employer) requires the theoretical and practical application of a body of highly specialized knowledge and attainment of at least a baccalaureate degree in the field for the H-1B employment. The USCIS may require contracts, work orders, statements of work, employment agreements, etc., in order to evidence that the third-party company's requirements qualify the offered assignment for H-1B classification.

The proposed rule also has implications for all visa classification when an extension or amendment is requested. First, the USCIS proposes to codify and clarify its deference policy – whereby if there has been no change in the job duties, locations of employment or other material changes, then the USCIS should not be second-guessing a previously approved petition, absent fraud. Additionally, the USCIS explains the documentation needed to evidence that the beneficiary is maintaining nonimmigrant status in order to be eligible for a change of status, amendment or extension would be applicable to all nonimmigrant classification – not solely the H-1B classification.

Finally, the proposed rule seeks to modernize the definition of "U.S. employer" for U.S. immigration purposes to be a person, firm, corporation, contractor or other association having an IRS Tax identification number (FEIN), having a legal presence (legally formed and authorized to conduct business) in the United States and is amenable to service of process to be sued in the United States who offers a bona fide job offer for a beneficiary to work in the United States.

Written comments are due on or before December 22, 2023. After the comment period closes, the USCIS will consider the comments prior to sending a final regulation to Office of Management and Budget (OMB) for another review. After OMB approves the final regulation, it may then be implemented by the USCIS (unless a court enjoins the implementation). Therefore, although the exact timing of the implementation of the new H-1B regulation is unknown, there has been indication that the USCIS would like the final regulation, or at least a portion thereof, implemented prior to the next H-1B quota registration process (which should occur in early March 2024).

Additional information about the implementation of the changes to the H-1B program will be contained in future Business Immigration Monthly updates when they become available.

## 5-YEAR EMPLOYMENT AUTHORIZATION CARDS

The USCIS has announced that it will issue eligible Employment Authorization Documents ("EAD") for five-year periods. However, it is within the discretion of the USCIS to issue them for a shorter period of time without having to provide an explanation as to why only the shorter period was issued.

Eligible applicants include:

- Refugees [EAD classification (a)(3)]
- Asylees [EAD classification (a)(5)]
- Citizens of Micronesia, the Marshall Islands or Palau [EAD classification (a)(8)]
- Individuals granted withholding of deportation or removal [EAD classification (a)(10)]
- Individuals with a pending application for asylum or withholding of deportation or removal [EAD classification (c)(8)]
- Individuals with a pending application for permanent resident status ("Adjustment of Status" – AOS application) [EAD classification (c)(9)]
- Individuals with a pending application for suspension of deportation, cancellation of removal, or relief under the Nicaraguan Adjustment and Central American Relief Act (NACARA) [EAD classification (c)(10)]
- Long-term residents of the Commonwealth of the Northern Mariana Islands (CNMI) [EAD classification (c)(37)]

## SUPREME COURT WATCH – UPDATE ON OPT/STEM OPT LITIGATION

The U.S. Supreme Court declined to grant a *writ of certiorari* thus ending the STEM OPT litigation which has been ongoing since 2014. Washington Alliance of Technology Workers, an IT union, opposed the expansion Optional Practical Training (OPT) to foreign students who completed designated STEM (science, technology, engineering, mathematics) programs at U.S. universities. Universities may continue to authorize STEM OPT to foreign students for up to 24 months if the student will be employed by an employer who is enrolled in E-Verify

and the student has graduated with a designated STEM major. This work authorization is in addition to the 12 months of OPT work authorization a foreign student is eligible for upon graduation at each higher level of education.

## NOVEMBER VISA BULLETIN UPDATE

The U.S. Department of State (DOS) recently issued the November 2023 Visa Bulletin with few changes from the October 2023 Visa Bulletin.

On a positive note, the USCIS has agreed to continue to allow individuals eligible in the family-based and employment-based categories to apply for permanent resident status in the United States (adjustment of status (AOS)) under the “Dates of Filing Chart” (instead of the Final Action Date chart).

To be approved for the actual Green Card/Permanent Resident status, an immigrant visa must be available when the USCIS approves the AOS application or when the Consular post issues the Immigrant Visa. This is based upon the Final Action Date (not Dates for Filing) chart.

The only advancement in the November 2023 Visa Bulletin benefits persons born in any country other than India or China or the Philippines (World category) who have been approved for the employment-based 2nd preference category - they may be eligible to be approved for the actual Green Card/Permanent Resident status if their Final Action priority date is before July 8, 2022.

Certain Religious Workers (SR), the employment-based 4th preference category, must receive their immigrant visa and use that visa to enter the United States or have their application to adjust status approved before midnight on November 16, 2023. The Religious Worker program expires on November 17th pursuant to H.R. 5860, signed on September 30, 2023, and Congressional action is needed to extend the program.

The DOS noted in the Visa Bulletin that the next priority date advancement may not occur until January 2024 in order to keep visa issuance within quarterly limits in accordance with the provisions of the Immigration and Nationality Act (INA).

## NEW I-9 FORM REQUIRED AS OF NOVEMBER 1ST

Starting November 1st, employers can only use Form I-9, Employment Eligibility Verification, with the 08/01/2023 edition date, found at the bottom of the page of the form and instructions. After that date, the prior version of Form I-9 will be obsolete and no longer valid for use.

Employers are required to use Form I-9 to verify the identity and employment authorization of individuals hired for employment in the United States. All U.S. employers must properly complete Form I-9 for every individual they hire for employment, including citizens and noncitizens.

Both employees and employers (or authorized representatives of the employer) must complete the form. An employee must attest to their employment authorization and present their employer with acceptable documents as evidence of identity and employment authorization. The employer must examine these documents to determine whether they reasonably appear to be genuine and relate to the employee, then record the document information on the employee’s Form I-9.

After the required date, employers who fail to use the 08/01/23 edition of Form I-9 may be subject to all applicable penalties under section 274A of the INA, 8 U.S.C. 1324a, as enforced by U.S. Immigration and Customs Enforcement (ICE).

**THE USCIS LAUNCHES ENTERPRISE CHANGE OF ADDRESS TOOL**

The USCIS recently launched an Enterprise Change of Address (E-COA) self-service tool on the USCIS website to allow individuals to update their mailing and physical address with the USCIS. This tool is available to individuals with pending applications, petitions, or requests and to individuals without pending applications. Individuals need to create an USCIS online account (regardless of whether they have previously submitted an application through the USCIS website) in order to update the address. The tool aims to eliminate the need to update the address in multiple places. The USCIS indicates it will automate address changes for almost all form types. The USCIS ultimately plans to eliminate the option to update address changes by mail or through the USCIS Contact Center.

*All noncitizens in the United States (including permanent residents and except A and G visa holders and visa waiver visitors) are legally required to report a change of address to the USCIS within 10 days of moving. F and J nonimmigrants should report address changes to their schools or sponsors who will then update the new address in the SEVIS system.*

***Please note that a change of address made with the U.S. Postal Service (USPS) will not change your address with the USCIS.*** New addresses should be updated with both the USCIS and USPS.