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DHS Releases New H-1B Regulation Significantly Modifying H-1B Program

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Practices: Immigration

On December 18, 2024, the Department of Homeland Security (DHS) published a final regulation implementing major changes to the H-1B visa program. This regulation builds on a previous final regulation from January 2024 which implemented the "beneficiary centric" H-1B quota registration process. The changes in the December 18th final regulation become effective on January 17, 2025, unless enjoined by a court.

DHS recognized that modernization of the H-1B program, improving its efficacy and streamlining processes is needed. While the H-1B program is open for any employer seeking to hire a noncitizen who has at least a bachelor's degree or its equivalent in a particular field (discussed infra) who will work in a "Specialty Occupation" (discussed infra), the majority of H-1B employers are in the Information Technology (IT) industry, including but not limited to Amazon, Cognizant Technology Solutions, Infosys Limited, Tata Consultancy Services, Google, Microsoft Corporation, April, Ina and Meta Platforms.

Highlights from the December 18th final regulation and its preamble include:

1. "Specialty Occupation" - As background, the H-1B classification is for noncitizens coming to perform services in a specialty occupation for a U.S. employer. A specialty occupation is defined as one that requires "theoretical and practical application of a body of highly specialized knowledge" and "attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry to the United States." Over the years, U.S. Citizenship and Immigration Services' (USCIS) interpretation of the required area of knowledge, or major field of study, needed for the degree and for the occupation varied, often by a particular Administration's policies. This regulation seeks to provide clarity on the "specialty occupation" definition by --

a. Identifying a two-prong analysis USCIS take when evaluating H-1B petitions -- (i) is the proffered position a specialty occupation (i.e., does the degree field correlate to the job duties), and (ii) does the noncitizen qualify for the specialty occupation based upon their credentials.

b. Recognizing that degree program titles (a/k/a majors) vary by schools, and a broader look into the program itself may be needed, rather than mere reliance on the degree title. The title of the degree (e.g., Business Administration or Liberal Arts) is not determinative. Instead, the USCIS will look at the underlying educational program and courses completed to determine whether there is a direct correlation to the duties of the position.

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c. Clarifying that “normally” does not mean “always” for specialty occupation definition in determining whether a specific bachelor’s degree or higher is normally required to perform the duties of the position.

d. Clarifying that when considering the knowledge needed for a specialty occupation, USCIS will consider a range of qualifying degree fields, but all must be “directly related” to the job duties. “Directly related” is defined as a logical connection between the degree or its equivalent and the duties of the position -- an “exact” connection is not required.

e. Confirming that USCIS will continue to consider work experience, skills and courses of study in determining whether a beneficiary meets the qualifications of a specialty occupation position -- a focus on a “match between required skills and job duties.”

f. Confirming there is no change to the regulation requiring three years of specialized training and/or work experience as a possible substitute for a year of post-secondary education that a noncitizen lacks for the degree requirement.

g. Recognizing that noncitizen entrepreneurs and/or business owners may have their business (i.e., U.S. employer) petition for their H-1B status; but the specific job the noncitizen will perform must qualify as a specialty occupation. (see also Beneficiary Owners *infra*).

2. Amended Petitions - The H-1B program is employer-specific, job-specific and work location-specific. For compliance with the H-1B program requirements, an employer has been required to notify USCIS of a material change by filing an amended petition. This regulation seeks to provide updated instruction on when an amended or new petition must be filed before a material change in the terms and conditions occurs, specifically:

a. If there is a change in work location which requires the filing of a new Labor Condition Application (LCA) with the U.S. Department of Labor (DOL), the employer is required to file an amended or new petition prior to the change.

b. If the employer will place the beneficiary on a new project with different minimum requirements, the employer is required to file an amended or new petition prior to the change.

c. Confirms that the amended or new H-1B petition must be filed **before** the material change occurs. DHS declined to provide a grace period for filing the amended or new petition. This is not a new policy shift, the rules for noncitizens to qualify for H-1B portability (i.e., to change employers) require the H-1B worker to not have worked without authorization. Employers who assign H-1B workers to different projects and work sites will have to closely monitor assignment changes to timely file an amended H-1B petition.

3. Codifies “Deference Policy” - The new regulation clarifies that when adjudicating a Form I-129 with the same parties and same underlying facts, adjudicators should defer to the prior decision unless a material error in the prior approval is discovered or a material change or information impacts eligibility.

a. Clarifies evidence of maintenance of status must be included for extension.

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b. Impacts all employment-based nonimmigrant classifications using Form I-129, not just the H-1B classification.

c. Eliminates Itinerary requirement from H classification petitions, noting that the LCA covers the location(s) of employment.

d. Employers are not required to establish specific day-to-day assignments for the entire time requested in the petition.

4. Greater Benefits and Flexibilities

a. Under the immigration law, certain U.S. employers are exempt from the H-1B quota (a/k/a lottery) and may file an H-1B petition at any time. Such quota-exempt petitions apply where the employment will occur ***at*** an institution of higher education or a related or affiliated nonprofit entity or a nonprofit or government research organization. When determining whether a "nonprofit research organization" and "governmental research organization" is an H-1B quota exempt employer, the new regulation changes the definition of research replacing "primarily engaged/mission" with "fundamental activity". Therefore, where the basic and/or applied research is one of the employer's fundamental activities (not 50% or more of its activities), the employer may be exempt from the H-1B quota.

b. Allows beneficiaries not directly employed by a qualifying H-1B quota-exempt employer, but who spend at least half of their time providing essential work to advance fundamental purpose, mission, objective, or function, to be considered as quota-exempt.

c. Cap Gap: Provides automatic extension of F-1 status (including post-completion optional practical training (OPT) and STEM OPT work authorization in certain circumstances) until April 1 to beneficiaries of non-frivolous pending H-1B quota petitions that request a change of status to H-1B classification. Cap Gap currently expires on September 30. Extending Cap Gap up to the following April validity helps F-1 students maintain their status while USCIS is processing the H-1B petition.

d. Recognizes that when the U.S. employer notifies USCIS that the H-1B worker is no longer employed, USCIS will revoke the approved petition.

5. Strengthening Program Integrity

a. Bona Fide Employment:

i. Requires employers to establish that a bona fide position in a specialty occupation is available as of the requested start date. The employer is not required to establish specific day-to-day assignments for the entire time requested in the H-1B petition. DHS acknowledges that this requirement may result in

ii. Codifies USCIS' authority to request contracts or evidence to determine if position is bona fide and ensure the LCA supports and corresponds to the position.

iii. Eliminates the requirement to document the employer-employee relationship.

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iv. Confirms that the USCIS no longer requires the U.S. employer to establish a right to control the beneficiary's work.

v. Changes definition of "United States employer" to require the petitioner to have a legal presence in the United Status (i.e., is legally formed and is authorized to conduct business) and be amenable to service of process in the United States.

b. Beneficiary Owners: Clarifies certain owners of petitioning employers may be eligible for H-1B status as "beneficiary-owners" with limited validity of 18 months where beneficiary has a controlling interest. Noncitizens may qualify for the H-1B classification even when having a controlling interest in the petitioning entity, but the specific job the noncitizen will perform a majority of the time must qualify as a specialty occupation.

c. Site visits: Codifies USCIS' authority to conduct site visits at the location where the beneficiary works, which may include the beneficiary's house or third-party worksites. Clarifies that the refusal to cooperate with the site visit process by the employer, beneficiary or third party (when there is a third-party placement) may result in the denial or revocation of the H-1B petition. Indicates that between fiscal year 2019 and 2023, approximately 19 percent of site visits have either been noncompliant or have resulted in a finding of fraud.

d. Third party placement:

i. Confirms that staffing companies are not prohibited from participating in the H-1B program. Also confirms that third-party placement arrangements are permissible under the Immigration and Nationality Act (INA).

ii. Differentiates between when a beneficiary will be staffed to fill a position with an end-client's organization and where the beneficiary will participate on the employer's project for end-client organizations. Indicates that in USCIS experience, it is "rare" for beneficiaries to participate on the employer's project for end-clients.

iii. When a beneficiary will be staffed to fill a position with an end-client's organization, the USCIS will determine whether the offered position qualifies as a specialty occupation based upon the end-client's requirements for the position (not the employer's requirements). USCIS indicates that employers should be able evidence the end-client's requirements through documents generated in the "normal course of the relationship," such as Master Services Agreements, Statement of Work, end-user letters or similar documentation. Evidence should show the contractual relationship between all parties, the bona fide nature of the beneficiary's position and the end-client's minimum educational requirements to perform the duties.

iv. Confirms that DHS does not intend to limit validity periods based on end-date of contracts, work orders, or similar documentation.

v. Where H-1B a worker will be contracted to fill position at a third party's organization, the work must be in a specialty occupation and the requirements of the third party, not the petitioner, are most relevant to determine if the position is a specialty occupation.

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To implement the December 18th final regulation, a new edition of Form I-129 will be required for all petitions beginning January 17, 2025. USCIS will soon publish a preview version of the new Form I-129 on their website.

Additional information about the implementation of the December 18th final regulation will be posted on the Masuda Funai website when it becomes available.

Please contact any Masuda Funai attorney with questions about the significant changes to the H-1B program and the implementation of these changes.

Masuda Funai is a full-service law firm with offices in Chicago, Detroit, Los Angeles, and Schaumburg.

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