Immigration Update: The New H-1B Modernization Rule

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On January 17, 2025, U.S. Citizenship and Immigration Services (USCIS) published a final rule ("Rule") intended to modernize and improve the efficiency of the H-1B nonimmigrant visa program. The H-1B visa allows U.S. employers to employ temporary workers in specialty occupations that require highly specialized knowledge and a bachelor's or higher degree in the specific specialty or its equivalent. The private sector is increasingly turning to the H-1B visa to address labor shortages and find the most highly qualified candidates for sophisticated roles, with almost half a million registrations submitted for the fiscal year 2025 cap of 85,000 visas.

Changes Under the New H-1B Modernization Rule?

"Specialty Occupation" Definition

Under the previous rule, a specialty occupation was defined by one of four criteria:

- A bachelor's or higher degree is normally the minimum entry requirement;
- The degree is common to the industry, or the position is so complex and unique it can only be performed by individuals with a degree;
- The employer normally requires a degree or its equivalent for the position; or
- The position duties are so specialized and complex that the knowledge required to perform the duties is associated with attainment of a bachelor's or higher degree.

The Rule shifts the specialty occupation definition to include demonstrating the direct relation between the required degree and the occupation, meaning the degree has a "logical connection" to the position's duties. If the employer offers a range of suitable degrees for the position, each must be directly related to the position's duties. For example, if a company will accept a degree in

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electrical engineering for a software engineer position, it must demonstrate the logical connection between the degree and the position.

H-1B Cap-Exempt Employers

The Rule expands the definition of cap-exempt employers who can solicit H-1B visas outside of the 85,000 visa cap. Now, non-profits and government organizations that conduct research "as a fundamental activity," instead of those that are "primarily engaged" or have a "primary mission" of research, can qualify as a cap-exempt employer. This change in language will allow more institutions engaging in research to sponsor H-1B temporary workers outside of the visa cap.

The Rule also provides additional clarification on what it means to work "at" a qualifying cap-exempt employer. Work performed at a qualifying cap-exempt employer may now include work performed remotely, via telework, or off-site. It further clarifies that to qualify for the American Competitiveness and Workforce Improvement Act (ACWIA) fee exemption, a nonprofit must have IRS tax-exempt designation under 501(c)(3), (c)(4), or (c)(6), and the Rule eliminates the additional requirement to have been approved for tax exempt status for research or educational purposes.

Employer-Employer Relationship and Third-Party Worksites

Under the previous rule, a U.S. employer eligible to sponsor an H-1B visa was limited to a person, firm, corporation, contractor, or other association or organization in the U.S. which engages a person to work within the U.S., has an IRS tax identification number, and has an employer-employee relationship with its H-1B nonimmigrant employees. "Employer-employee relationship" was specifically defined as having the ability to "hire, pay, fire, supervise or otherwise control the work of any such employee."

The new Rule, however, eliminates the employer-employee relationship language and expands the definition of a U.S. employer. The Rule requires a U.S. employer to have legal presence in the U.S.,

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be amenable to service of process, and have an IRS tax identification number. This expands eligible petitioners to include beneficiary-owned companies, such as one owned by a H-1B worker. This change is intended to promote access to H-1B visas for entrepreneurs and start-up entities, among others.

The Rule also codifies existing USCIS policy that the employer have a bona fide job offer for the beneficiary. This job offer may include telework, remote work, or other off-site work within the U.S. USCIS has authority to request contracts, work orders, or similar evidence to establish a bona fide job offer exists.

Lastly, for third-party work assignments, and consistent with current USCIS policy, the Rule eliminates itineraries as a requirement for filing.

Compliance

USCIS has authority to conduct inspections, evaluations, verifications, and compliance reviews of H-1B employers and employees to verify compliance with all applicable laws. This may include site visits where USCIS officers visit the employer's office unannounced to conduct the review. Site visits may be conducted physically, telephonically, or electronically.

The Rule codifies and expands existing USCIS authority to conduct these visits and clarifies the scope of inspections and consequences for failure to cooperate with the inspection. Now, USCIS is authorized to conduct inspections at the employer's worksite, neutral locations, and other places where the H-1B employee's work will be performed. This includes third-party worksites and the employee's home, if the employee works remotely. Failure to cooperate with the inspection can result in revocation or denial of a H-1B worker's petition.

H-1B Extensions

Historically, a deference policy has been in place instructing USCIS officers to approve extension requests when the petition involves the same parties and the same facts. In the first Trump

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administration, this longstanding deference policy was rescinded, which created delays and uncertainty. The Rule codifies the deference policy, making it less subject to change between administrations and making extension requests more reliable and routine. This aspect of the Rule applies beyond H-1B visas to all nonimmigrant workers using petition I-129, including O, P, TN, L, E, H-2A, H-2B, Q, and R nonimmigrant workers.

Automatic Work Authorization Extensions for F-1 Students

The "cap-gap" automatic extension applies to F-1 students working for employers who are petitioning for a change in status to H-1B. F-1 students typically work with employment authorization granted under Optional Practical Training (OPT). Their employment authorization may expire prior to the start of the fiscal year (October 1), leading to a gap in status. The automatic extension (known as "cap gap") previously granted automatic extensions through September 30, the last day before the start of the fiscal year. Now, eligible students may receive an automatic extension through April 1 of the fiscal year. This puts F-1 students with expiring OPT in a better position to continue working for their petitioning employer without disruption while waiting on pending requests to change status from F-1 to H-1B.

Looking to the Future

The H-1B Modernization Rule revises and protects key aspects of the H-1B visa program upon which U.S. employers and specialty occupation workers have come to rely. From expanding opportunities to entrepreneurs and start-up entities to providing U.S. employers and workers with more certainty and greater flexibility, the Rule presents new opportunities for employers to utilize the H-1B visa program and remain competitive in the market.

If you have any questions about these changes to the H-1B visa program, or any other immigration issues, please contact the authors or any attorney with Frost Brown Todd's Immigration team.

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