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Blog Post

A Modern Approach: USCIS Proposes to Update the H-1B Program

December 11, 2023

USCIS is proposing to modernize the H-1B visa program by streamlining eligibility requirements, improving program efficiency, providing greater benefits and flexibilities for employers and workers, and strengthening integrity measures related to the lottery. Employers are invited to participate in the rulemaking by submitting written data, views, comments, and arguments on all aspects of USCIS's proposed rule. Employers wishing to provide input need to hurry — the public comment period is scheduled to end on December 22, 2023.

Streamlining Eligibility Requirements and Improving Program Efficiency

The H-1B visa gives employers the opportunity to hire foreign nationals in specialty occupations for three years at a time and for a maximum period of six years. To qualify as a specialty occupation, the offered position must require the application of highly specialized knowledge in fields such as architecture, business, engineering, mathematics, medicine and health, and the arts, and also require a bachelor's or higher degree. USCIS proposes to streamline H-1B requirements by codifying existing USCIS practice that there must be a direct relationship between the required degree field(s) and the duties of the position; there may be more than one acceptable degree field for a specialty occupation; and a general degree is insufficient.

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USCIS proposes that a position may qualify as an H-1B specialty occupation even if the employer accepts degrees in multiple, disparate fields of study, provided that each of the qualifying fields are directly related to the duties of the position. However, a general degree without further specialization or an explanation of what type of degree is required will be insufficient. According to USCIS, a requirement of a general business degree for a marketing position would not satisfy the specific specialty requirement. Similarly, an H-1B petition with a requirement of any engineering degree in any field of engineering for a software developer position would generally not satisfy the statutory requirement, as it is unlikely that the employer could establish how the fields of study within any engineering degree provide a body of highly specialized knowledge directly related to the duties and responsibilities of the software developer position.

USCIS also proposes to clarify when an amended or new H-1B petition must be filed due to a change in an H-1B worker's place of employment. Specifically, USCIS seeks to clarify that any change of work location that requires a new labor condition application is considered a material change and therefore requires the petitioning employer to file an amended or new H-1B petition with USCIS before the H–1B worker may commence employment under the changed conditions. Additionally, an amended or new petition would not be required when a beneficiary is going to a non-worksite location to participate in employee development, will be spending little time at any one location, or will perform a peripatetic job. Peripatetic jobs include situations where the job is primarily at one location, but the beneficiary occasionally travels for short periods to other locations on a casual, short-term basis, which can be recurring but not excessive.

Finally, USCIS proposes to improve program efficiency by codifying its policy that if there has been no material change in the underlying facts,

adjudicators generally should defer to prior determinations involving the same party. However, USCIS will not defer to a prior approval if: there was a material error involved with a prior approval; there has been a material change in circumstances or eligibility requirements; or there is new, material information that adversely impacts the employer's or beneficiary's eligibility.

Strengthening Integrity Measures

USCIS is limited to a congressionally mandated quota of 65,000 regular cap H-1B visas, with 6,800 of those reserved for Chilean and Singaporean nationals, and 20,000 master's cap H-1B visas per fiscal year. *Before* an employer can ask USCIS to admit a qualified candidate into the United States in H-1B status to begin working in a specialty occupation or change the candidate's current U.S. immigration status to H-1B, the employer must register for the H-1B lottery, unless the employer is otherwise exempt (i.e., an institution of higher education, nonprofit organization related to or affiliated with an institution of higher education, or nonprofit research organization or governmental research organization, among others).

Under the current process, the more registrations that are submitted on behalf of an individual, the higher chance that individual will be selected in a lottery. At the same time, an individual's chance of selection with a single registration is greatly reduced, as the number of individuals with multiple registrations increases. During the registration period for the FY 2023 H-1B lottery, the number of individuals with multiple registrations eligible for selection was much larger than in previous years, raising concerns that employers may be submitting registrations that do not represent legitimate job offers, thereby skewing the selection process. In fact, registration data showed patterns of groups of companies submitting registrations for the same groups of individuals. When selected, these companies subsequently filed a low number of H-1B

Petitions compared to the number of registrations they submitted.

To ensure that the annual numerical allocations are going to employers that truly intend to hire an H-1B worker, USCIS proposes a beneficiary-centric H-1B registration selection process. Under this process, each individual would be entered into the selection process once, regardless of the number of registrations filed on their behalf. If an individual is selected, each employer that submitted a registration on behalf of the individual would be eligible to file an H-1B petition on that individual's behalf. Consequently, the beneficiary-centric process levels the playing field for companies submitting legitimate registrations for unique individuals and not attempting to unfairly improve their chance of selection.

Providing Greater Benefits and Flexibilities for Employers and Workers

USCIS proposes to expand H-1B cap-exempt eligibility for employers and H-1B workers. Specifically, USCIS seeks to broaden the definition of "nonprofit research organization" and "governmental research organization" to include such organizations that conduct research as a fundamental activity but are not primarily engaged in research, or where research is not the primary mission. According to USCIS, a nonprofit organization with a mission to eradicate malaria that engages in lobbying, public awareness, funding medical research, and performing its own research on the efficacy of various preventative measures may qualify for H–1B cap exemption even if it was not primarily engaged in research.

Additionally, USCIS proposes to clarify that H-1B workers may be exempt from the lottery even if they are not directly employed by a cap-exempt organization so long as at least 50 percent of the H-1B worker's time is spent performing job duties at the cap-exempt organization. Further, H-1B workers

are eligible for a cap-exempt H-1B petition if their work directly contributes to, but does not necessarily predominantly further, the qualifying organization's purpose, mission, objection, or function.

USCIS also proposes to account for operational issues related to the H-1B cap-gap. Each year, U.S. employers seek to employ F-1 students through the H-1B program by requesting a change of status and filing an H-1B cap-subject petition with USCIS. Because employers may not file H-1B petitions more than six months before the date of actual need for the employee, the earliest date an H-1B cap-subject petition may be filed for a given fiscal year is April 1. Many F-1 students complete a program of study or post-completion optional practical training (OPT) employment authorization in mid-spring or early summer. Per current regulations, after completing their program or post-completion OPT, F-1 students have 60 days to depart the United States or take other appropriate steps to maintain lawful status. However, because the change to H-1B status cannot occur earlier than October 1, an F-1 student whose program or post-completion OPT expires in mid-spring has some time following the 60-day period before they can commence employment in H-1B status. To address this "cap-gap" issue, USCIS established regulations that automatically extended F-1 status and, if applicable, post-completion OPT to October 1 for eligible F-1 students. USCIS now proposes to revise its regulations to automatically extend F-1 status and related work authorization until April 1 of the relevant fiscal year for which the H-1B petition is requested due to adjudication delays causing some cap-subject H-1B petitions to remain pending on or after October 1.

Implications

USCIS is currently accepting public comments on the proposed changes. Once the 60-day comment period ends, USCIS will review the feedback and publish the final regulations. Accordingly, employers should take the time now to (1) review current job

descriptions to ensure that there is a direct relationship between the required degree field(s) and the duties of their offered positions; (2) determine if their organization qualifies for cap-exempt status to avoid the H-1B lottery; and (3) update internal I-9 compliance protocols to account for likely cap-gap extensions.

For questions related to the H-1B visa process, please contact your Akerman immigration lawyer.
