Global Immigration alert

December 2024

United States

Department of Homeland Security publishes H-1B Modernization Rule

Executive summary

On 18 December 2024, the Department of Homeland Security (DHS) published a final rule entitled "Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers" (the "H-1B Modernization Rule"). This final rule, which is intended to enhance the integrity of the H-1B program and facilitate its intended purpose of allowing U.S. employers to hire and retain foreign talent in specialty occupation positions without disadvantaging U.S. workers, will be effective on 17 January 2025.

Background

DHS published the proposed text of the H-1B Modernization Rule on 20 October 2023. After receiving and reviewing extensive comments from the public, DHS is now issuing the final rule "to modernize and improve the efficiency of the H-1B program, add benefits and flexibilities, and improve integrity measures." As the name of the rule suggests, regulatory provisions relating to F-1 students and other visa categories have also been updated.

In addressing the comments received, DHS identifies several important phrases that were present in the proposed text but that have been removed from or revised in the final rule. Of note is the element of the "specialty occupation" definition providing that if a sponsoring employer requires attainment of a general degree, without further specialization, for entry into an occupation, that occupation is not eligible for H-1B "specialty occupation" classification. The proposed rule contained specific references to "business administration or liberal arts" degrees, which were removed. This revision to the regulatory language is meant to emphasize the importance of considering the "beneficiary's actual course of study" rather than solely the title of the degree they hold.

Analysis

Throughout the final rule, DHS emphasizes that the revisions to the regulatory language for the definition and criteria for a "specialty occupation" do not represent a change in policy; instead, they represent the codification of existing adjudication practices and are intended to provide greater predictability and clarity.

The key aspects of the new regulation as it relates to the determination of whether an offered position is an H-1B "specialty occupation" include:

- A position can only be classified as an H-1B "specialty occupation" if it requires the theoretical and practical application of a body of highly specialized knowledge and requires at least a bachelor's degree in a "directly related" specific specialty, or its equivalent. "Directly related" is defined as a "logical connection between the required degree . . . and the duties of the position."
- If a petitioner seeks to demonstrate that a position is a "specialty occupation" because a bachelor's in a directly related specific specialty is "normally" the minimum requirement, they will not be required to prove that it is *always* the minimum; DHS defines "normal" as "usual, typical, common, or routine," and declined a suggestion to follow the preponderance of the evidence standard definition of "more likely than not."

Other important updates to the regulations impacting H-1B petitions include:

- Removing the reference to an employer-employee relationship in the definition of "United States employer." As an additional integrity measure, however, the definition will include a requirement that a petitioner have a bona fide job offer to work in the U.S. Contracts, work orders, or similar evidence may be requested to verify the bona fide job offer.
- Removing the itinerary requirement
- Codifying the requirement to file a new Labor Condition Application and amended petition when the beneficiary will work from a new area of intended employment when the Department of Labor 30/60-day short-term placement rule does not apply. Such an amendment must be filed prior to the material change taking place.

The final rule has also codified existing policy of providing deference to prior determinations of eligibility in requests for extensions of petition validity and finalizes the provision to expand F-1 cap-gap protection from 1 October to 1 March of the fiscal year.

What this means

The new H-1B "specialty occupation" definition requires that a petitioning employer establish that each acceptable field of study is "directly related" to the duties of the offered position when a range of qualifying degree fields is accepted. Each acceptable degree field must provide the body of highly specialized knowledge to be applied by a beneficiary when performing the job duties associated with the position. It will be the petitioner's burden to establish how each field of study is in a "specific specialty" directly related to the position's duties and responsibilities.

The new definitions and requirements will apply to any H-1B petition filed on or after 17 January 2025. A new edition of Form I-129, Petition for a Nonimmigrant Worker, will be required for all petitions beginning on this date. Employers and beneficiaries should closely follow the implementation of the H-1B Modernization Rule, as it is expected to be in place for the foreseeable future. A new administration would need to go through the full rulemaking process to rescind all or part of the H-1B Modernization Rule (absent an act of Congress to formally disapprove of the rule via the Congressional Review Act).

We will continue to monitor and review future developments. For additional information, or if you wish to discuss this further, please contact your EY Law LLP or Mehlman Jacobs LLP professional.

EY Law LLP

Alex Israel, Partner
+1 416 943 2698
alex.d.israel@ca.ey.com

Roxanne Israel, Partner
+1 403 206 5086
roxanne.n.israel@ca.ey.com

Marwah Serag, Partner
+1 416 943 2944
marwah.serag@ca.ey.com

Jonathan Leebosh, Partner
+1 604 899 3560
jonathan.e.leebosh@ca.ey.com

Melanie Bradshaw, Partner
+1 416 943 5411
melanie.bradshaw@ca.ey.com

Stephanie Lipstein, Partner
+1 514 879 2725
stephanie.lipstein@ca.ey.com

Mehlman Jacobs LLP

Sharon Mehlman, Partner
+1 858 404 9350
sharon.mehlman@mehlmanjacobs.com

Dilnaz A. Saleem, Partner
+1 713 750 1068
dilnaz.saleem@mehlmanjacobs.com

Author: Jessica Marks, Senior Counsel
+1 416 943 3229
jessica.marks@ca.ey.com