

Practice Alert: Top Ten Key Takeaways of the H-1B Modernization Rule

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On December 18, 2024, USCIS published a [final rule](#) implementing significant changes to the H-1B nonimmigrant visa category. The stated purpose of the final rule is “to modernize and improve the efficiency of the H-1B program, add benefits and flexibilities, and improve integrity measures.” While the changes will primarily affect H-1B specialty occupation workers, the final rule includes provisions that will impact other nonimmigrant classifications, including the H-2, H-3, F-1, L-1, O, P, Q-1, R-1, E-3, and TN categories.

AILA provides the following key takeaways from the final rule.

- **New Form I-129 Starting on January 17, 2025**

- The new H-1B eligibility requirements, including the new requirement for qualifying as a specialty occupation, will apply to any H-1B petition filed on or after **January 17, 2025**, the effective date of the final rule. To incorporate the changes implemented by the rule, a new Form I-129, Petition for a Nonimmigrant Worker, will become *mandatory* for all filings received on or after January 17, 2025. A preview of the new Form I-129 is available at <https://www.uscis.gov/sites/default/files/document/forms/i-129preview.pdf>.

- **Specialty Occupation**

- In addressing the comments received, USCIS identifies several important phrases from the NPRM that have been revised or removed in the final rule. This includes the element of the proposed “specialty occupation” definition providing that, if a petitioner 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 intended to emphasize the importance of considering the “beneficiary’s actual course of study” rather than solely the title of the degree they hold.
- 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. A “directly related” degree is defined as a degree having 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,” declining a suggestion to follow the preponderance of the evidence standard definition of “more likely than not.”
- When a petitioner indicates a range of qualifying degree fields is acceptable, the petitioner must establish that *each* acceptable field of study is “directly related” to the duties of the offered position. 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.

- **H-1B Cap Exemptions**

- The Rule changes the requirement that a nonprofit research organization or a governmental research organization be “primarily engaged” in research or have a “primary mission” to perform research. The new requirement is that research must be a “*fundamental activity*” of the organization to qualify as a nonprofit research organization or a governmental research organization for cap exemption purposes.
- The Rule clarifies that work performed “at” a qualifying institution may include work performed via telework, remotely, or off-site and that USCIS will focus on the job duties performed rather than where the duties are physically performed.
- To qualify for the ACWIA fee exemption, the nonprofit must be determined by the Internal Revenue Service to be tax exempt under IRS sections 501(c)(3), (c)(4), or (c)(6). Prior regulations stated that the nonprofit must be defined as tax exempt under IRS sections 501(c)(3), (c)(4), or (c)(6) AND have been approved for tax exempt status for research or educational purposes by the IRS.

- **Definition of Employment and Third-Party Worksites**

- USCIS revised the definition of U.S. Employer, eliminating the employer-employee relationship requirement and replacing it with the requirement that the petitioner has a bona fide job offer for the beneficiary to work (including telework, remote work, or other off-site work within the U.S.).
- Also, the definition of U.S. employer has been expanded to include those that have a legal presence in the U.S., are amenable to service of process, and have a U.S. Tax ID #. This definition enables owner-beneficiaries to petition for themselves.

- The itinerary requirement has been eliminated. Petitioners are no longer required to submit specific day-to-day assignments for the full validity period but must demonstrate that the position will exist by the start date. The preamble to the final rule clarifies that eliminating the itinerary requirement is consistent with USCIS policy memorandum PM-602-0114 following the decision of the U.S. District Court for the District of Columbia in *ITServe Alliance, Inc. v. Cissna*, 443 F. Supp. 3d 14, 42 (D.D.C. 2020) (“the itinerary requirement in the [regulations] has been superseded by statute and may not be applied to H-1B visa applicants”).
- If USCIS determines a beneficiary is “staffed” to a third party, USCIS will look to the requirements of the third party, not petitioner, when determining whether the position is a specialty occupation. A beneficiary “staffed” to a third party fills a position within the third party’s organizational hierarchy and aligns with the third party’s requirements. By contrast, a beneficiary “providing services” works on discrete projects for third-party clients without integrating into the third party’s operations.
- The new rule replaces the existing regulation’s focus on demonstrating an employer-employee relationship (e.g., ability to hire, fire, supervise, and pay the worker) with a requirement to establish the existence of a bona fide job offer in a specialty occupation as of the requested start date.
- USCIS has formalized the requirement for contracts, statements of work, and client letters to confirm bona fide job offers in third-party work locations. In addition, USCIS may request documentation such as contracts, work orders, or similar evidence to demonstrate the bona fide nature of a position and its educational requirements.
- **Site Visits**
 - The Rule contains expanded authority and compliance requirements for H-1B site inspections. Under the rule, USCIS is authorized to conduct site visits at the petitioner’s worksite, neutral locations, and other places where H-1B work will be performed, including third-party customer locations (including, according to the Supplementary Information accompanying the Rule, at the private residence of the H-1B beneficiary, if H-1B work is remotely performed in the home). If USCIS is unable to verify facts, including situations in which the petitioner or a third party refused or declined to cooperate in an inspection, USCIS is authorized to deny or revoke any petition for H-1B workers performing services at these locations.
- **Amended Petitions**
 - The Rule clarifies requirements for when to file H-1B amended petitions, essentially codifying *Matter of Simeio Solutions*, and incorporates DOL rules on when a new LCA is not necessary (e.g., peripatetic, short-term placements, etc.).
- **Deference**
 - The Rule codifies the existing USCIS deference policy, stating that USCIS will generally defer to prior determinations involving the same parties and underlying facts unless there is a material error, material change in circumstances or eligibility requirements, or new material information adversely impacting eligibility. The burden of providing evidence to support the petition still rests on the petitioner. The *deference regulation applies to all petitions*, not just extensions of status, and to all nonimmigrant classifications using Form I-129.
- **Extension of Status petitions for H-1B, L-1, O-1 and P-1**
 - The Rule removes the sentence, “[s]upporting evidence is not required unless requested by the director” from 8 CFR §214.2(h)(14). In addition, the rule added the word “generally” to the sentence: “A request for a petition extension *generally* may be filed only if the validity of the original petition has not expired.” Both of these changes were also made to the parallel regulations for L-1, O-1, and P-1 extensions [see new 8 CFR §214.2(l)(14)(i), (o)(11) and (p)(13)].
- **H-1B Cap-Gap Extensions**
 - Under the Rule, H-1B Cap-Gap extensions may run to April 1 of the fiscal year for which the non-frivolous petition was filed, or the start date of the H-1B petition if approved, whichever is earlier. The prior regulation had H-1B Cap Gap extensions run until September 30, the day before the fiscal year for which the petition was filed.
- **H-1B Validity Period**
 - Under 8 CFR 214.2(h)(9)(ii), the rule addresses the validity period for the following situations:
 - A) If the petition is approved before the start date requested, the petition will be valid starting on the date requested;
 - (B) If the petition is approved after the start date requested, the petition will be valid starting on date of decision until the end date requested; and
 - (C) If the petition request exceeds the limit available, the petition will be valid for the limit available.
 - The new rule adds an additional scenario “D” stating that when the petition is approved after the initial requested validity period, USCIS may send an RFE asking if the petitioner wants to amend the dates. If the new requested dates exceed the validity of the Labor Condition Application (LCA), the petitioner must submit a new one. This new LCA may be certified after the date the H-1B petition was filed with USCIS. The petitioner may not reduce the proffered wage from that originally indicated in their petition. The request for new dates of employment and submission of an LCA corresponding with the new dates of employment, absent other changes, will not be considered a material change. An increase to the proffered wage will not be considered a material change, as long as there are no other material changes to the position. If a new validity period is not requested, or no RFE is

issued or replied to, the petition will be approved for the originally requested period, but any change of status or extension of status will not be granted, and the petition will not be forwarded to a consulate.

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