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WHILE THE PROPOSED H-1B RULES HAVE MANY POSITIVE FEATURES, THEY MAY ALSO RESULT IN REQUESTS FOR EVIDENCE AND DENIALS

Posted on October 23, 2023 by Cyrus Mehta

The Department of Homeland Security (DHS) plans to amend its H-1B regulations "governing H–1B specialty occupation workers to modernize and improve the efficiency of the H–1B program, add benefits and flexibilities, and improve integrity measures." The notice of proposed rulemaking (NPRM), expected to be published in the Federal Register on October 23, 2023, would also "narrowly impact other nonimmigrant classifications, including: H-2, H-3, F-1, L-1, O, P, Q-1, R-1, E-3, and TN." A 60-day public comment period starts following publication of the NPRM in the Federal Register.

Below is a non-exhaustive summary of highlights. DHS proposes to:

- Revise the regulatory definition and criteria for a "specialty occupation" and clarify that a position may allow a range of degrees if they have a direct relationship to the duties of the position;
- Clarify when an amended or new petition must be filed due to a change in an H-1B worker's place of employment;
- Codify and clarify that if there has been no material change in the underlying facts, adjudicators generally should defer to a prior determination involving the same parties and underlying facts;
- Require that evidence of maintenance of status must be included with the petition if a beneficiary is seeking an extension or amendment of stay;
- Change the definition of "nonprofit research organization" and "governmental research organization" by replacing "primarily engaged" and "primary mission" with "fundamental activity" to permit a nonprofit entity or governmental research organization that conducts research as a fundamental activity, but is not primarily engaged in research or where

research is not a primary mission, to meet the definition of a nonprofit research entity;
- Provide flexibilities, such as automatically extending the duration of F-1 status, and any employment authorization granted under 8 CFR 274a.12(c)(3)(i)(B) or (C), until April 1 of the relevant fiscal year, rather than October 1 of the same fiscal year, to avoid disruptions in lawful status and employment authorization for F-1 students changing their status to H-1B;
- Clarify the requirements regarding the requested employment start date on H–1B cap-subject petitions to permit filing with requested start dates that are after October 1 of the relevant fiscal year;
- Select H-1B cap registrations by unique beneficiary rather than by registration;
- Clarify that related entities are prohibited from submitting multiple registrations for the same beneficiary;
- Clarify that beneficiary-owners may be eligible for H-1B status, while setting reasonable conditions for when the beneficiary owns a controlling interest in the petitioning entity; and
- Clarify that if an H-1B worker will be staffed to a third party, meaning they will be contracted to fill a position in the third party's organization, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation.

There are some good features in the proposals. For example, it codifies the deference that USCIS gives to prior approvals. It also allows companies to file H-1B petitions on behalf of owners under certain conditions in order to encourage entrepreneurship. The proposal to select H-1B cap registrations by unique beneficiary rather than by registration is also salutary as it will improve the chances in the H-1B lottery. The rule will extend the H-1B the F-1 cap gap from September 30 to April 1 the following to allow students who are in Optional Practical Training to continue in that status beyond September 30 if the H-1B petition is not approved by October 1 of that year.

On the other hand, the proposal to redefine "specialty occupation" will make the H-1B program more restrictive and will negate all the good features. See Stuart Anderson's Biden Immigration Rule Copies Some Trump Plans to Restrict H-B Visas in Forbes dated October 23, 2023. Even if the proposed rule codifies the deference policy, it will prove hollow if the next H-1B extension will be evaluated under different and heightened standards relating to what is a

specialty occupation, which lies at the heard of the H-1B program. All the other goodies will become less significant if employers face more obstacles in obtaining approvals under the altered definition of specialty occupation.

The proposed regulation seeking to amend the definition of "specialty occupation" is of great concern as it would incentivize USCIS examiners to issue requests for evidence, which in turn would be burdensome on employers.

The inclusion of the required specialized studies being "directly related" to the position does not faithfully interpret the Immigration and Nationality Act I ("INA"). The proposed rule adds, "A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position. A position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields or each body of highly specialized knowledge is directly related to the position."

Under INA § 214(i)(1) a "specialty occupation" is defined as an occupation 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 into the occupation in the United States

There is no requirement in the INA provision that the required specialized studies must be directly related to the position.

At issue is whether the occupation, in order to qualify for an H-1B visa, must require a bachelor's degree in the specific specialty. A lawyer would qualify as a specialty occupation as only a degree in law would allow entry into the occupation. But INA § 214(i)(1) reads more broadly. It also ought to encompass a marketing analyst, even though this occupation may require a bachelor's degree in diverse fields such as marketing, business or psychology. While the proposed regulations would allow range of degrees or multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields or each body of highly specialized knowledge is directly related to the position, a position requiring a business degree may not qualify.

As I have explained previously, the answer lies with how the phrase in the

parenthetical "or its equivalent" is interpreted in INA § 214(i)(1). In *Tapis International v INS*, 94 F. Supp. 2d 172, the court held that a "position may qualify as a specialty occupation if the employer requires a bachelor's degree *or its equivalent.* For the "equivalent" language to have any reasonable meaning, it must encompass …….various combinations of academic and experience based training. It defies logic to read the bachelor's requirement of "specialty occupation" to include only those positions where a specific bachelor's degree is offered." The phrase "or its equivalent" in INA 214(i)(1) is distinct from what the H-1B beneficiary is required to possess to qualify for specialty occupation. INA 214(i)(2) sets forth separate requirements, such as completion of a bachelor's degree or experience in the specialty through progressively responsible positions relating to the specialty. Therefore, the phrase "or its equivalent" actually broadens the requirement for a bachelor's degree is a specific specialty to encompass "not only skill, knowledge, work experience, or training ….. but also various combinations of academic and experience based training." *See Tapis, supra*. Thus, if an occupation requires a generalized degree, but specialized experience or training, it should still qualify as a specialty occupation.

The proposed rule seems to latch onto old, outdated notions of a business degree being too generalized to qualify for H-1B classification. If a lawyer can qualify for H-1B classification with a JD degree or its equivalent to take up a position as a tax associate or corporate associate, why does the marketing analyst need a business degree with a specialization in marketing rather than be able to qualify with a broad MBA degree? Similarly, the preamble to the rule also states that "a petition with a requirement of any engineering degree in any field of engineering for a position of software developer would generally not satisfy the statutory requirement" as the petitioner may not be able demonstrate how the different fields of engineering would qualify the H-1B worker to perform the duties of software developer.

Until the Trump administration, it was presumed that an occupation that requires an engineering degree should qualify for H-1B classification. Although there are many types of engineering disciplines, the basic quantitative skills gained in an engineering degree program should equip the worker to perform the technical duties of a specialty occupation whether it is for the position of Operations Research Analyst, Software Developer or Computer Systems Analyst. The USCIS backed off after the court in *Inspectionxpert v. USCIS*

criticized the government for objecting to engineering degrees but the proposed regulation will ensure that the engineering degree suffers the same fate as the generalized business degree.

Still, the DHS must be credited for clarifying in the proposed regulation that if the bachelor's degree in a directly related specific specialty is normally the minimum requirement, "normally does not mean always." The proposed rule will take into account other synonyms like "mostly" or "typically." See *Innova v. Baran* ("There is no daylight between typically needed, per OOH, and normally required, per regulatory criteria. 'Typically' and 'normally' are synonyms.")

Finally, if the worker will be "staffed" to a third party client site, the client rather than the employer would need to establish that it would normally require a US bachelor's degree is a directly related specific specialty. It would be difficult for the sponsoring employer to obtain such a justification from a client, and this too could result in RFEs (request for evidence) bonanza and potential denials.

The proposed regulations codify the 5th Circuit's holding in *Defensor v Meissner* but in that case the Court treated the client as a co-employer. The H-1B framework contemplates only the petitioner as the employer. The client does not supervise the H-1B worker or evaluate their job performance. The clients of the petitioner would certainly not want to be viewed as a co-employer and incur potential liability from a claim by the H-1B worker.

It must be acknowledged, that the educational requirements of the third party would only be taken into accounts would only trigger if the H-1B worker is "staffed" to the third party as opposed to providing services to the third party. *Defensor v. Meissner* involved a staffing agency for nurses that filed the H-1B petitions and contracted the nurses to hospitals. Would the USCIS understand the distinction between the nurse in *Defensor v. Meissner* and a software engineer who is providing services to the client rather than being staffed to the client? This distinction may be lost on a USCIS examiner, and this will result in an RFE bonanza.

Readers are encouraged to submit comments within 60 days of October 23, 2023.