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WHILE THE H-1B MODERNIZATION RULE WILL INSULATE THE H-1B PROGRAM FROM TRUMP, IT GIVES MORE POWER TO INVESTIGATE ALLEGED FRAUD WHICH TRUMP WILL READILY USE TO HARASS EMPLOYERS AND WORKERS

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By Cyrus D. Mehta

The Department of Homeland Security (DHS) announced a final rule, effective January 17, 2025, that will "significantly enhance U.S. companies' ability to fill job vacancies in critical fields, strengthening our economy." The new rule "modernizes the H-1B program by streamlining the approvals process, increasing flexibility to better allow employers to retain talented workers, and improving the integrity and oversight of the program." To implement this rule, a new edition of Form I-129, Petition for a Nonimmigrant Worker, will be required for all petitions beginning January 17, 2025.
Among other things, the final rule:

• Updates the definition and criteria for specialty occupation positions and for nonprofit and governmental research organizations that are exempt from the annual statutory limit on H-1B visas.
• Extends certain flexibilities for students on an F-1 visa seeking to change their status to H-1B to avoid disruptions in lawful status and employment authorization for those F-1 students.
• Allows U.S. Citizenship and Immigration Services (USCIS) to process applications more quickly for most individuals who had previously been approved for an H-1B visa.
• Allows H-1B beneficiaries with a controlling interest in the petitioning organization to be eligible for H-1B status subject to "reasonable conditions."

• Codifies USCIS' authority to conduct inspections and impose penalties for failure to comply.
• Requires employers to establish that they have a bona fide position in a specialty occupation available for the H-1B worker as of the requested start date.
• Clarifies that the Labor Condition Application must support and properly correspond with the H-1B petition.
• Requires the petitioner to have a legal presence and be subject to legal processes in court in the United States.

One of the highlights in the sweeping H-1B modernization rule is that is codifies the policy of "prior deference" when deciding extension requests of previously approved H-1B petitions. The codification of the deference policy would insulate H-1B workers from policy changes under the Trump administration. Even if the DHS requires its officers to view H-1B extension requests more strictly, under the deference policy, now codified in the regulation, the USCIS would not be able to deny a previously approved H-1B petition unless "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 petitioner's, applicant's or beneficiary's eligibility."

The definition of specialty occupation now requires the attainment of a bachelor's degree or higher in a "directly related specialty" as a minimum as a minimum for entry into the occupation. The requirement that the bachelor's degree be in a directly related specialty continues to cause concern as it would preclude occupations that are now related to degrees in a directly related specialty. On the other hand, the concern that commenters had when the H-1B rule was proposed last year have been addressed as "directly related" means that there is a logical connection between the required degree and the duties of the position. The regulation also allows for a range of qualifying degree fields provided that each of those fields is directly related to the duties of the position. It remains to be seen how the requirement that the degree must be in a directly related specialty plays out in emerging AI occupations. However, the need to show only a logical connection between the degree and duties rather than an "exact correspondence" should resolve some of the concerns.

With regards to H-1B workers placed at client sites, if the worker will be "staffed to a third party", it is the requirement of the third party to establish that the

degree is directly related to the position. The USCIS may also require evidence such as contracts, work orders, or similar evidence between all parties in the contractual relationship showing the bona fide nature of the position and the educational requirements to perform the duties. This may incentivize USCIS to issue requests for evidence when IT companies place H-1B workers at client site.

The rule also codifies USCIS' authority to conduct inspections and impose penalties for failure to comply. It will require employers and workers to comply with unannounced worksite visits, and this aspect of the rule could be taken advantage of by the Trump administration to harass employers and workers, find fraud when there is none, and find reasons to deny pending H-1B petitions or extension requests. The rule gives the fraud directorate broad authority to enter businesses and homes without a warrant to question, obtain information and use it against the applicant.

DHS said the new rule builds on a previous final rule, announced in January 2024, "which has already dramatically improved the H-1B registration and selection process." DHS noted that these provisions "mainly amend the regulations governing H-1B specialty occupation workers, although some of the provisions narrowly impact other nonimmigrant classifications, including: H-2, H-3, F-1, L-1, O, P, Q-1, R-1, E-3, and TN."

There will be no grace period for accepting prior form editions, DHS said. USCIS will soon publish a preview version of the new Form I-129 edition on uscis.gov.