



BREAKING DOWN THE H-1B MODERNIZATION PROPOSED RULE



MELTZER HELLRUNG
IMMIGRATION SOLUTIONS

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The Department of Homeland Security (DHS) recently announced a proposed rule to update various aspects of the H-1B and F-1 visa programs. [Public comments](#) are welcome until December 22, 2023. After the comment period closes, DHS will review the comments, respond, and make any necessary revisions. The final regulation may become effective as early as March 2024. Given the H-1B cap lottery issues, we expect the agency will do everything possible to have this in effect prior to the FY 2025 H-1B cap lottery in March 2024.

This summary provides an overview of the most significant changes in the proposal, as well as Meltzer Hellrung's understanding of the impact of those changes, to help our corporate clients understand the potential impact on their companies, their immigration programs, and their employees.

H-1B Modernizations and Efficiencies



1. Amending the Definition of a H-1B “Specialty Occupation”

The rule proposes to codify existing DHS practices, such as requiring a direct relationship between the required degree field(s) and H-1B position duties. Notably, the rule states this does not necessarily mean a specific, singular field of study is required. For example, degrees in computer science and software engineering would both qualify for a software engineer position. However, general degree requirements such as business administration or humanities may not pass the direct relationship requirement. Time will tell whether an MBA will qualify as a specialized degree of study for roles like management consultant and financial analyst.

2. H-1B Amended Petitions

The proposed rule will require employers to file amended H-1B petitions when an employee changes third-party client sites within a metro area, something that has previously not been enforced by DHS.

3. Evidence of Maintenance of Status

DHS seeks to add additional evidence options to show maintenance of status, such as quarterly wage reports, tax returns, contracts, and work orders, that the sponsoring company could provide to prove the beneficiary is maintaining H-1B status. This proposal would impact other nonimmigrant visa categories as well.

H-1B Benefits and Flexibilities



1. H-1B Cap Exempt Employers

The proposal clarifies language and definitions for cap-exempt employment. Proposed changes broaden the number of entities that would qualify for H-1B lottery exemption and expand the ability of beneficiaries working at qualifying H-1B lottery-exempt employers. The proposed regulation will not require an employee's work to benefit the research mission of the cap-exempt organization.

H-1B cap-exempt employers will be determined based on whether research is a significant function of the organization, not necessarily the main function.

2. Automatic Extension of Employment Authorization under F-1 OPT Cap-Gap

DHS proposes expanding F-1 OPT cap-gap from ending on October 1st to ending on April 1st of the current fiscal year. Thus, if one submits an H-1B lottery petition filed in June 2024, the beneficiary can receive F-1 OPT cap-gap until April 1, 2025. Recognizing that H-1B lottery petition processing has been met with delays that often create gaps in employment, this DHS proposal seeks to minimize those gaps in employment by extending the F-1 OPT cap-gap eligibility period. Employers should be able to reduce their dependence on H-1B cap premium processing service.

3. Start Date Flexibility for Certain H-1B Cap-Subject Petitions

DHS proposes eliminating all regulatory text relating to a limitation on the requested H-1B lottery petition start date. This proposal would allow companies to submit H-1B lottery petitions with a start date beyond October 1st, but the requested future start date must still be in the particular fiscal year.

H-1B Program Integrity



1. Beneficiary-centric H-1B Lottery System

DHS proposes shifting from selecting H-1B submissions by company registration to selection by unique beneficiary.

- First, each unique individual who has an H-1B lottery registration submitted on their behalf by their company would be entered into the selection process once, regardless of the number of company registrations submitted.
- Second, DHS proposes to extend the existing prohibition on related entities filing multiple H-1B lottery petitions by also prohibiting related entities from submitting multiple H-1B registrations for the same individual.
- Third, DHS proposes to codify USCIS's ability to deny an H-1B lottery petition or revoke an H-1B approval when the petition is based on a registration where the statement of facts is found fraudulent.

This “beneficiary-centric” system would grant H-1B beneficiaries more bargaining power. If a beneficiary has multiple legitimate job offers, all employers would be notified of the selection of the beneficiary, and the beneficiary could negotiate with all company sponsors that filed for him or her, seeking the best employment offer.

2. Provisions to Ensure Bona Fide Job Offers at Third-Party Client Sites

DHS proposes to, again, require documentation between the petitioning employer and a third-party client, and may rely on the position requirements set by the end-client rather than the sponsoring company for specialty occupation purposes. DHS says it will only rely on the job duties and requirements for the role listed by the end-client. This proposal is a reversal of the standards DHS has applied since 2020 and presents an even greater burden than previously imposed. Professional staffing companies will need to secure master services agreements, statements of work, and end-client letters for employees placed at third-party client sites.

3. H-1B Entrepreneurs

DHS proposes allowing the filing of H-1B petitions where the beneficiary employee owns a controlling stake in the sponsoring company, removing references to employer-employee relationships from the definition of “employer” that have caused challenges for entrepreneurs pursuing H-1B visas. As a balance, DHS proposes limiting the H-1B approval validity period of initial H-1B approvals and the first H-1B extension to 18 months.

While DHS claims this is not a significant change in policy, it very much is, as it was never made clear such H-1B petitions were allowable. The proposal dramatically increases the possibility of using H-1B visa sponsorship for immigrant founders and entrepreneurs.

4. Site Visits

As company participation in USCIS visits is currently voluntary, the proposed rule would codify USCIS’s site visit authority, clarify the scope of inspections, and provide clear disincentives for refusal or failure to fully cooperate in site visit inspections.

DHS Requests for Preliminary Public Input Related to Future Actions

1. Use or Lose (informational only)

DHS is considering regulations to prevent petitions from receiving approval for speculative H-1B employment and to curtail the practice of delaying H-1B employment in the U.S. until a bona fide job opportunity arises. DHS has two options it is considering but is open to public comment on proposals.

2. Beneficiary Notification (informational only)

DHS has not proposed an actual regulation here, but it is exploring options. It is important to resolve this issue due to concerns that the lack of petition information may leave Form I-129 beneficiaries unable to verify their own immigration status, making them susceptible to employer abuse.

What Does This Mean for Your Business?

The implications of the proposed rule are complex and potentially far-reaching. Of course, they will affect every organization differently depending on your current staffing situation and future hiring plans. Contact your Meltzer Hellrung attorney for customized guidance.