

IMMIGRATION OFFICIALS UNVEIL SWEEPING PROPOSED CHANGES TO H-1B VISA PROCESS: WHAT EMPLOYERS NEED TO DO TO PREPARE

Insights

Oct 24, 2023

Federal immigration authorities have just published long-awaited revisions to the H-1B visa process intended to modernize that nonimmigrant category and tighten the annual lottery system that has long frustrated employers and employees alike. After yesterday's notice from the U.S. Citizenship & Immigration Services (USCIS) was published, the proposed rule will be available for a 60-day public comment period. We expect that the resulting regulations will be finalized and implemented in the coming months. What are the biggest changes awaiting the H-1B system that employers need to know about – and what should you do to prepare?

5 Biggest Changes for Employers

Much of the proposed regulations are intended to codify existing rules which have already been in place for years. Essentially, USCIS has aggregated H-1B standards and practices which were previously implemented through agency memoranda to officially incorporate these into controlling law. For instance, the modernization rules include provisions which outline the Fraud Detection and National Security (FDNS) site visit program, as well as the petition amendment requirements in connection with employee worksite moves. Neither of these represent new areas of H-1B law. However, the planned changes also include several, highly impactful and entirely new rules.

- **Cap-Exempt Organizations:** The rule will expand eligibility for companies that support “nonprofit research organizations” and “governmental research organizations”

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to allow for H-1B cap exempt filings. This change will hopefully provide a broader range of organizations with the ability to sponsor H-1B employment without the need to compete in the annual cap lottery.

- **Clarification of Specialty Occupation Criteria:** The rule will revise the definition of “specialty occupation” for H-1B purposes to allow for a position to require a range of academic degrees, provided these are related to the role in some, explainable way. This change is very welcome, as USCIS will sometimes challenge an H-1B petition where more than one degree is listed as potentially qualifying for the underlying position. The new rule will hopefully eliminate that unreasonable agency posture and allow employers to include several academic fields in minimum H-1B job requirements. Among other things, this will allow employers to reflect requirements which are more in synch with actual “real world” requirements.
- **Deference to Prior Approvals:** The rule will codify of the concept of deference to prior approvals to confirm that USCIS should find a case approvable if the same candidate/employment was previously approved by the agency and no material changes in employment have occurred. This specific change is important, as the Trump administration had previously reversed this agency policy, leading to a heightened level of RFE issuance. The incoming Biden administration then restored the policy as one of its first USCIS agency actions in 2021. The new rule will make this policy “official” and less susceptible to future changes in the political climate.
- **Improvement to Cap-Gap Rules:** Since the new H-1B cap registration was introduced a few years ago, there have been several annual runs of the selection lottery conducted by USCIS. This has resulted in many candidates receiving an H-1B cap approval and related Change of Nonimmigrant Status well beyond October 1. However, current “cap-gap” rules technically only provide for renewed OPT work authorization until that date. The new rules will extend the cap-gap period six months from October 1 of the Fiscal Year to April 1. This will hopefully solve the problem that employers encounter with I-9 compliance, where USCIS delays adjudication of an H-1B cap petition until after October 1.
- **Cap Lottery Process:** The rule will change the cap registration process and allow no more than one

beneficiary to be counted – no matter how many companies register that beneficiary. This particular part of the rule was included in light of last year’s H-1B cap lottery where more than half of all registrations were submitted on behalf of candidates who were sponsored by multiple employers. Essentially, the new rule will make it impossible for several employers to collude by sharing sponsorship lists in an attempt to “game the system” for maximum cap selections. In this way, USCIS is seeking to make the process more equitable.

What’s Next?

Again, these rules are not yet implemented. After the notice-and-comment period concludes in late December, the draft regulations will go to the U.S. Office of Management and Budget for final approval. Given the nature of the proposed changes, however – and especially since they generally align with the priorities of both USCIS and employers – we do expect a version of these provisions to go into effect relatively soon thereafter.

What Should You Do?

While waiting for these new rules to take effect, there are some steps you can take to put yourself in the best position to take advantage of the impending changes.

- **Review Current Job Descriptions and Requirements:** Given how the “specialty occupation” criteria will be clarified, you should review existing job descriptions for those positions occupied by workers on H-1B workers. You need to ensure they reflect the actual requirements of the position. If necessary, consider broadening the range of acceptable academic degrees related to the role.
- **Consult with Legal Counsel for Cap-Exempt Eligibility:** If your organization supports nonprofit or governmental research, consult with your Fisher Phillips immigration attorney to assess your eligibility for cap-exempt H-1B filings. Being cap-exempt will allow you to bypass the annual cap lottery and make it easier to secure visas.
- **Update Internal Compliance Protocols for Cap-Gap Rules:** With the extension of the cap-gap period, you should update your internal I-9 compliance protocols. This will help you avoid inadvertent violations and penalties

related to employment authorization verification for H-1B employees.

- **Develop a Strategy for Prior Approvals:** Given the deference to prior approvals, you may consider establishing a strategy for maintaining thorough records of prior approvals and any material changes in employment. These records may be valuable for subsequent H-1B applications or for challenging Request for Evidence (RFE) notices.
- **Take Stateside Renewals into Account:** Remember that the government is also close to bringing back the stateside issuance of nonimmigrant visas, which would allow H-1B (and L-1) workers the option of renewing their visas without leaving the U.S ([read more here](#)). Make sure to take this change into account when adapting to the new system that will soon be in place.

Conclusion

If you have any questions on how to shift your foreign workforce immigration strategy to match this change, reach out to your Fisher Phillips attorney, the author of this Insight, or any member of our [Immigration Practice Group](#). We will continue to monitor the latest developments related to this area and provide updates as warranted, so you should ensure you are subscribed to [Fisher Phillips' Insight System](#) to gather the most up-to-date information directly to your inbox.