ARTICLES

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Key Provisions of the New H-1B Regulations "Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers"

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On December 18, 2024, the Department of Homeland Security (DHS) implemented a final rule, intended at modernizing the H-1B visa program. The proposed changes streamline H-1B requirements, provide additional benefits and flexibilities to H-1B workers, and enhance program integrity. The topics covered include bona fide job offers, legal presence of the employer, H-1B employees that have an ownership interest in the employer, DHS site visits, third-party placements, H-1B cap exemptions, and automatic employment extensions.

Below is a list of key provisions that may affect H-1B employers:

1. **Specialty occupation definition and criteria:** To qualify for an H-1B visa, the job offered to the H-1B worker must qualify as a "specialty occupation," meaning that the occupation requires the theoretical and practical application of a body of highly specialized knowledge for which the attainment of a bachelor's degree or higher degree (or the equivalent) in a specific field of study is required.

Revised definition: Clarifies that a position may allow for a range of qualifying degree fields, provided each field is directly related to the job duties.

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Direct relationship requirement: The position's required degree field(s) must have a direct relationship with the duties of the position.

2. **Bona fide job offer and employment:** H-1B employers must establish a bona fide position in a specialty occupation available for the H-1B worker as of the requested start date.

Evidence: U.S. Citizenship and Immigration Services (USCIS) may request contracts, work orders, or similar evidence to determine if the position is bona fide.

No itinerary requirement: Removes the requirement for an itinerary for H-1B petitions.

3. **Automatic extension of authorized employment ("cap-gap"):** F-1 students working pursuant to Optional Practical Training (OPT) may receive an automatic extension of work authorization between the end of their OPT and October 1, the start of their initial H-1B period.

Extension: Automatically extends the duration of F-1 status and any employment authorization until April 1 of the relevant fiscal year (instead of October 1) to avoid disruptions while a change of status to H-1B is pending.

4. **Deference to prior H-1B approvals:**

Policy codification: USCIS should generally defer to prior determinations involving the same parties and underlying facts unless there is a material error, change in circumstances, or new material information affecting eligibility.

5. **USCIS site visits and third-party placement:**

Authority: Codifies USCIS' authority to conduct site visits at the H-1B worker's worksite.

Compliance: Refusal to comply with site visits may result in denial or revocation of the petition.

Third-party work: If an H-1B worker is staffed to a third party, the work must be in a specialty occupation, and the third party's requirements are most relevant to the determination.

6. **Legal presence and amenable to service of process:** H-1B employers must have a legal presence and be amenable to service of process in the U.S.

Definitions:

Legal presence: Legally formed and authorized to conduct business in the U.S.

Amenable to service of process: Can be sued in a U.S. court.

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7. **H-1B workers with an ownership interest in their H-1B employer ("beneficiary-owners"):**

Support for entrepreneurs: Provisions to permit H-1B beneficiary-owned businesses in the H-1B program, including permission for those with more than 50% ownership interest in their H-1B employer.

Duties: Beneficiary-owners can perform non-specialty occupation duties related to owning and directing the business.

Husch Blackwell's Business Immigration and Global Mobility team offers a Resource Center with insights to help employers navigate the evolving immigration policy landscape.

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