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H-1B modernisation rule: Flexibility in defining eligible occupations but stricter site-visit norms

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A last-minute measure by the Biden administration to modernize the H-1B program comes in to effect on January 17, 2025 - just a few days before President Trump's second inauguration. The final H-1B modernization rules, issued on Tuesday night, clarify certain norms – such as what constitutes specialty occupation, which is a mandatory eligibility criterion, some rules provide more flexibility to the sponsoring companies and beneficiaries (those sponsored for the work-visa) and usher in integrity measures.

The Trump administration had earlier sought that day-to-day itineraries of H-1B workers at third-party client sites must be provided, now the new rules clarify that this is not required, even as agencies can seek requisite evidence to establish the existence of a bonafide H-1B job offer. Or for that matter, a location change of an H-1B worker would not require amendment of the application, if the location change is within the area of intended employment listed in the labour condition application. Another friendly measure is that for visa extensions, deference will be given to previous adjudications if the facts remain the same – this was earlier removed by the Trump administration. In this backdrop, immigration experts are guessing if the lifeline of some of the new rules will be only of a few days.

Regulatory changes are important not just for American companies that hire H-1B workers but also for the Indian diaspora. According to TOI's analysis, in FY 2023 (ended September 30, 2023), Indians were allotted 68,825 initial employment visas which was nearly 58% of the total allotment. Visa extensions were approved for 2.10 lakh Indians (79%) of the total extensions approved by USCIS.

The five key provisions are enumerated below:

i) H-1B speciality occupations: The rule revises the definition of an H-1B specialty occupation. Some of the revisions introduce greater flexibility to the definition, and some could narrow eligibility. In particular, the rule clarifies that an occupation 'normally' requiring a bachelor's degree does not mean that it must 'always' require a bachelor's degree. It also clarifies that a position may qualify as a specialty occupation even if the employer accepts a range of qualifying degree fields, as long as each of those fields is 'directly related' to the duties of the H-1B position.
Mitch Wexler, partner at Fragomen, a global immigration law firm told TOI, "In the final rule, Department of Homeland Security (DHS) has added a reasonable definition of 'directly related,' defining the term to mean that there is a 'logical connection' between the required degree and the H-1B position duties. The final rule importantly omits a provision contained in the proposed rule that would have limited H-1B eligibility for those with more general degree titles such as business administration or liberal arts."

"This change should reduce Requests for Evidence (RFEs) during the H-1B visa application processing and streamline the process, but employers must carefully demonstrate how the degree aligns with the role, including describing applicable coursework that supports the connection, states Sameer Khedekar, founder of Vanguard Visa Law, an immigration law.

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Kripa Upadhyay, immigration attorney said, "At times, H-1B applications especially in the tech field are denied as the job is not considered a 'specialty occupation' because the job either does not always require a Bachelor degree or the education and the work to be done are not a perfect match. Jobs in Artificial Intelligence (AI) for example, may need an Engineering degree to work on training AI models. There is no university degree for Large Language Models (LLM) or Blockchain which is increasingly the wave of future AI products. To illustrate, this rule will not question hiring someone with a degree in Quantitative Math to work on training AI models just because the degrees are not related. The sponsoring employer should be able to show why and how the two are related within their industry."

New York based immigration attorney, Cyrus D Mehta told TOI, “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.”

ii) Third party placement and speciality occupations: Wexler points out that, “The regulation includes a provision for certain off-site placements, providing that when a beneficiary is ‘staffed’ to a third party, the requirements of that third party (say client), and not the petitioner (sponsoring employer), would be considered most relevant when determining whether the position is a qualifying specialty occupation. The final rule defins ‘staffing’ to mean that the foreign national will be contracted to fill a position in the third party’s organization and become a part of that third party’s organizational hierarchy – not merely providing services to the third party.”

In this context Mehta adds, “It will be the requirement of the third party to establish that the degree is directly related to the position. US Citizenship and Immigration Services (USCIS) in the course of processing 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 sites.”

iii) Deference to prior non-immigrant adjudications: The rule codifies and slightly expands USCIS’s current policy of deference to its prior adjudications, giving employers greater predictability when filing a Form I-129 (say for an H-1B visa extension).

Snehal Batra, managing attorney at NPZ Law Group explains, “A significant change under the H-1B

modernization rule is the deference policy, which will be codified and will apply to all I-129 petitions, not only extensions applications. The regulation provides that when adjudicating a Form I-129 involving the same parties and same underlying facts, USCIS should defer to its prior I-129 approval, unless there has been a material change in circumstances or eligibility requirements, a material error in the prior approval, or new material adverse information."

"The general deference policy was rescinded during the first Trump Administration, resulting in a significant surge in requests for evidence (RFEs) and case denials. The Biden Administration reinstated the policy and, in codifying it now, makes the policy less vulnerable to rescission," states Wexler.

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TOI had recently covered a study by the National Foundation for American Policy which showed that the significant drop in H-1B denial rates for continued employment to a current low of 1.8% is attributed to the rescission of restrictive policies and memos, including the 2017 USCIS directive that removed deference to prior approvals. This policy change had disproportionately affected companies relying on H-1B visa holders to work at client sites.

Greg Siskind, founding partner, at Siskind Susser – an immigration law firm said, "I am extremely happy that the DHS has finally put in the regulations that they will defer to earlier determinations on issues like whether a job is a specialty occupation or a worker has demonstrated they have suitable qualifications for the position. Given many H-1B workers are waiting years and years for their green cards, the risk that an immigration officer could overturn an earlier decision despite no evidence of fraud or misrepresentation is daunting. This change was a long time coming."

iv) Codification of the site visit program: The final rule formalizes and enhances USCIS's longstanding Fraud Detection and National Security (FDNS) site visit program, specifying that failure to comply with a site visit may lead to the denial or revocation of a petition. It also codifies DHS's authority to conduct site visits at any location associated with the H-1B employment, including the employee's current, previous, or future work sites, as well as third-party locations.

Rajiv S Khanna, managing attorney at Immigration.com said, “The new H-1B regulations represent a shift in how tech staffing companies must operate. The regulations create a three-pronged framework of scrutiny: enhanced site inspections that can occur anywhere H-1B workers are placed, comprehensive documentation requirements for the entire contractual chain between staffing companies and end clients, and a redefinition of how USCIS will evaluate specialty occupation requirements for staff placement at third-party worksites.”

He adds, "The regulations grant USCIS sweeping authority to conduct verifications ‘through lawful means. This includes not just site visits but also electronic validations, document reviews, and interviews with ‘any other individuals possessing pertinent information.’ Most troublingly, for staffing companies, these inspections can occur at any location where the H-1B worker ‘works, has worked, or will work.’

“Most significantly, staffing companies now face potential H-1B denials or revocations if any party in the chain - including end clients - fails to cooperate with USCIS verifications. Combined with the requirement to prove ‘bona fide’ positions when filing and the shift to evaluating specialty occupation requirements based on end-client standards rather than staffing company criteria, these changes create substantial operational challenges," concludes Khanna.

v) Bonafide H-1B employment: The rule shifts the focus from the current regulation’s requirement to show an employer-employee relationship to establishing the existence of a bonafide job offer, and it codifies the agency’s longstanding practice of requesting contracts and other evidence of a bona fide job offer but eliminates the itinerary requirement for H-1B petitions. “In response to public comments, the final rule adds a new provision clarifying that a petitioner (sponsoring company) is not required to establish specific day-to-day assignments for the entire time requested in the H-1B petition. The rule also adds a requirement that the H-1B petitioner have a legal presence in the US and be amenable to service of process here,” states Wexler.

A press release by the DHS states: The new rule modernizes the H-1B program by streamlining the approvals

process, increasing its flexibility to better allow employers to retain talented workers, and improving the integrity and oversight of the program. The rule builds on previous efforts by the administration to ensure the labour needs of American businesses are met, while reducing undue burdens on employers and adhering to all US worker protections under the law.

“American businesses rely on the H-1B visa program for the recruitment of highly-skilled talent, benefitting communities across the country,”said Secretary of Homeland Security Alejandro N. Mayorkas. “These improvements to the program provide employers with greater flexibility to hire global talent, boost our economic competitiveness, and allow highly skilled workers to continue to advance American innovation.”

“The H-1B program was created by Congress in 1990, and there’s no question it needed to be modernized to support our nation’s growing economy,”said USCIS Director Ur M Jaddou. “The changes made in today’s final rule will ensure that US employers can hire the highly skilled workers they need to grow and innovate while enhancing the integrity of the program.”