Preface

The 2025 Edition of the *H-1B Handbook* provides a comprehensive, up-to-date analysis of the standards and procedures that apply to companies seeking to employ foreign nationals in the H-1B program. There have been a number of significant developments in the past year impacting H-1B practice.

In December 2024, the Biden Administration finalized the remaining portions of its long-anticipated H-1B modernization regulation. These provisions took effect on January 17, 2025. See 89 Fed. Reg. 103054 (Dec. 18, 2024). The rule implements major changes to the H-1B program, including, among others, revising the definition of an H-1B specialty occupation, codifying and expanding the policy on deference to prior adjudications, requiring a showing of a bona fide and non-speculative position, clarifying when employers must amend nonimmigrant petitions due to material changes in employment, extending F-1 cap-gap protection, codifying the Fraud Detection and National Security (FDNS) site visit program, and expanding the cap exemptions. The rule took effect just days before President Donald Trump was sworn in to office on January 20, 2025, and it is not yet clear whether the new administration will seek to make changes to or withdraw the regulation entirely, although it is certain that the priorities of the second Trump Administration will impact H-1B practice overall.

The Second Phase of the H-1B Modernization Measures

In February 2024, the first phase of the H-1B modernization rule was implemented, making changes to the H-1B cap registration and selection process and strengthening the H-1B fraud prevention measures. The rule introduced several changes to the H-1B cap process. Most significantly, the rule switched the H-1B cap registration system to a beneficiary-centric system rather than the registration-centric system that had been in effect since 2020. Each beneficiary is entered into the H-1B cap lottery process only once regardless of how many registrations are submitted on a beneficiary's behalf. By changing the process in this way, U.S. Citizenship and Immigration Services (USCIS) reduced the incentive for entities to collaborate to submit multiple registrations on behalf of the same individual to unfairly increase a foreign national's chance of selection in the H-1B lottery. In its waning days, the Biden Administration finalized the remaining portions of its H-1B modernization regulation. The December 2024 rule went into effect on January 17, 2025. Note these key revisions:

- *Qualifying H-1B 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 doesn't 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. "Directly related" is defined as a "logical connection" between the required degree and the H-1B position duties. Importantly, the final rule 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. However, 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 and not the petitioner would be considered most relevant when determining whether the position is a qualifying specialty occupation. The final rule defines "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.
- *Bona fide 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 bona fide 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 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 United States and be amenable to service of process here.

- *Business owners' H-1B eligibility.* The regulation clarifies that H-1B beneficiaries who have a controlling interest in the petitioning entity may be eligible for H-1B status as long as the beneficiary will perform H-1B-caliber specialty occupation duties a majority of the time; however, the initial and first extension of such petitions will be limited to 18 months rather than the normal H-1B maximum petition validity period of three years.
- *LCA corresponds with the petition.* The regulation aligns Department of Homeland Security (DHS) regulations with the Department of Labor (DOL) regulations stating that DHS has the authority to determine whether the labor condition application (LCA) supports and corresponds with the H-1B petition. USCIS' review pertains to evaluating whether the information on the LCA, e.g., SOC code, wage level, or independent wage source, and location of employment "sufficiently align" with the position described in the petition. The LCA, petition, and supporting docs must be for the same position, but the information describing the position need not be identical across documents.
- *Greater F-1 cap-gap protections.* The final rule provides a longer cap-gap protection period (extending the period from October 1 to potentially as late as April 1 of the following calendar year) for F-1 students who are beneficiaries of timely filed, nonfrivolous petitions to change status to H-1B. The rule provides up to an additional six months of status and employment authorization to help qualifying F-1 status holders avoid lapses in status and work authorization while awaiting a change to H-1B status.
- *Modest expansion of cap exemptions.* The final rule expands the scope of certain H-1B cap exemptions. The revisions are intended to recognize that qualifying cap-exempt nonprofit and governmental research organization and nonprofits affiliated with institutions of higher education may have more than one fundamental activity or mission beyond just research or education, and the revised regulations allow for cap exemption even if research or education is not the organization's primary activity or mission as long as research or education is one of the organization's fundamental activities.
- *Mitigation of the impact of lengthy petition adjudications.* The rule allows USCIS to offer H-1B employers the opportunity to amend a petition's requested nonimmigrant employment validity period if the requested validity period has already passed by the time when the petition is adjudicated. If the existing LCA does not cover the new validity period, the employer will be required to provide a new LCA and meet the higher of the current prevailing or actual wage and will not be permitted to reduce the offered wage below the wage listed in the original petition.
- *Maintenance of status evidence.* The rule expressly requires submission of evidence of maintenance of status in support of I-129 petitions seeking to extend or amend the beneficiary's stay. The required evidence must "establish that the applicant or beneficiary maintained the previously accorded nonimmigrant status before the extension or amendment request was filed." Maintenance of status evidence includes copies of paystubs, W-2 forms, quarterly wage reports, tax returns, contracts, and work orders. Failure to establish maintenance of status will result in a denial of the extension or amendment of stay unless the status violation involved an overstay and USCIS exercises its discretion to excuse the late filing under 8 C.F.R. § 214.1(c)(4). In practice, the provision codifies current I-129 form instructions requiring submission of status documents in extension or change of status filings. Language in the regulations stating that supporting documentation is not required for extension petitions, unless requested by USCIS, has been deleted.
- *Deference to prior nonimmigrant adjudications.* The rule also codifies and slightly expands USCIS' current policy of deference to its prior adjudications, giving employers greater predictability when filing a Form I-129. The regulation provides that, when adjudicating a Form I-129 involving the same parties and the 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. Unlike the current version of the policy, the regulatory provision applies to all Form I-129 adjudications by USCIS, not just requests for extensions of stay. See 2 USCIS-PM A.4. 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.

- *H-1B location changes and petition amendments.* The rule codifies USCIS' longstanding requirement that an employer must amend a nonimmigrant petition due to material changes in an H-1B worker's place of employment and requires the amendment to be filed before the change takes place. The rule also codifies the circumstances under which a location change would not require an amendment, including location changes within the area of intended employment listed in the DOL LCA supporting the existing petition.
- *Codification of the site visit program.* The final rule codifies and strengthens USCIS' long-established FDNS unit's site visit program and clarifies that refusal to comply with a site visit could result in the denial or revocation of a petition. The rule also codifies the authority of DHS to conduct site visits at the location where the H-1B employee works, has worked, or will work, including third-party worksites among other locations related to the H-1B employment.
- *Immediate and automatic revocation of H petitions.* Under the regulation, when an H-1B employer notifies USCIS that an H-1B foreign national is no longer employed (as the employer is required to do under existing rules), this notification will result in immediate and automatic revocation of the H-1B petition. Under the prior rule, an H-1B petition was only automatically revoked if the employer requested withdrawal of the petition.

Impact of the November 2024 Elections

The new administration's laser focus on immigration is bound to significantly impact H-1B practice. Generally, the President has indicated that his administration will prioritize immigration enforcement, scrutiny of foreign nationals and their employers, "hire American" policies that limit access to foreign talent, and sweeping deportation initiatives aimed at undocumented individuals. Several orders have already been issued. H-1B employers and sponsored foreign nationals will see tougher requirements, more administrative hurdles, and significant slowdowns in case processing in the second Trump Administration.

Executive order on travel bans and extreme vetting. On his first day in the office, President Trump issued Exec. Order No. 14156 requiring enhanced security screening and vetting of foreign nationals applying for U.S. visas, entry into the United States, or U.S. immigration benefits. Under the order, federal agencies must establish screening and vetting standards and procedures for applicants for visas and immigration benefits consistent with those in effect during the first Trump Administration. The standards must also ensure that such individuals are vetted and screened "to the maximum degree possible," particularly those individuals coming from countries or regions with identified security risks. In addition, within 60 days of the executive order, the State Department, DHS, Department of Justice, and the Director of National Intelligence must jointly submit a report identifying countries for which entry restrictions may be recommended. Finally, the order calls on the federal agencies to take other enhanced security measures within 30 days of the executive order.

The extreme vetting policy will likely mean more intensive biometrics requirements, background checks, and security screenings for foreign nationals at each stage of the immigration process from petitions and applications for immigration benefits at USCIS (including extensions of stay) to visa applications at U.S. consulates abroad and inspections at U.S. borders and ports of entry. At a minimum, extreme vetting will mean longer waits for visas,

entry, and immigration benefit approvals, which can delay an individual's ability to travel to the United States and to begin work, reenter the United States, and resume employment. It may also result in a higher rate of denials of immigration benefits applications and refusals of entry to the United States. The visa interview waiver programs that were expanded under the Biden Administration have already been eliminated. See below.

he order also delivers on President Trump's promise to bring back travel bans similar to those that he imposed during his first administration, including for individuals who were born in or are citizens of the following countries: Chad, Eritrea, Iran, Iraq, Kyrgyzstan, Libya, Myanmar, Nigeria, North Korea, Somalia, Sudan, Syria, Tanzania, Venezuela, and Yemen. The President has indicated that he would consider restrictions against entrants from other countries as well.

Rescission of Biden Administration executive orders. A sweeping executive order rescinds many Biden Administration executive actions, including several key orders affecting employment-based immigration. Specifically, the new Exec. Order No. 14157 rescinds President Biden's order on restoring faith in legal immigration (Exec. Order No. 14012), which directed the immigration agencies to reduce barriers to legal migration and access to immigration benefits. This order led to numerous administrative improvements in USCIS practices and policies. Citing Exec. Order No. 14012, the Biden Administration restored a longstanding policy which instructs adjudicators to issue RFEs or notices of intent to deny (NOIDs)—not denials—in cases filed with initially insufficient evidence unless there is no possibility that additional evidence would establish eligibility for the immigration benefit. The Biden Administration also reinstated guidance to immigration officers to defer to prior nonimmigrant petition approvals when adjudicating petition extension requests if the facts and parties remain the same (a policy that is now codified in the H-1B rules). As part of the directive to reduce barriers under Exec. Order No. 14012, the Biden Administration also relaunched the International Entrepreneur Parole Program to allow promising foreign entrepreneurs who might not meet the eligibility criteria of existing visa programs to remain in the United States to grow their businesses and contribute to the U.S. economy. The agencies may seek reversals of these policies and programs under the new executive order.

Exec. Order No. 14157 also rescinds President Biden's order on policies relating to artificial intelligence (Exec. Order No. 14110); that order directed immigration agencies to develop mechanisms to help the United States attract and retain foreign artificial intelligence (AI) and science, technology, engineering, and mathematics (STEM) talent and was credited with facilitating nonimmigrant and permanent residence pathways for critical talent.

Other possible changes that may impact access to H-1B workers. Note these potential changes that would impact H-1B employers and workers:

- The President may reinstate Exec. Order No. 13788, the Buy American, Hire American executive order, which would translate to greater scrutiny of petitions for high-skilled workers and executives (in the H-1B and L-1 programs), higher rates of requests for evidence and denials, and longer processing times for employers in nearly all industries.
- DHS could reissue a proposed rule to replace the random, computerized H-1B cap lottery with a system that allocates H-1B visa numbers according to the DOL's four-level wage system. Priority would be given to beneficiaries paid at the highest rate.
- The DOL could reintroduce a rule to restructure the prevailing wage system for the H-1B, E-3, H-1B1, and PERM programs and lift wage minimums for those programs.
- DHS could reintroduce a rule to tighten H-1B eligibility criteria and impose new obligations on H-1B employers, including requiring secondary employers to file an I-129 in certain cases.
- Another DHS proposal to rescind the H-4 employment authorization program could also be reintroduced.

USCIS policy and practice relating to all Form I-539 applicants could revert to policies implemented during the first Trump Administration, including a requirement that H-4 Form I-539 applicants appear in person to provide biometrics.

Impact on enforcement and compliance. President Trump has promised more extensive enforcement during his second term. This is likely to include (1) more audits of employers' Form I-9 employment eligibility verification practices, (2) broader inspections by USCIS' Fraud Detection and National Security division, (3) more Department of Labor audits and investigations of labor certification and labor condition application compliance, and (4) continued Department of Justice focus on discrimination against U.S. workers. Employers should take a proactive stance on immigration compliance and consider internal audits of their practices to minimize the risks of violations and penalties.

Cap Developments

On December 2, 2024, USCIS announced that it received enough H-1B cap petitions to meet the annual H-1B quota of 85,000 for fiscal year (FY) 2025 and that USCIS will not conduct further lotteries for new H-1B employment in FY 2025. There are no further opportunities for cap-subject H-1B employment commencing in FY 2025, though USCIS continues to accept petitions for employment not subject to the cap, including extensions of stay, changes of employer, and amended petitions, and employment that is exempt from the annual quota. Overall, the selection rate for FY 2025 was approximately 29%, up from 25% in FY 2024 and 27% in FY 2023.

The FY 2026 cap registration period opened on March 7, 2025, and closed on March 24, 2025. All employers and immigration counsel for selected beneficiaries were notified of the lottery results by March 31, 2025. USCIS sent email notifications to counsel and employers of selected registrations. Cap-subject petitions (on Form I-129) for winning registrations may be filed (in paper form or online) during the designated petition filing period, which runs from April 1, 2025, through June 30, 2025. Second drawings may be conducted if insufficient number of petitions are filed after the initial drawing to meet the fiscal year cap. Such second drawings, if necessary, will be conducted soon after the close of the petition filing period for the initial drawing, i.e., soon after June 30).

Other Developments

Processing of concurrently-filed Form I-539 applications for H-4 family members. As of January 18, 2025, USCIS resumed its practice of adjudicating H-4 applications for changes or extensions of status (Form I-539) and for employment authorization (Form I-765) several months after H-1B principals' nonimmigrant petitions (Form I-129) even when those forms are concurrently filed. The January 2023 settlement agreement that required USCIS to bundle adjudication of these forms for almost two years expired on January 18, 2025, removing USCIS' obligation to streamline processing of H-4 applications with the principal's visa petitions in this way. It is not clear whether applications that are filed during the effective period of the settlement agreement but remain pending after its January 18 expiration will receive bundled treatment under the terms of the settlement. In general, employers and foreign nationals should be prepared for the possibility of increasingly lengthy processing times for H-4 Form I-539 and I-765 applications after January 18, 2025.

Form I-129 revised. The latest version of Form I-129 is dated 01/17/25. As of January 17, 2025, the agency is only accepting the 01/17/25 edition of the form (with no grace period). Any petitions received at USCIS on or after January 17, 2025, with prior editions will be rejected. Note the following changes: (1) Part 1 asks whether the petitioner is a nonprofit organized as tax exempt or a governmental research organization (reduced fees or fee waivers are ap-

plicable to such organizations), (2) Part 3 solicits information on the type of beneficiary, i.e., named or unnamed beneficiary (in H-1B cases, the beneficiary must also be "Named"), (3) Part 5 asks whether the work location is a third-party worksite, (4) Part 5 asks whether the petitioner, including all affiliates or subsidiaries of the organization, currently employes 25 or fewer full-time equivalent workers in the United States (reduced fees are applicable to such organizations), (5) the H Supplement solicits information on the passport or travel document used by the beneficiary during registration (for cap-subject petitions), rephrases the question on the beneficiary's ownership interest in the company, and clarifies the statements required by the signatory, and (6) the H-1B data collection and filing fee exemption supplement clarifies the scope of the cap exemption for persons already counted against the cap.

DHS permanently increases auto EAD extension, but rule may be rescinded. A final employment authorization document (EAD) rule—published in the final weeks of the Biden Administration and effective as of January 13, 2025—permanently increased the automatic EAD extension period to up to 540 days for certain EAD renewal applicants who timely filed their Form I-765 application. H-4 spouses applying for EAD renewals benefit from the extension. However, in January 2025, both chambers of Congress introduced separate joint resolutions under the Congressional Review Act (CRA) seeking to disapprove the DHS final rule. Both resolutions are now in committee. Under the CRA, Congress has the power to overturn agency rules within a certain time limit, subject to a complex set of timing and procedural rules.

NIV interview waiver program restricted. According to various consular websites, U.S. consulates have implemented a roll back of the expanded nonimmigrant visa (NIV) interview waiver program criteria that has been in place since the COVID-19 pandemic. Without having issued any public announcement, it appears that the State Department has reversed course on the scope of the interview waiver program, reverting to pre-COVID-19 eligibility requirements. Moving forward, in order to qualify for the interview waiver program and forgo an in-person interview at a U.S. consulate, an NIV applicant must meet the following criteria, in addition to other general program requirements: (1) be applying for a visa in the same NIV classification as the prior visa and (2) the prior visa must have expired within the last 12 months or still be valid. This change considerably narrows interview waiver eligibility because the expanded program permitted interview waivers for applicants whose prior visa in the same classification had expired within 48 months and, in some cases, permitted an interview waiver for applicants applying for a visa classification for the very first time. Those criteria appear to no longer be in effect. Nonimmigrant visa applicants who do not meet the newly narrowed interview waiver criteria will be required to schedule an in-person interview at a U.S. consulate to apply for their visa.

These and other developments are discussed in detail in this new edition of the *H-1B Handbook*.

We trust that this product continues to serve as an indispensable tool for H-1B employers and practitioners.

The Authors

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