



U.S. CITIZENSHIP AND IMMIGRATION SERVICES ISSUES H-1B FINAL RULE

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On Dec. 18, 2024, U.S. Citizenship and Immigration Services (USCIS) released a final rule with the less than concise title “Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers.” The full text of the new rule was published in the Federal Register and is 147 pages long. It includes sections that formalize existing policies of the agency and others that create substantive changes to the current H-1B program regulations. The highlights of the new rule include the following:

- An employee holding a majority interest in the sponsoring employer can obtain H-1B status, although the initial validity period will be 18 months rather than three years. This is a significant change because it opens the H-1B category up to entrepreneurs. Previously, it was very difficult to obtain approval of an H-1B petition when the beneficiary held a financial interest in the company.
- A specialty occupation is defined as a field that “normally” requires a bachelor’s degree; it doesn’t have to “always” require a degree. Note: this clarification addresses whether a particular *field* is a specialty occupation. However, all H-1B candidates must have at least a bachelor’s degree or an equivalent combination of education and experience.
- An employer can accept a range of qualifying fields of study for the position, as long as they relate to the job duties. Previously, USCIS had sometimes denied petitions where the employer would accept candidates with a degree in a number of alternative fields of study.
- An employer must file an H-1B amendment *before* changing the employee’s worksite location. Previously, it was unclear as to when such amendments were required to be on file. Employers must take note of the required timing in order to avoid problems with late-filed amendments.

- Where the conditions of employer haven't changed significantly, USCIS will give deference to a prior approval when adjudicating an H-1B extension application. The question of when a USCIS adjudicator must give deference to a prior adjudication has been somewhat fluid.
- An employer may be considered exempt from the H-1B cap when research is a fundamental activity of the employer, as opposed to being the employer's *primary* mission or engagement. Cap exempt means the prospective employee need not be selected in the H-1B lottery to obtain an H-1B visa. This change broadens the number of employers that may qualify as exempt from the H-1B cap (which limits the number of H-1B petitions granted to 85,000 per year).
- An employer may file a cap-exempt petition for an employee who will spend at least 50% of their time working at a cap-exempt employer, even though the sponsoring employer is not itself cap-exempt.
- Employees moving from post-graduate Optional Practical Training (OPT) to H-1B status may continue working until April 1 of the following year if their H-1B petition is still pending. OPT is the period of time during which a graduating foreign student may work in his field without obtaining another work-authorized visa such as the H-1B (up to three years for STEM degree holders versus one year for all other graduates). Previously, the student changing from OPT to H-1B had to stop working on October 1 of the same year they were selected in the H-1B lottery if their petition was yet to be approved. This changes gives USCIS longer to process the petition without destroying the graduate's work authorization.

Whether the new administration will attempt to roll back any of these changes remains to be seen. However, recent comments by President-elect Trump and his trusted advisors, Elon Musk and Vivek Ramaswamy, regarding the benefits of the H-1B program give employers of foreign workers and graduating foreign students reason to hope that the program will not only remain in place but could see both expansion and higher approval rates.

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