USCIS Proposed Rule to Modernize H-1B Program — Should Employers Be Happy or Worried?

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USCIS released a proposed rule that aims to update and modernize the H-1B program by publishing a Notice of Proposed Rulemaking (NPRM) to amend current regulations. The proposed rule covers a wide range of issues related to all types of H-1B matters, but some of the more interesting aspects of the proposed rule include:

1. Fixing the Broken H-1B Lotter Registration System – Addressing Issues with Multiple Registration Fiasco

FY2024 saw an astounding number of H-1B cap lottery registrations - 780,884. Included in that total were an equally astounding 408,891 registrations for beneficiaries with multiple registrations.

I spoke with one individual after the initial lottery process who said he was registered by 12 companies, only 7 of which he actually had knowledge. He was selected for three (3) different registrations. That perfectly describes the problem with last year's lottery process and the current selection system in place.

How did we get here - a 14.6% selection rate for the H-1B cap lottery process? The answer is actually pretty simple. Outdated H-1B cap limits that do not represent current demand and a rushed electronic registration system left wide open for abuse.

The proposed change calls for a "Beneficiary Centric Solution". Companies will still submit registrations on behalf of beneficiaries, and beneficiaries will still be allowed to have multiple registrations. However, each beneficiary will be entered into the lottery system only once, regardless of how many registrations were submitted on their behalf. If selected, each company that submitted a registration on behalf of that beneficiary would be notified and would be eligible to file an H-1B petition on behalf of that individual.

This means that any beneficiary would only account for one lottery selection, regardless of how many registrations were submitted on their behalf.

This does not address outdated cap limits, but it goes a long way to leveling the field for everyone and curtailing any incentives for fraudulent registrations.

The new beneficiary-centric H-1B lottery system is a huge improvement, but will it be ready for FY 2025 cap season? The proposed rule reads in part "DHS may need to delay the effective date if it determines that USCIS does not have sufficient time to ensure proper functionality of the beneficiary-centric section process, including completing all requisite user testing." The question remains — what will the FY 2025 registration process look like?

2. Third-Party Placement H-1B Scenarios Under Attack Again

Third-party placement H-1Bs are likely under attack again. The proposed rule would bring back much of the Neufeld Memo requirements and burdens that had recently been struck down in court.

Importantly, the new rule would affect third-party placement scenarios by altering how a position is assessed under specialty occupation criteria. It reads in part, "Therefore, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation." ***Not only does this place additional documentation burdens on the end client, but I would not be surprised to see USCIS challenge appropriate prevailing wage levels for these positions based on end-client position requirements.***

Key Point: It will be the position requirements of the end client, not the employer, that controls assigning the appropriate prevailing wage level.

3. Subtle, But Important Changes to Specialty Occupation Eligibility

The proposed rule would compact the current 4-prong analysis into 3 prongs, clarify that more than one degree field may be acceptable for a position, and clarify that “normal” does not mean “always” for a position’s degree requirements.

While I think there may be a few red flags with how the specific language is drafted, overall, I think most of the proposed rule serves as an important codification of accepted interpretations and procedures already in place.

The negative feedback I am reading about the proposed changes to specialty occupation eligibility revolves

around two points:

- **Requiring that the Bachelor's degree be directly related to the position offered. Some are referring to this as a new "directly related" mandate.**
- **Concerns that referencing "degree" as opposed to "course of study" to show how a degree is related to the position offered.**

While neither of these requirements are necessarily new or more restrictive than what already exists in practice, many immigration attorneys and advocacy groups are concerned that explicit language in the rule could be used in a more restrictive manner by USCIS when adjudicating H-1Bs. There are concerns as to how USCIS will assess "directly related" to the position offered, and if USCIS will focus on degree field in name only as opposed to the coursework behind the degree.

I am likely seen as naïve, but I am less concerned about the degree field focus concern. When the named field on the degree does not jump out as a match to a position offer, attorneys can still show coursework to show how the degree is related. The proposed rule reads: "***As in the past***, to establish a direct relationship, the petitioner would need to ***provide information regarding the course(s) of study associated with the required degree*** , or its equivalent, and the duties of the proffered position, and ***demonstrate the connection between the course of study*** and the duties and responsibilities of the position."

Those that are concerned about this language are being professionally vigilant to ensure that this rule is finalized with clear and unambiguous language. They want to make sure that the language in the final rule accurately reflects intention, and they want to make sure that administrations in the future cannot conjure up new interpretations of the language. (We have seen that problem before with past administrations). Clarity and finality will be important when it comes to specialty occupation language.

4. Eliminate Common Law Definition of Employer/Employee

The proposed role would eliminate using the common law definition of employer/employee, and in turn, open up real options for start-up entrepreneurs to pursue H-1Bs through their own business.

5. Extend Cap-Gap Work Authorization Timeframe

The proposed rule would finally implement a common-sense timeframe for cap-gap work authorization while H-1B cap filings are pending – it would extend work authorization to April 1st as opposed to the current October 1st limit. This is needed based on the multiple lottery selections that we see in some fiscal years that push out H-1B cap adjudications beyond October 1st.