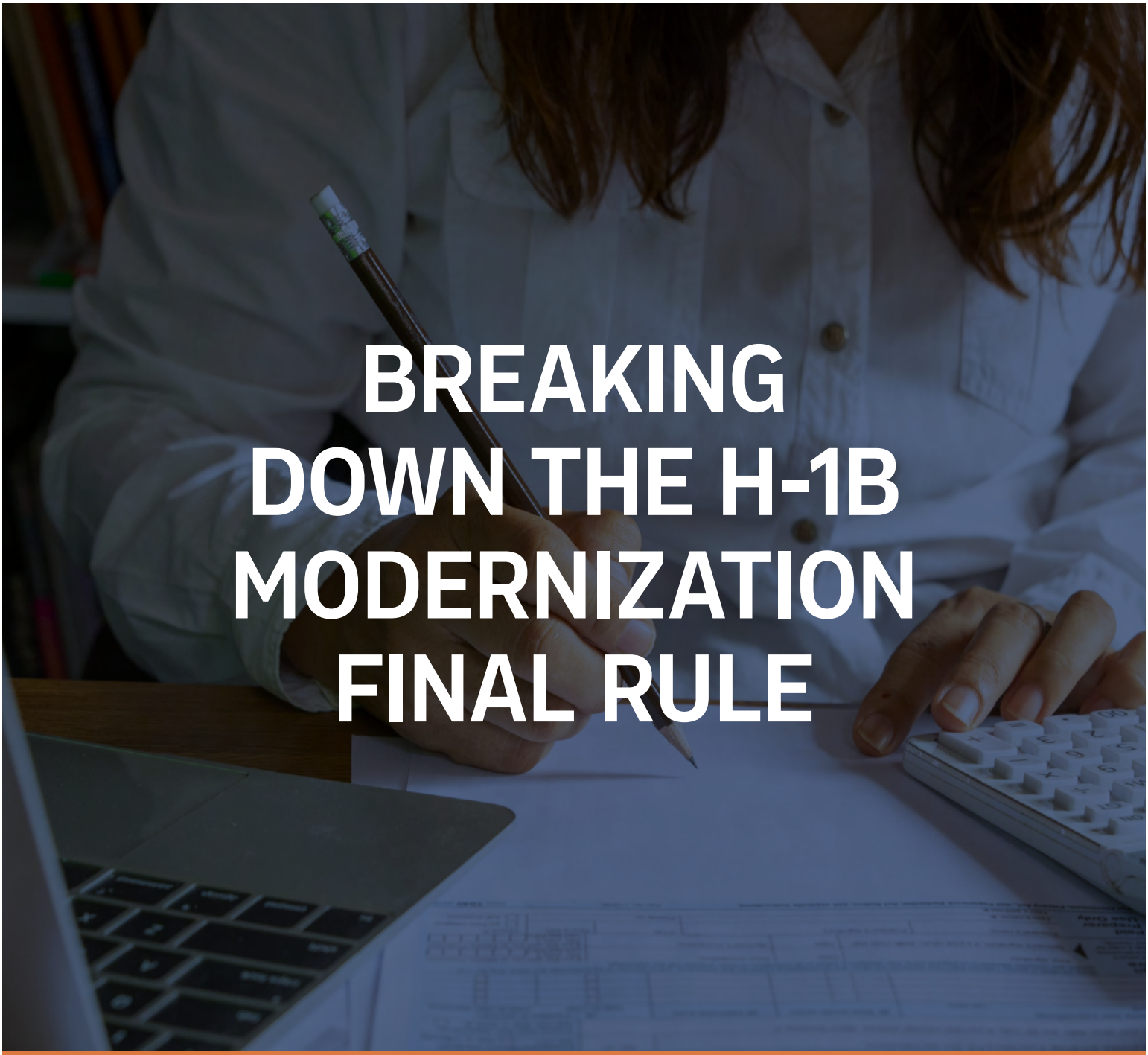

BREAKING DOWN THE H-1B MODERNIZATION FINAL RULE

MELTZER HELLRUNG

IMMIGRATION SOLUTIONS

BREAKING DOWN THE H-1B MODERNIZATION FINAL RULE

New H-1B regulations are being implemented on January 17, 2025. DHS is revising its regulations by finalizing several provisions outlined in the "Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers" notice of proposed rulemaking (NPRM), which was published in the on October 23, 2023. Previously, DHS finalized parts of the NPRM related to H-1B registration in a separate final rule, titled "Improving the H-1B Registration Selection Process and Program Integrity," on February 2, 2024.

This summary provides an overview of the most significant changes in the proposal, as well as Meltzer Hellrung's understanding of the impact of those changes.

H-1B Modernizations and Efficiencies

1. **Deference to Prior Petition Adjudications**

   The rule codifies and slightly expands USCIS's existing policy of deference to prior adjudications, providing employers with greater predictability when filing H-1B petitions. When adjudicating an H-1B involving the same company, employee, and underlying facts as a prior petition, USCIS should defer to its prior approval, unless there has been a material change in circumstances or eligibility, a significant error in the previous approval, or new material adverse information.

   USCIS had a non-regulatory deference policy. The policy was rescinded during the first Trump Administration, leading to a notable increase in requests for evidence (RFEs) and case denials. The Biden Administration reinstated the policy, and by codifying it, the rule makes the policy more resilient to future rescissions.

2. **Amended Definition of H-1B "Specialty Occupation"**

   The rule claims to codify existing USCIS practices, providing a regulatory definition of specialty occupation that is consistent with the existing standard. Through this rulemaking, DHS is formalizing the existing USCIS practice that requires a direct connection between the qualifying degree field(s) and the duties of the position.

   DHS has decided not to finalize the proposed regulatory language stating "[t]he required specialized studies must be directly related to the position," as this wording could be misunderstood to imply that USCIS would only consider a beneficiary's specialized studies. However, the "directly related" requirement will still be included in the definition of "specialty occupation" and in the associated criteria.

   This means that a single area of study will not be required for roles and employers can continue to allow multiple fields of study to qualify for occupations. In addition, general fields of study such as business or liberal arts will not be automatically disqualifying for individuals considered for H-1B roles.

3. **Determining When H-1B Amended Petitions Must be Filed**

   DHS is codifying and consolidating the requirements for when an amended or new H-1B petition must be filed due to a change in an H-1B worker's place of employment. Currently, the requirements for filing an amended or new H-1B petition due to a change in work location are outlined in various sources, including DHS regulations, a precedent decision interpreting the existing DHS regulation, USCIS policy guidance, DOL regulations, and DOL guidance. If there are material changes in an H-1B worker's place of employment, the employer must file the amendment before the change takes effect.

4. **Evidence of Maintenance of Status**

   The regulation provides a non-exhaustive list of documents which may be submitted as evidence of maintenance of status. Petitioners are not required to submit every item listed and may submit alternate documentation not listed. Meltzer Hellrung will continue to request the employee's two most recent pay stubs as the primary means of demonstrating maintenance of status.

H-1B Benefits and Flexibilities

1. **H-1B Cap Exempt Employers**

   The final rule will slightly broaden the scope of certain H-1B cap exemptions. The revisions aim to acknowledge that qualifying cap-exempt nonprofit and governmental research organizations, as well as nonprofits affiliated with institutions of higher education, may have multiple core activities or missions, beyond just research or education. Under the revised regulations, an organization can qualify for the cap exemption even if research or education is not its primary activity or mission, as long as research or education is one of the organization's fundamental activities.

   Additionally, Petitioners who qualify for a cap exemption for their employees under the final rule will no longer have to register for the cap lottery or pay the $215 registration fee. Some affected petitioners may avoid ACWIA fees that would have been applicable to their initial cap-subject petitions.

2. **Automatic Extension of Employment Authorization under F-1 OPT Cap-Gap**

   The final rule extends the cap-gap protection period for F-1 students who are beneficiaries of timely filed, nonfrivolous petitions to change their status to H-1B. The protection period will now last from October 1 until as late as April 1 of the following calendar year. This rule provides up to an additional six months of status and employment authorization, helping qualifying F-1 status holders avoid lapses in status and work authorization while awaiting the change to H-1B status. This is especially beneficial for employees selected in second lottery round draws in July or August.

3. **Lengthy Petition Adjudication Impacts Mitigated**

   USCIS will offer H-1B employers the option to amend the requested nonimmigrant employment validity period if the original period has already passed by the time a petition is adjudicated. If the existing Labor Condition Application (LCA) does not cover the new validity period, the employer must submit a new LCA and ensure compliance with the higher of the current prevailing wage or the actual wage. Additionally, the employer will not be allowed to reduce the offered wage below the amount listed in the original petition.

H-1B Program Integrity

1. **Provisions to Ensure Bona Fide Job Offers at Third-Party Client Sites**

   The rule shifts the focus from the current regulation's requirement to demonstrate an employer-employee relationship to establishing the existence of a bona fide job offer. It codifies the agency's long-standing practice of requesting contracts and other evidence of a legitimate job offer, while eliminating the itinerary requirement for H-1B petitions. Employers in staffing and consulting industries will be required to provide documentation from the ultimate end client describing the duties and degree requirements for the role.

   In response to public comments, the final rule introduces a new provision clarifying that a petitioner is not required to establish specific day-to-day assignments for the entire duration requested in the H-1B petition. Additionally, the rule adds a requirement that the H-1B petitioner must have legal presence in the United States and be subject to service of process within the country.

   Petitioners will not be required to provide sensitive information that is irrelevant and does not show the non-speculative nature of the beneficiary's position or the minimum educational requirements to perform the duties.

2. **H-1B Eligibility for Business Owners**

   The DHS rule clarifies that H-1B beneficiaries with a controlling interest in the petitioning entity may still be eligible for H-1B status, provided they will perform specialty occupation duties of H-1B caliber for the majority of the time. DHS proposes limiting the H-1B approval validity period of initial H-1B approvals and the first H-1B extension to 18 months. This is a break from the previous employer-employee model that prevented many entrepreneurs from seeking H-1B status.

   By establishing conditions like the majority of the time requirement and shortened validity periods for beneficiaries who own a controlling interest in the petitioner, DHS aims to ensure that the beneficiary will be engaged in a specialty occupation within a legitimate job opportunity. The limitation of this framework to beneficiary-owners with a controlling interest in their companies is designed to provide integrity protections for the program and prevent misuse of the H-1B system by these owners.

3. **Site Visit Program Codification**

   The final rule codifies and strengthens USCIS's long-established Fraud Detection and National Security (FDNS) unit's site visit program, making it clearer that failure to comply with a site visit may result in the denial or revocation of a petition. The rule also affirms DHS's authority to conduct site visits at the location where the H-1B employee works, has worked, or will work, including third-party worksites and other locations related to the H-1B employment.

What Does This Mean for Your Business?

The implications of the proposed rule are complex and potentially far-reaching. Of course, they will affect every organization differently depending on your current staffing situation and future hiring plans. Contact your Meltzer Hellrung attorney for customized guidance.

MELTZER HELLRUNG
IMMIGRATION SOLUTIONS

Meltzer Hellrung challenges conventions to deliver better outcomes.

Founded with the belief that immigration can be a strategic advantage, we understand the complexities of immigration and respond with innovative solutions to meet business and talent needs. Our unique solution - skilled immigration professionals delivering responsive service to clients through Voyager , our proprietary immigration management platform, delivers the best immigration experience to companies, employees and their families.

Chambers SPOTLIGHT IL 2025