



# U.S. Citizenship and Immigration Services Modernizing H-1B Requirements

## Small Entity Compliance Guide

### Introduction and Purpose

The U.S. Department of Homeland Security (DHS) has prepared this document as the small entity compliance guide required by section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. The guide summarizes and explains rules that DHS adopted, but it is not a substitute for any rule. Only the final rule can provide complete and definitive information regarding its requirements.

### Overview

On December 18, 2024, DHS published a final rule at 89 FR 103054 (Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers), which modernizes and improves the H-1B program by: (1) clarifying the requirements of the H-1B program and improving program efficiency, (2) providing greater benefits and flexibilities for petitioners and beneficiaries, and (3) strengthening program integrity measures. The effective date of the final rule is January 17, 2025.

This guidance incorporates information from this final rule for small entities seeking information concerning the potential impact identified by DHS’s Regulatory Impact Assessment and Small Entity Analysis of the rule.

### Summary of the H-1B Modernization Final Rule Provisions

The H-1B Modernization Final Rule adopts, with some changes, the remainder of the proposals published in the Federal Register on October 23, 2023, “Modernizing H-1B Requirements,

Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers,” Notice of Proposed Rulemaking (NPRM). DHS previously finalized portions of the NPRM relating to H-1B registration in a separate final rule, “Improving the H-1B Registration Selection Process and Program Integrity,” published in the Federal Register on February 2, 2024. The H-1B Modernization Final Rule’s provisions are briefly summarized here; more detailed and technical information involving each provision can be found in the rule itself.

1. **Specialty Occupation Definition and Criteria** - DHS codified and clarified the specialty occupation standard, including codifying the “directly related” requirement in the definition and criteria, and clarifying this as meaning “a logical connection”; codifying current practice that a generalized degree is not sufficient; and codifying current practice that a position may allow for a range of qualifying degree fields.
2. **Amended Petitions** - DHS clarified when an amended or new H-1B petition must be filed due to a change in an H-1B worker’s place of employment.
3. **Deference** - DHS codified and clarified its existing deference policy.
4. **Evidence of Maintenance of Status** - DHS clarified that evidence of maintenance of status is required for petitions where there is a request to extend or amend the beneficiary’s stay.
5. **Eliminating the Itinerary Requirement for H Programs** - DHS eliminated the H programs’ itinerary requirement.
6. **Validity Expires Before Adjudication** - DHS revised its regulations to allow H-1B petitions to be approved or have their requested validity period dates extended if USCIS adjudicates and deems the petition approvable after the initially requested validity period end-date, or the period for which eligibility has been established, has passed. This typically will happen if USCIS deems the petition approvable upon a favorable motion to reopen, motion to reconsider, or appeal.
7. **H-1B Cap Exemptions** - DHS revised the requirements to qualify for H-1B cap exemption when a beneficiary is not directly employed by a qualifying institution, organization, or entity. DHS also revised the definitions of “nonprofit research organization”, “governmental research organization” and “non-profit or tax-exempt organization.”
8. **Automatic Extension of Authorized Employment “Cap-Gap”** - DHS revised the automatic cap-gap extension end date from October 1 to April 1 of the fiscal year for which H-1B status is being requested.
9. **Provisions to Ensure Bona Fide Job Offer for a Specialty Occupation Position** - DHS codified the requirements to have a bona fide job offer for the beneficiary to work within the United States, and a bona fide position in a specialty occupation as of the

start date of the validity period requested on the petition. DHS also codified USCIS' authority to request contracts, work orders, or similar evidence to show the bona fide nature of the beneficiary's position.

10. **Beneficiary-Owners** - DHS codified a petitioner's ability to qualify as a U.S. employer even when the beneficiary possesses a controlling interest in that petitioner, while also setting reasonable parameters around such employment.
11. **Site Visits** - DHS modified the H-1B regulations to codify its existing authority to conduct site visits and clarify the scope of inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections.
12. **Third-party placement (Codifying Defensor)** - DHS codified the prior practice of, when the beneficiary will be staffed to a third party, USCIS will look at the third party's requirements for the beneficiary's position, rather than the petitioner's stated requirements, in assessing whether the proffered position qualifies as a specialty occupation.

## **Entities Subject to the Rule**

Indirect impacts from a rule on a small entity are not considered as costs for RFA purposes.

USCIS acknowledges that the rule could have indirect impacts on small entities including, but not limited to, costs associated with the time required to comply with the site visits provision.

USCIS's RFA analysis for this final rule focuses on the population of Form I-129 petitions for H-1B workers.

## **Description of the Projected Reporting, Record-keeping, and Other Compliance Requirements of the Regulations, Including an Estimate of the Classes of Small Entities that Are Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record**

This rule codifies USCIS' existing authority to conduct site visits, and further clarifies the scope of inspections and the consequences of a petitioner's or third party's refusal or failure to fully cooperate with these inspections. Supervisors of H-1B beneficiaries will bear an opportunity cost of time as described in the final rule. While the site visit provision imposes some burden to prospective employers, USCIS found no other alternatives that achieved stated objectives with less burden to small entities.

## **Resources to Support Compliance Among Small Entities**

Resources for small entities are available <https://www.uscis.gov/legal-resources/small-business-regulatory-enforcement-fairness-act-sbrefa>. USCIS can help small entities with questions about the final rule. Please refer to the above website for information on directing questions to the help desk via phone and other inquiries and resources.