

PUBLICATION

The H-1B Visa Process and the Second Trump Administration

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USCIS has officially announced the initial registration period for the fiscal year 2026 H-1B CAP season. The initial registration period will open at noon Eastern on March 7 and will run through noon Eastern on March 24, 2025. During this period, prospective petitioners and representatives must use a USCIS online account to register each beneficiary electronically for the selection process and pay the associated registration fee for each beneficiary. The FY2026 H-1B CAP will utilize the beneficiary-centric selection process launched in FY2025 whereby registrations are selected by unique beneficiary rather than by registration. If USCIS receives registrations for enough unique beneficiaries by March 24, the Service will randomly select unique beneficiaries and send selection notifications via users' USCIS online accounts. The initial registration period may be extended if the Service does not receive enough registrations for unique beneficiaries. The Service intends to notify by March 31 prospective petitioners and representatives whose accounts have at least one registration selected.

With the registration period announcement and filing dates for the FY2026 H-1B CAP Registration process along with the inauguration of the second Trump administration, there is much uncertainty about the types of changes that may be implemented which could have an impact on nonimmigrant and immigrant visa policies. Although the new administration has yet to announce specific changes to the H-1B visa process, changes made during President Trump's first term placed high scrutiny on the interpretation of a "specialty occupation" which led to an increase in Requests for Evidence (RFE) and H-1B visa petition denial rates. Therefore, it is critical that employers begin laying the groundwork for the H-1B CAP Registration for fiscal year 2026.

On January 17, 2025, just days prior to the inauguration of President Trump this month, the Department of Homeland Security implemented the H-1B Modernization Rule. This long-awaited Rule modernizes and enhances the efficiency of the H-1B program, clarifies H-1B requirements, offers more benefits and flexibility to both petitioners and beneficiaries, and strengthens program integrity measures. We include key provisions of the Rule below:

1. **Specialty Occupation:** The Rule clarifies that an employer "normally" requiring a bachelor's degree does not mean that the employer must "always" require a bachelor's degree. Another issue that routinely showed up in H-1B specialty occupation RFEs in Trump's first administration was the range of qualifying degrees. However, the new Rule clarifies that there may be a range of qualifying degree fields that might meet a position's requirements if there is a direct relationship between the field of degree and the position duties. In addition, the new Rule expressly requires evidence of a Beneficiary's maintenance of H-1B status to be included with a petition seeking an extension or amendment of stay.
2. **H-1B Cap-Exempt Employers:** The H-1B modernization Rule also expands the definition of cap-exempt employers who can solicit outside the 85,000-visa cap. Specifically, the Rule states that non-profits and government organizations that conduct research "as a fundamental activity," instead of those that are "primarily engaged" or have a "primary mission" of research, can qualify as a cap-exempt employer. This change in language is aimed at allowing more institutions engaging in research to sponsor H-1B temporary workers outside of the visa cap. Further, the Rule clarifies what

it means to work "at" a qualifying cap-exempt employer. Work performed at a qualifying cap-exempt employer may now include work performed remotely, via telework, or offsite. Moreover, the Rule clarifies that to qualify for the American Competitiveness and Workforce Improvement Act (ACWIA) fee exemption, a non-profit must have IRS tax-exempt designation under 501(c)(3), (c)(4), or (c)(6) as well as eliminating the additional requirements to have been approved for tax-exempt status for research or educational purposes.

3. **The Employer-Employee Relationship and Third-Party Worksites:** Previously, U.S. employers eligible to sponsor H-1B workers were limited to a person, firm, corporation, contractor, or other association or organization in the U.S. engaging a person to work within the U.S., has an IRS tax identification number, and has an employer-employee relationship with the H-1B nonimmigrant employee(s). The employer-employee relationship was defined as having the ability to "hire, fire, supervise, or otherwise control the work of any such employee." The new Rule, however, eliminates the employer-employee relationship language and broadens the definition of a U.S. employer. The Rule requires a U.S. employer to have a legal presence in the U.S., be amenable to service of process, and have an IRS tax identification number. This expands eligible petitions to include beneficiary-owned companies and is intended to promote access to H-1B visas for entrepreneurs and start-up companies.
4. **Compliance:** USCIS is granted the authority to conduct inspections, evaluations, verifications, and compliance reviews of H-1B employers and employees to verify compliance with all applicable laws, including site visits. The Rule not only codifies but expands USCIS' authority to conduct these visits and clarifies the scope of inspections and consequences for failure to cooperate with the inspection. USCIS is now authorized to conduct these site visits at the employer's worksite, neutral locations, and all other locations where the H-1B employee's work will be performed such as third-party worksites. Lastly, USCIS is authorized to conduct site visits of an H-1B employee's home if the petition indicates the employee, is a remote worker.
5. **Automatic Work Authorization Extension for F-1 Students (cap-gap):** F-1 students working pursuant to Optional Practical Training (OPT) may receive an automatic extension of work authorization between the end of their OPT and October 1, the start date of the initial H-1B period. Essentially, the Rule automatically extends the duration of F-1 status and any employment authorization until April 1 of the relevant fiscal year (instead of October 1) to avoid disruptions while a change of status to H-1B is pending adjudication with USCIS.

Potential Impacts on H-1B Visas under a Second Trump Administration

While business immigration policies have largely been spared in the first few weeks of the new administration, we continue to advise employers that this will likely change as the administration begins to form. While we are unaware of the exact changes President Trump will implement, the President has already warned of strict immigration enforcement, including closely monitoring foreign nationals and their employers and enhanced "vetting" processes for foreign nationals obtaining visas abroad at the U.S. Embassies and Consulates. We note that President Trump's first administration sought to change the prevailing wage structure by increasing wage obligations for employers and this stance may be reincarnated over the course of the next four years.

Overall, we anticipate the H-1B visa process will be met with increased scrutiny. Given the uncertainty surrounding the H-1B visa process, we urge employers to begin planning for the FY2026 H-1B CAP Registration. With the announcement of the initial Registration period, USCIS has also confirmed multiple enhancements for organizational and representative accounts for H-1B filing. These enhancements will be live before the start of the initial registration period and include:

- The ability for paralegals to work with more than one legal representative. A paralegal will now be able to accept invitations from multiple legal representative accounts, allowing them to prepare H-1B registrations, Form I-129 H-1B petitions, and Form I-907 requests for premium processing for different attorneys, all within one paralegal account;
- An easier way for legal representatives to add paralegals to company clients.
- Pre-population of certain Form I-129 fields from selected H-1B registrations; and
- The ability to prepare a spreadsheet of H-1B beneficiary data and upload the information to pre-populate data in H-1B registrations.

Our immigration team is prepared and well equipped to guide employers through the H-1B process and will continue to report on important immigration-related updates to support employers with comprehensive immigration planning and assistance.

If you have any questions or would like more information on the issues discussed, please contact a member of Baker Donelson's Immigration team.