

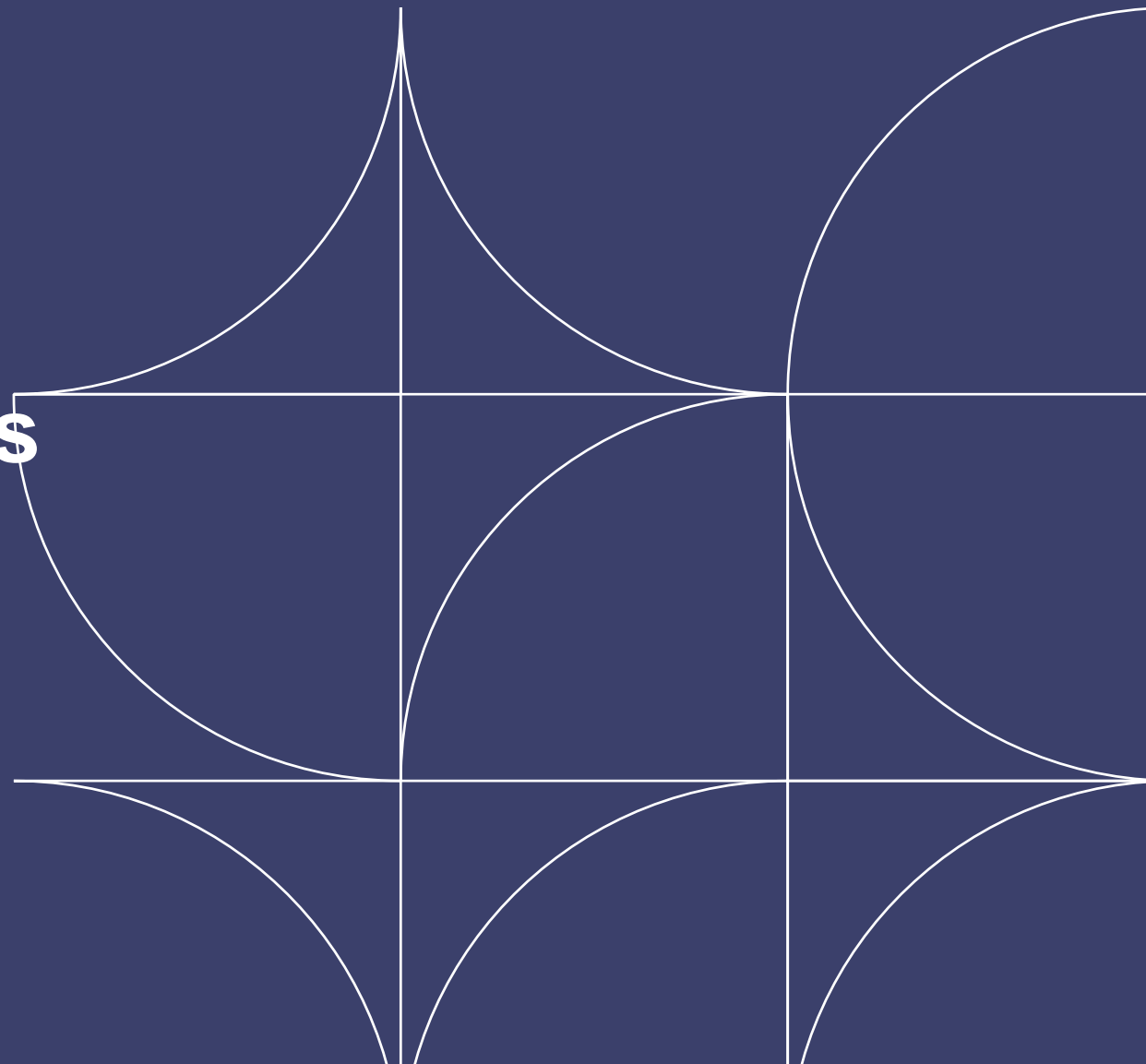


Business Immigration Developments and Their Implications on Employers

March 21, 2024

Seyfarth Shaw LLP

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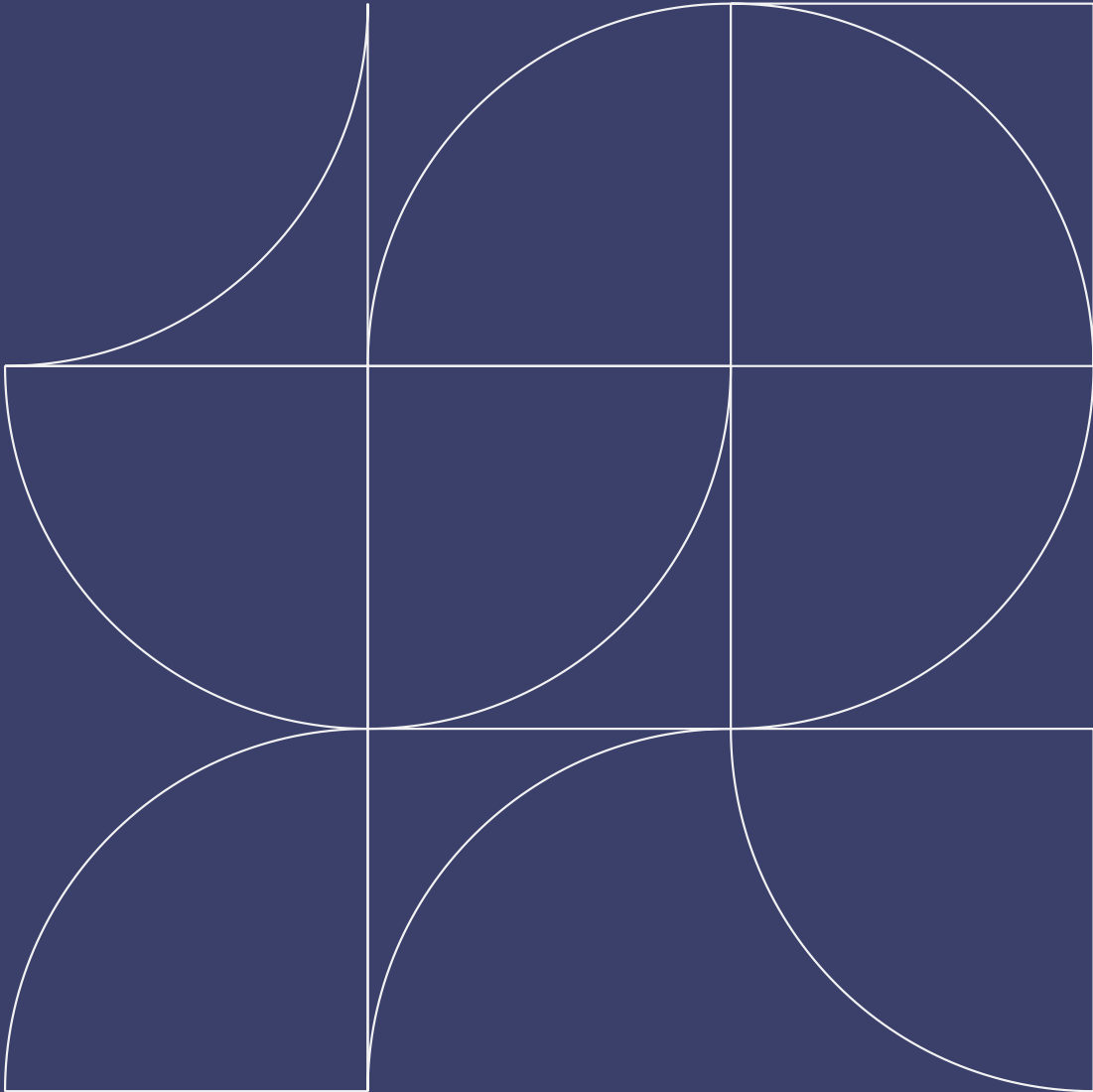


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Program Snapshot

- 1 | Recent USCIS Updates
- 2 | Proposed H-1B Modernization Rule
- 3 | PERM Updates & Alternatives

Recent USCIS Updates



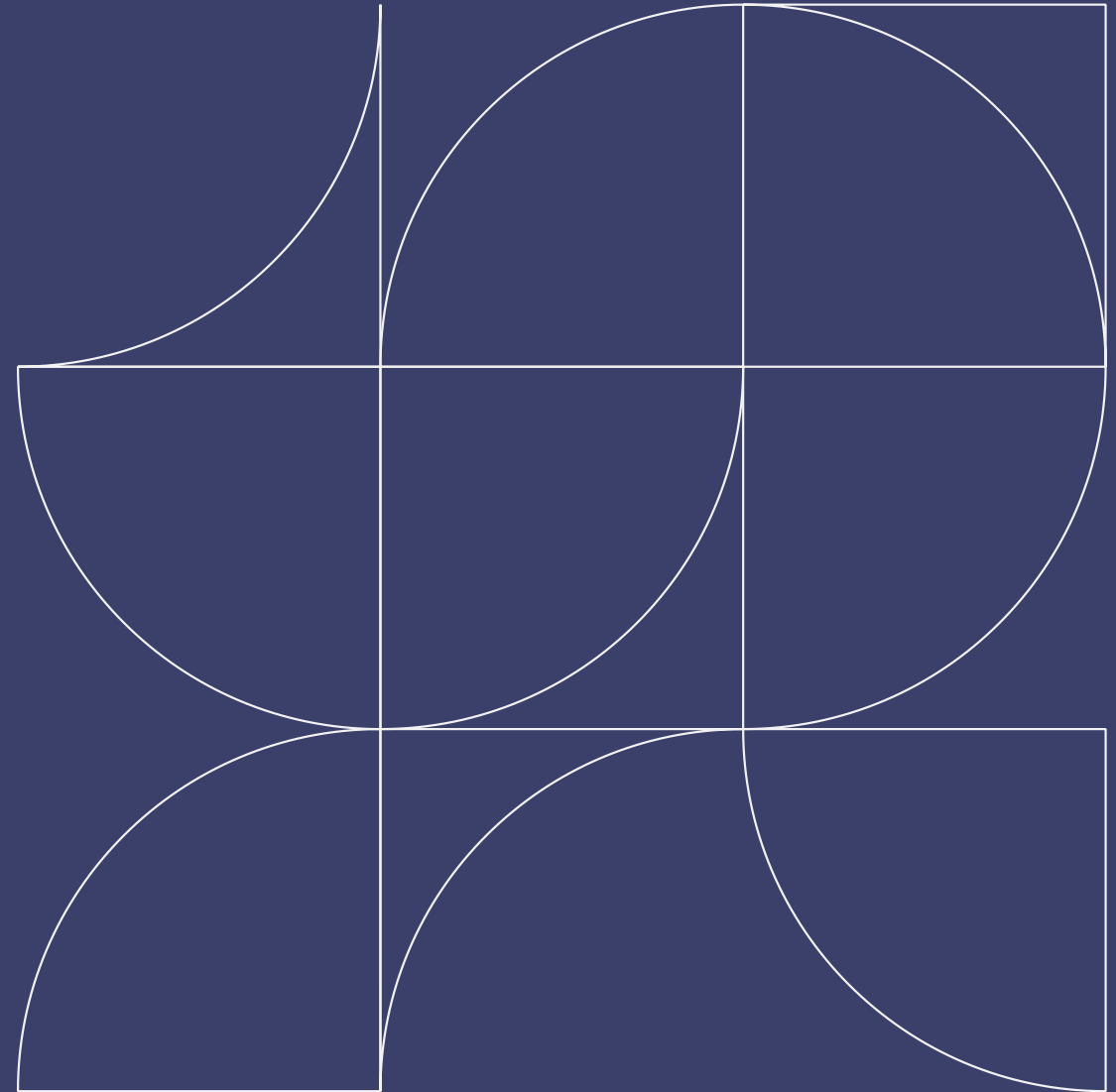
H-1B Updates

- H-1B Cap Rule in effect for registration
 - Beneficiary centric Cap selection process
 - Each employer who submitted a registration for a selected Beneficiary can file an H-1B petition
- Electronic H-1B filings
- Domestic H-1B Visa Renewal program began on January 29, 2024 and will end on April 1, 2024
 - Limited to individuals with H-1B visa stamps issued in Canada or India during a certain time period.

Recent USCIS Updates

- Premium processing fees increased on February 26th
 - \$2,805 for premium processing on most I-129 and I-140 petitions
 - On April 1, adjudication period will change from calendar days to business days
- New fee rule effective April 1
 - Separate I-129 filing fees for H-1B, L-1, and other nonimmigrant case types
 - Asylum Program Fee for employment-based visa petitions on Forms I-129 and I-140
 - Green card applications – separate EAD and Advance Parole fees will be required
 - Lawsuit filed yesterday to challenge
- EAD validity period increased to five years for some categories, including those issued based on pending I-485 applications

H-1B Modernization Rule



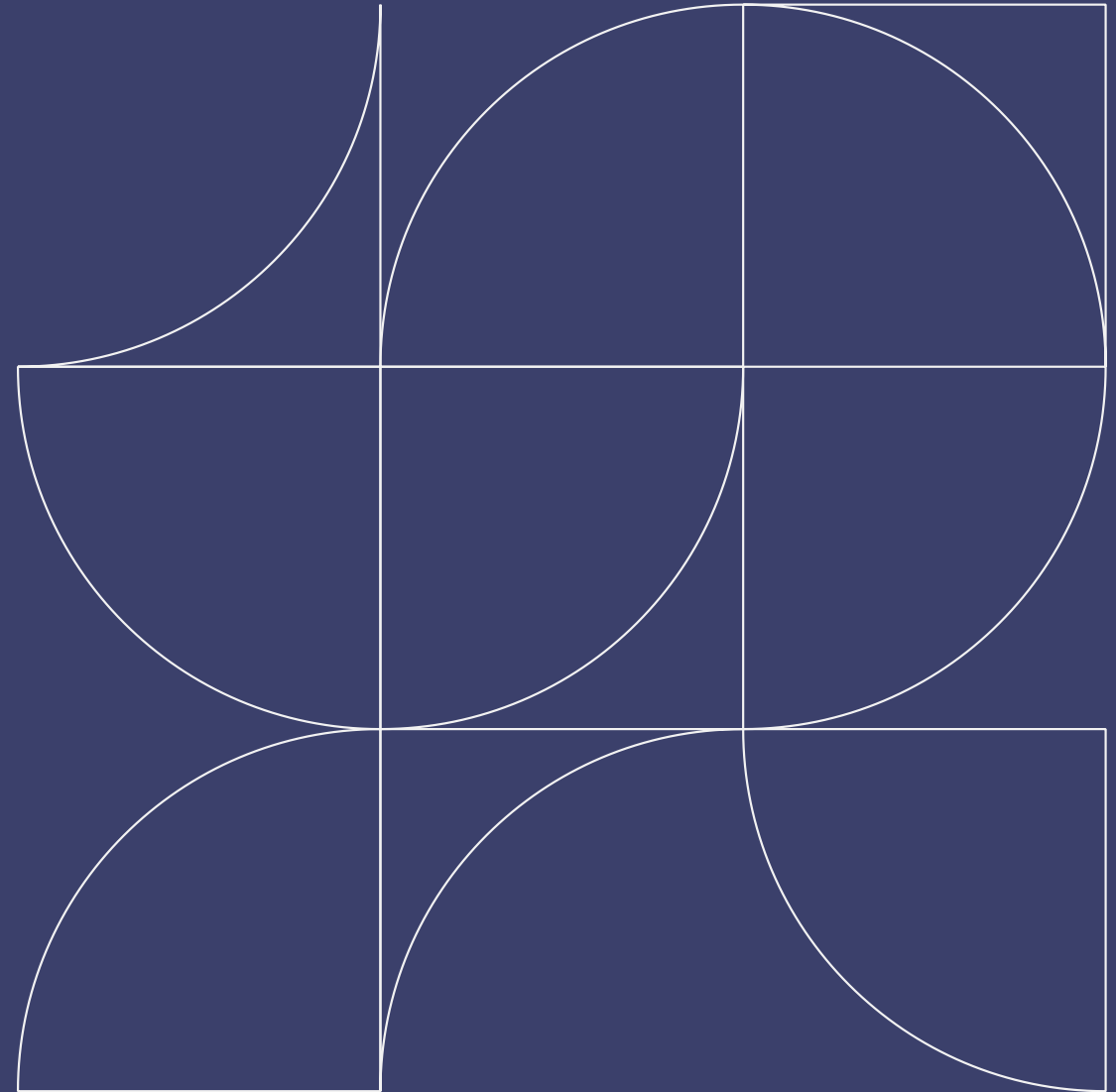
Redefining “Specialty Occupation”

- Concerns over definitions of specialty occupation and nexus
- Categorized some degrees as “general degrees”
 - Position that requires a general degree will not qualify as a “specialty occupation”
 - Impact on industries such as consulting, finance, etc.
 - Occupations/Degrees: MBAs, General Engineering, Marketing, Liberal Arts
- USCIS received 1,300+ comments from various organizations and firms, including Seyfarth

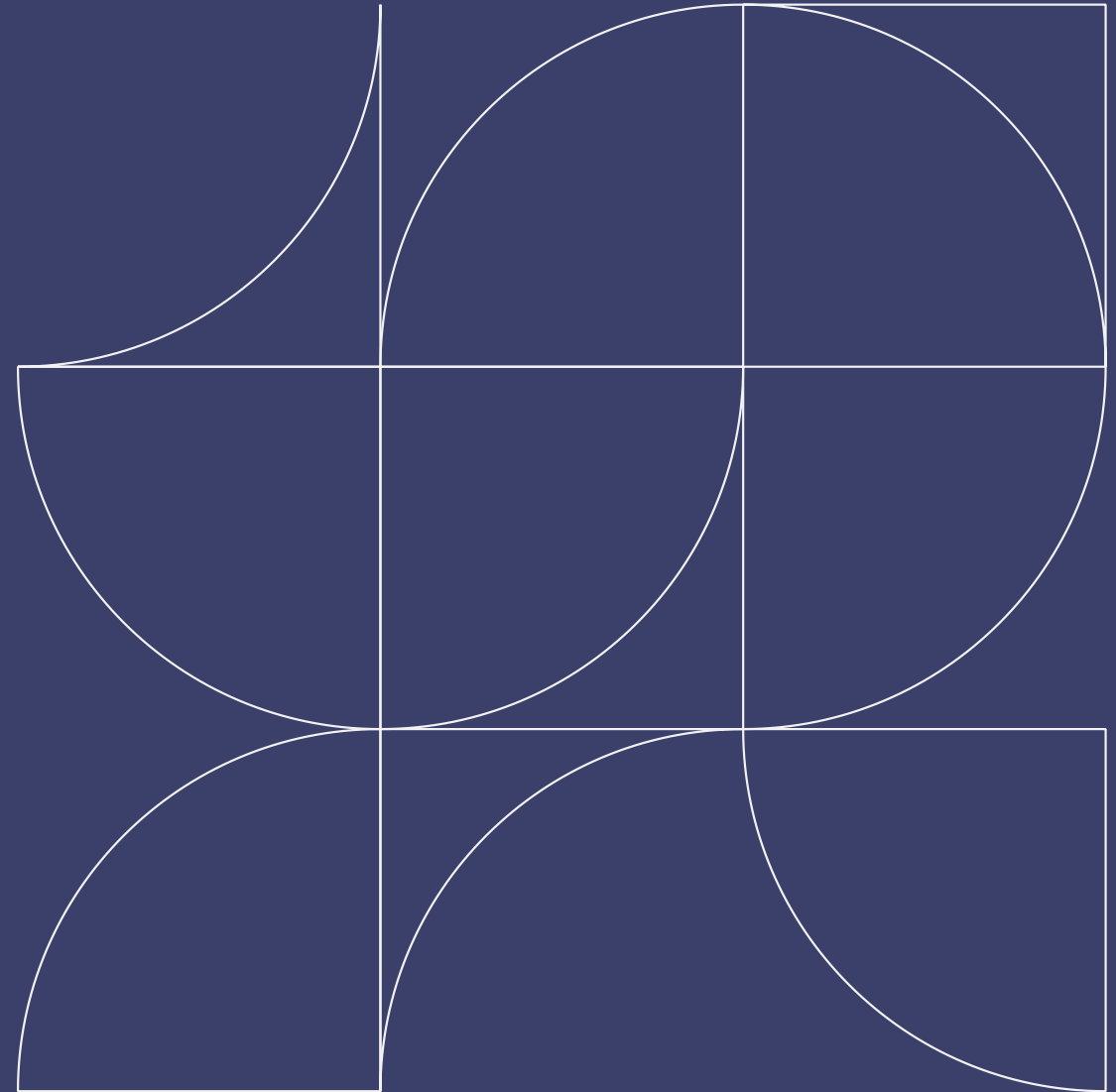
Third-Party Placement Issues

- Proposed 8 CFR 214.2(h)(4)(iii)(A)(3) and (i)(b)(3)
 - Third party's requirements not only those of the petitioning employer to be disclosed in petition
 - Applies when the beneficiary is contracted to the third party meaning that they are part of the third-party's organizational hierarchy
 - Distinction between beneficiary who is staffed and one who provides services to a third party
 - No itinerary requirement

CLE Code



PERM Updates & Alternatives



PERM & DOJ

Why the sudden interest?

- Why is DOJ involved?
 - Two high profile cases- one in 2021 and the other in 2023 tell slightly different stories
 - Timing of the investigations overlap in part in 2019
 - 2021 settlement at the time reflected highest monetary award under INA's anti-discrimination provision at \$14.25M
 - 2023 settlement topped it at \$25M
 - At its core - employment discrimination
 - The target - recruitment practices in the context of PERM
 - The call out –
 - Standard recruitment practice vs PERM recruitment practice
 - Designed to deter
 - How candidates submit resumes
 - Where the position is posted

PERM Scrutiny DOJ vs DOL

- How are the two settlements different?
 - 2021 involved both DOJ **and** DOL
 - DOL conducted an audit of pending PERM applications
 - DOL settlement including requirement for the company to provide additional notice and recruitment for U.S. workers and subjects the company to ongoing audits to ensure compliance with applicable DOL PERM regulations
 - 2023 involved only DOJ
 - DOJ settlement included provisions for conducting more expansive recruitment for all PERM positions
 - Posting PERM position on company external job website
 - Accepting resumes and applications electronically
 - Allowing PERM positions to be searchable in the company tracking system

PERM Scrutiny DOJ vs DOL

- Is the difference in the story behind these two settlements significant?
 - Both companies had PERM practices that complied with the letter of the law
 - Did they comply with the “spirit” of the law differently?
 - Did they meet the “good faith” PERM regulatory requirement?
- What is DOJ looking at?
 - Discriminatory practices – their mandate dictates they look at the practices in how they may or may not violate INAs antidiscrimination practices
 - The purpose of the job postings is irrelevant
 - The artificial nature of an “open” position in the context of PERM also irrelevant
 - Highlights PERM program flaw
 - Recruitment vs Test of the Labor Market
 - Advocacy for a program that is inline with real world practice vs artificial process
 - A model exists already– Higher Education PERM program model

Alternative Options for Permanent Residence

- EB-1 Extraordinary Ability
- I-140 National Interest Waivers (NIW)
 - Promote use of the category by STEM graduates and entrepreneurs
 - Consider associates with STEM degrees
 - Researchers/Scientists
 - Engineers
 - Top tier leaders with STEM degrees who are critical and can document a track record of innovations and contributions in a particular field OR prospective benefit
- Indicators
 - Work related to critical infrastructure
 - Impact of work on the business operations/function
 - Involved in novel research / innovative practices
 - Testimonial letters
 - Publications – helpful but not necessary
 - Presentations at key conferences – helpful but not necessary

H-1B Investigations by DOJ

- Complaints to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section
- Complaints typically allege that U.S. citizens and/or LPRs disfavored for hiring in preference for H-1B beneficiaries
- Employers should pay attention to potential pitfalls when hiring, promoting or assigning H-1B beneficiaries where a “protected person” sought the same position
 - Ensure contracts are clear on hiring term for H-1B
 - Avoid statements suggesting that placement is because worker was an H-1B beneficiary
- US workers are not entitled to preference over H-1B beneficiaries but are protected from discrimination

Thank You

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