

# Immigration Compliance in a Changing Landscape: Strategies for Employers

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# Overview

- Changes to the H-1B program
- Petition Denials and Litigation Options
- Mergers and Successorship
- Worksite Enforcement - FDNS site visits

# Changes to H-1B Program

- Revised definition of specialty occupation ◀
- Program integrity: Employer must offer “bona fide position”; and FDNS investigations ◀
- Not required to establish specific day-to-day assignments
- When to file new or amended petition
  - Material changes
  - Consequences of failure to file or untimely filing
- Deference to previous adjudications
  - but typical weasel words – material error or material change
- F-1 Students – extension to employment authorization
- Expanded cap exemptions for research and concurrent employment

<https://www.fisherphillips.com/en/news-insights/biden-administration-reshapes-h-1b-visa-rules.html>

# Specialty Occupation - Revised Definition

- Specialty Occupation - Statutory Definition (8 U.S.C. 1184(i))
  - Occupation that requires theoretical and practical application of a body of highly specialized knowledge; and
  - Attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.
- New regulatory gloss: “. . . in a **directly related** specific specialty, or its equivalent, as a minimum for entry into the occupation . . .” (89 FR 103198)
  - Directly related does not appear in the statutory text
  - Directly related means a logical connection between the required degree, or its equivalent, and the duties of the position.
  - General degrees do not qualify

# Revised Definition

- Occupation must also meet one of four regulatory criteria:
  - Bachelor's degree must be—
    - “Normally” required for entry into the occupation, OR
    - Required to perform job duties in parallel positions, OR
    - Employer requires degree to perform job duties of the position, OR
    - Duties are so specialized, complex, or unique that a degree is required
- “Normally” means conforming to a type, standard, or regular pattern
- Normally does not mean “always”

(89 FR 103198)



# Good News -- Normally

- Clarification of “normally” is likely meant to preclude a prior slate of poorly reasoned decisions improperly interpreting DOL’s sources:
  - Occupational Outlook Handbook – common, although not always required
    - Info Labs v. USCIS, 613 F. Supp. 3d 415 (D.D.C. 2020)
  - O\*NET – most positions require a degree
    - 3Q Digital v. USCIS (D.D.C.)

# Mixed Bag - Directly Related

- USCIS claimed
  - It was seeking to create a more flexible definition that can be adopted to emerging fields (89 FR 103064)
  - But the changes were also meant to codify existing practice (103065)
- These two propositions will lead to inconsistent directions
  - Although specific degree requirement will no longer apply (flexibility)
  - The “directly related” requirement will likely continue to be a problem in some cases (codifying existing practice to correlate job duties and courses of study) (89 FR 103071, 103073)

# Specific degree – the historical position

Before the regulatory change, USCIS sometimes required a specific degree:

- RELX v. Baran (D.D.C.)
  - Bachelor's degree in STEM field for a Data Analyst at LexisNexis
  - USCIS required a degree from one specific discipline to qualify
- Stellar IT v. USCIS (D.D.C.)
  - Bachelor's degree or a Master's degree with course work in Information Technology, Accounting/Finance and Business Management for a Senior Project Manager Information Technology position
  - USCIS required a precise specialty
  - Petition denied if more than one type of degree was acceptable

The new regulation forecloses those positions (89 FR 103071, 103073).



# Specific degree – continued scrutiny

USCIS clarifies it is now accepting a variety of different fields of study.

A “range of qualifying degree fields” are permissible (89 FR 103074).

However: There must be a correlation (not “exact correspondence”) between the job duties and the course of study associated with the academic degree (89 FR 103072).

- ▶ Correlation means a “logical connection” between the two, as shown by (89 FR 103075):
  - established curriculum of courses
  - course descriptions
  - information connection courses to job duties
- ▶ USCIS continues to reject “general attestations” from employers (89 FR 103076)

# Directly Related – the historical position



- Before the regulatory change, USCIS often used the “directly related” requirement to deny petitions:
  - Xpress Group v. Cuccinelli (W.D.N.C.)
    - bachelor's degree in business administration as a prerequisite for position is a “general degree” and not indicative of a specialty occupation
  - Vision Builders v. USCIS (D.D.C) (agency prevailed)
    - Degree in Business Administration is not in a specific specialty that is directly related to the proposed position of VP of Strategic Planning

Those restrictive positions are still likely under the new regulation (89 FR103066)

# Directly Related – Two Areas of Concern

- The general degree probation is extended to traditional fields:

## Engineering degrees

- USCIS will not accept requirement of any engineering degree
- This does not indicate the requirement of a “highly specialized knowledge directly relating to the duties and responsibilities” of a position (89 FR 103072, 103080).

Irony: the statute specifically defines engineers as professionals. 8 U.S.C. 1101(a)(32).

## STEM degrees generally

- Studies in any STEM degree field would generally indicate “that the position does not require a ‘body of highly specialized knowledge’ but, rather, general mathematical or analytical skills.” (89 FR 103072)

Irony: USCIS purports to be flexible in acknowledging occupations in emerging fields, but it wants to cabin those occupations to a specific set of degrees

# Directly Related Redux

If a general degree is required (e.g., business administration, engineering, or STEM field):

- Draw attention to the coursework necessary to perform the duties
- Show that the coursework is regularly part of the curriculum for that degree
- Inclusion of a major, minor, or concentration of courses
- Point out that the degree title is not dispositive

(89 FR 103079-80)

Master's degrees in business administration should pass, but pay particular attention to a bachelor's degree requirement in business administration, which USCIS views as suspect.

(89 FR 103080)

# Denials and Remedies, ... Litigation

## Staying within the Agency

- Refiling
- Motions to USCIS
  - Reconsider
  - Reopen (note exception to 30-day deadline)
- Appeals to the A.A.O. (Administrative Appeals Office)
- Going outside the agency

## Litigation in Federal Court

- Administrative Procedure Act claims



# Litigation Options

## Legal Issues

After *Loper Bright v. Raimondo*, the courts no longer defer to an agency's interpretation of an ambiguous statute. Rather, the court must find the best reading of the statute.

Agency action contrary to law may be set aside by a reviewing court. 5 U.S.C. 706(2)(A)

- "Directly related" does not appear in the statute
- Bachelor's degree must be in a "specific specialty," or in an "equivalent" area

However, previous decisions have endorsed USCIS's view as "most faithful to the statute."  
*Vision Builders*, 2020 WL 5891546 (D.D.C. Oct. 5, 2020).

# Litigation Options

## Procedural Issues

Watch for denial notices that contain:

### ! Factual Errors

- » ignores evidence
- » fails to respond meaningfully to evidence
- » basic mistake of fact

### ! Flawed Reasoning

- » offers inaccurate or unreasoned justification for the decision
- » fails to engage with arguments raised by the employer
- » fails to apply the regulatory criteria/conditions to the facts
- » misapplies the law or applies the wrong law (e.g., *Matter of Treasure Craft*)

Agency's denial is arbitrary and capricious. 5 U.S.C. 706(2)(A)

# Immigration Issues in M&A

- Immigration Due Diligence
  - Prior to finalizing agreement texts, identify workers who are on employment-based visas and who are in various stages of employment-based immigration processes—actions may need to be taken
    - Establish successorship in interest through the deal documents
    - Amend petitions timely where needed
    - Amend deal structure where needed (L visas, E visas, to avoid key employees' loss of status)
  - Identify where projected post-deal job changes affect immigration status and pending applications
  - Review target's immigration sponsorship policies and commitments
  - I-9:
    - New I-9's are almost always better than inheriting the old ones
    - Potential Liability and Materiality
- Incorporate above immigration considerations into agreement drafting and deal structuring
  - Magic immigration-related successorship in interest language
  - Phased employment changes, e.g., to enable I-9 re-do
  - Indemnifications

# FDNS Site Visits

- New verification method through on-site inspections
  - Fraud Detection and National Security Directorate
  - Questions about its authority
- Not required to admit FDNS inspectors
  - But risk of denied/revoked petitions
- Remote work - risks involved with inspections at employee's worksite



# FDNS Site Visits - Risks

Not required to admit FDNS inspectors

Without a judicially authorized subpoena or warrant, employers are not legally required to allow entry of immigration officers into non-public areas of their businesses.

8 U.S.C. § 1357(a)(3); 8 C.F.R. § 287.8(f)

However, if FDNS cannot “verify” facts through site visits, USCIS may deny or revoke petitions.





# FDNS Site Visits – Risks

Information gathered during site visits may be used against the employer and/or employee

- FDNS uses the Fraud Detection and National Security Data System (FDNS-DS) to record, track, and manage “information related to beneficiary applications with suspected or confirmed fraud” (77 Fed. Reg. 47411, 47412 (Aug. 8, 2012)).
- “FDNS-DS maintains information on all individuals who have been reviewed for these concerns.” (Id.)



# FDNS Site Visits – Plan Ahead

- ▶ Non-public areas should be clearly marked as “private”
- ▶ Designate a manager/employee who is familiar with the petition/position as a point of contact
- ▶ If FDNS visits, ask to reschedule for a more convenient time/location
- ▶ Direct FDNS to company’s attorney
- ▶ Have the supporting documentation prepared for inspection



# Remote Work - FDNS Inspections

- **Site Visits and Compliance:** Employers with remote H-1B or L-1 workers are subject to unannounced site visits to verify compliance, even if an employee is not on-site, but instead at a home office.
- **Documenting Remote Work:** Employers must ensure that remote workers' home locations are properly documented and that wages, working hours, and job duties match what was submitted in the original petition filing. An FDNS Officer may review these records during inspections.
- **Means of Contact:** In-person (unannounced), or via email / telephone. Remote employees must be made aware.

# Third Parties - FDNS Inspections

- **Site Visits and Compliance:** Rule purports to authorize FDNS inspections at third-party worksites.
- **Documenting Third-Party Locations:** In-person (unannounced), or via email / telephone. Employers should advise third parties where employees are placed that they may be subject to inspections. This is a sensitive issue requiring an appropriate strategy.



# Fisher Phillips Employers' Rapid Response Team for DHS Raids



## 24/7 Emergency Hotline:

In the event of an active ICE enforcement action, call us at **877-483-7781** for immediate assistance.

[DHSRaid@fisherphillips.com](mailto:DHSRaid@fisherphillips.com)

Complimentary Employer DHS/ICE Raid Preparedness Action Plan checklist available on [Fisher Phillips Employers' Rapid Response webpage](#)

### Employer DHS/ICE Raid Preparedness Action Plan Checklist



#### 1. Immigration Point Person

- ☐ Assign a staff member as the primary contact for all DHS/ICE/CBP correspondence.
- ☐ Ensure all employees are aware of who this person is and how to contact them.
- ☐ Immigration Point Person:
  - Name:
  - Contact Info:

#### 2. Employee Awareness and Communication

- ☐ Train employees to immediately notify the Immigration Point Person in case of any contact from DHS/ICE/CBP.
- ☐ Provide clear instructions on workplace rights and responsibilities in case of a raid.
- ☐ Inform employees that they should not communicate with DHS/ICE/CBP on the Company's behalf.

#### 3. Workplace Signage and Access Control

- ☐ Ensure proper signage is displayed on all private and non-public workspaces.
- ☐ Restrict unauthorized access to non-public areas unless legally required.

#### 4. Handling ICE or CBP Agent Arrival

- ☐ Step 1: Ask agents if they have a warrant.
- ☐ Step 2: If no warrant is presented, deny access to employees, documents, and non-public areas.
- ☐ Step 2: If a warrant is presented, carefully review its details.

#### 5. Validating the Warrant

- ☐ Confirm it is a **judicial warrant**, issued by a federal court and signed by a judge.
- ☐ If it is an administrative warrant (issued by DHS/ICE/CBP), it does not grant access to non-public areas.

#### 6. Managing the Search and Seizure Process

- ☐ Cooperate within the limits of the warrant.
- ☐ Do not interfere with officers' search and seizure within the scope of the warrant.
- ☐ Record details of the search, including items taken and persons spoken to or detained.

#### 7. Employee Rights and Conduct

- ☐ Inform employees that it is their **choice whether to answer** questions from ICE agents.
- ☐ Inform employees that it is their **choice whether to remain silent** and request legal representation.

#### 8. Documentation and Evidence Collection

- ☐ Keep detailed records of all interactions, searches, and seizures.
- ☐ Request a copy of the warrant and any inventory of seized items.

#### 9. Handling Arrested or Detained Employees

- ☐ Gather details on where detained employees are being taken.
- ☐ Notify legal counsel or an immigration attorney for assistance.

#### 10. Protecting Business-Critical and Confidential Documents

- ☐ If agents attempt to seize confidential or critical business documents, request an accommodation to retain or copy them.
- ☐ Consult legal counsel immediately for guidance.

#### 11. Post-Raid Review and Next Steps

- ☐ Conduct a debriefing with key personnel to document the event.
- ☐ Consult an immigration attorney to assess the situation and respond appropriately.
- ☐ Coordinate with crisis communications team to manage post-raid internal and external communications and to limit risk and minimize exposure.
- ☐ Provide necessary support to affected employees.
- ☐ Revise and update this action plan based on new developments or legal requirements.

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# Employers' Rapid Response Toolkit for DHS/ICE Raids

- Available for purchase through [fpSolutions](#)
- **\$1,150 per [toolkit](#)**
  - 15% discount with code: **ACCNE15**



# QUESTIONS?

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