



GMS Flash Alert

Immigration Edition

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United States - Immigration Agencies Publish Spring 2020 Regulatory Agendas

The Department of Homeland Security (“DHS”), Department of State (“DOS”), and other agencies in the United States (U.S.) have released their Spring 2020 regulatory agendas, proposing new regulations and setting publication dates for certain proposed regulations. The agendas, which are released by the U.S. Office of Information and Regulatory Affairs, list regulatory actions that the agencies are expected to work on within the next 12 months. (For coverage of last year’s agendas, see GMS [Flash Alert 2019-174](#), November 26, 2019.)

The proposed regulations do not immediately impact any current U.S. immigration programs, but they provide insight into expected changes and their impact on B-1/B-2 visitors, visitors using the Electronic System for Travel Authorization (ESTA), F-1 and M-1 students, J-1 exchange visitors, H-1B specialty occupation workers, H-4 spouses currently eligible for Employment Authorization Documents (EADs), and others.

Below is a summary of the most significant regulatory and policy proposals outlined in the latest regulatory agendas.

WHY THIS MATTERS

Employers and immigration counsel should be cognizant of the continuing efforts by the U.S. government to limit legal immigration, specifically as they relate to foreign workers and business visitors seeking admission to the United States.

Awareness and understanding of plans for regulations, proposed regulations, and policy agendas, and the potential impact on U.S. immigration will allow employers and foreign nationals to proactively work with immigration counsel to develop strategies to facilitate temporary assignments and business travel to the U.S. in the event that any of the proposed changes take effect.

H-1B/H-4 EAD Program

H-1B Eligibility Requirements: DHS continues to propose a revised definition of “specialty occupation” in

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the H-1B context in an effort to obtain the “best and brightest foreign nationals.” Additionally, the proposed rule is also expected to define “employment” and “employer-employee relationship” more restrictively for H-1B employers, potentially limiting placement of H-1B workers offsite at third-party locations. The proposed rule also imposes new wage requirements.

KPMG NOTE

The anticipated publication date for public comment was delayed to December 2020; however, we have heard chatter that the Trump administration may avoid public comment altogether by instituting the proposed changes by way of interim final rules to take effect immediately.

Termination of the H-4 Employment Authorization Program: DHS also continues to propose rescission of employment authorization for certain H-4 spouses. This proposal was first introduced in December 2017 and termination seems to be an agency priority. (For related coverage, see GMS [Flash Alert 2019-043](#), March 13, 2019.)

KPMG NOTE

The anticipated publication date for public comment is September 2020. As of now, it is unclear if the proposal to rescind H-4 EAD eligibility would impact previously-issued, valid H-4 EADs.

B-1/B-2 Visa Programs

Elimination of the B-1 in Lieu of H-1B and B-1 in Lieu of H-3 Classifications: DOS intends to eliminate the use of the B-1 visa for foreign visitors who are seeking to enter the U.S. on a short-term basis for employment or labor pursuant to a contract or other “pre-arrangement.” According to DOS, the permitted use of a B-1 visa for pre-arranged activities is confusing and potentially misleading.

KPMG NOTE

The anticipated publication date for public comment was June 2020, but it has been delayed. The new anticipated publication date has not yet been confirmed.

B-1 and B-2 Period of Admission: DHS intends to modify the period of admission and extensions of stay for such visitors. Temporary visitors for business (B-1) or pleasure (B-2) are currently admitted for a temporary six-month period, and their stay may be extended by another six months if an extension request is filed with U.S. Citizenship and Immigration Services (USCIS) before their initial period of authorized stay expires.

KPMG NOTE

This item is at the proposed rule stage. The anticipated publication date for public comment was scheduled for June 2020, but it has been delayed.

Maintenance of Status and Departure Bond for B-1 and B-2 Visitors: The DOS seeks to implement a pilot program under which consular officers may require certain individuals applying for visas as temporary visitors for business or pleasure (i.e., B-1/B-2 visas) to post a “Maintenance of Status and Departure Bond” as a condition of visa issuance. The purpose of the proposed bond is to make sure that the visa applicant will not overstay his or her period of lawful admission in the United States.

KPMG NOTE

The final rule is expected to be published in July 2020.

Implementation of ESTA for Travelers to the U.S. by Land

DHS proposes implementation of ESTA for visitors eligible for the Visa Waiver Program (VWP) who seek admission to the U.S. via a land port-of-entry. Currently, citizens of a country which is part of the VWP who apply for admission at a U.S. land-border-crossing point are required to fill out a paper *I-94W Nonimmigrant Visa Waiver Arrival/Departure Record* (Form I-94W) to enter. Under the new proposed rule, these VWP travelers would instead provide this information to U.S. Customs and Border Protection (CBP) electronically through ESTA prior to seeking admission to the United States. ESTA requirements for VWP visitors who seek entry to the U.S. pursuant to the VWP via air or sea were implemented in January 2009.

KPMG NOTE

The implementation of this proposal is imminent, as it was expected to be implemented as an interim final rule last month.

Student and Exchange Visitor Visa Programs

Changes to the Optional Practical Training (OPT) and Curricular Practical Training (CPT) Programs: U.S. Immigration and Customs Enforcement (ICE) plans to restrict the practical training options available to nonimmigrant students in the F-1 and M-1 categories. Currently, foreign students in the U.S. may potentially receive up to 12 months of OPT employment authorization to gain practical experience in their respective field of study. Foreign students studying Science, Technology, Engineering, and/or Mathematics (STEM) may currently apply for a STEM OPT extension beyond the standard 12-month period to receive an additional 24 months of OPT employment authorization.

KPMG NOTE

The updated anticipated publication date for public comment is December 2020. As with the proposed rule to rescind H-4 EAD eligibility, it is possible that DHS may expedite changes to the OPT and CPT programs.

Eliminating the Availability of "Duration of Status" (D/S) for Certain F-1, J-1 and I Visa Holders: ICE intends to modify the period of authorized stay granted to certain foreign students, exchange visitors, and representatives of foreign media by eliminating the availability of admission for "duration of status," which allows foreign nationals to remain in the U.S. until their intended activity in the country is complete. By eliminating the possibility of admission for "duration of status," each foreign national seeking admission in the impacted categories would be authorized to stay in the U.S. until a specified date.

KPMG NOTE

This proposed rule is expected to be published for public comment in July 2020.

Fee Increase for Certain J-1 Visitors: ICE will propose a regulation to adjust fees that the Student and Exchange Visitor Program (SEVP) charges individuals and organizations to improve compliance and enforcement related to nonimmigrant students. According to ICE, the fee increase is necessary to support increased compliance, including worksite enforcement, investigating fraud related to nonimmigrant employment, and enforcement regarding nonimmigrant students who violate their status. The SEVP fee schedule was last adjusted in a rule published on May 23, 2019.

KPMG NOTE

The anticipated publication date for public comment is November 2020.

J-1 Camp Counselors, Interns and Trainees and Summer Work Travel Participants: DOS also intends to update the regulations pertaining to these specific types of Exchange Visitors. DOS is expected to place additional restrictions and requirements on Summer Work Travel (SWT) program sponsors. Typically, SWT participants are foreign students or recent graduates who spend the Summer in the U.S. to intern or participate in jobs programs.

KPMG NOTE

The anticipated publication date for public comment was June 2020; but it has been delayed.

Filing Fee Increases

USCIS Filing Fees: DHS proposed, among other things, to increase certain immigration and naturalization filing fees by 21 percent, add new fees for certain immigration benefit requests, establish multiple fees for petitions for nonimmigrant workers, and limit the number of beneficiaries who may be included on certain forms. According to DHS, fee increases will help ensure that USCIS has the resources it needs to provide adequate services to applicants and petitioners.

KPMG NOTE

A final DHS rule to implement the proposed fee changes is scheduled to be published in September 2020.

Consular Fees: DOS seeks to amend certain nonimmigrant and immigrant visa fees, special visa services fees, security surcharge fees, and certain citizenship service fees. Further, if approved, this rule would amend the application fees for U.S. passport books and cards.

KPMG NOTE

The anticipated publication date for public comment was June 2020, but it has been delayed.

Biometrics Collection

The DHS intends to expand the types of biometrics required to establish and verify identity. For instance, DHS seeks to modify existing age-related exemptions to detect, deter, or prevent human trafficking of children, establish consistent identity enrollment and verification policies and processes, and align USCIS biometric collection with other immigration operations.

KPMG NOTE

The anticipated publication date for a USCIS rule related to biometrics is July 2020, while a CBP rule on biometrics was scheduled for publication in June 2020.

Unlawful Presence

DHS is seeking to publish a proposed rule in March 2021 which would clarify agency policy regarding unlawful presence and the related 3- and 10-year bars to admissibility. The Spring 2020 regulatory agenda does, however, propose a new rule concerning provisional waivers applied for by certain individuals who have accrued unlawful presence and are planning to leave the U.S. to attend a consular appointment.

KPMG NOTE

This rule is slated for publication in August 2020.

Changes to the Affidavit of Support (Form I-864)

DHS intends to amend certain requirements pertaining to the *Affidavit of Support* (Form I-864) which is required for most family-based immigrants and some employment-based immigrants. An *Affidavit of Support* is a legally enforceable contract between the sponsor that completes the affidavit and the U.S. government. When completing Form I-864, the applicant-sponsor must attest that the sponsor has sufficient income and assets to support the intending immigrant and the rest of the sponsor's household at 125 percent of the Federal Poverty Guidelines. Further, if an immigrant sponsored in the affidavit receives certain public benefits, the granting agency may request that the sponsor repay the cost of those benefits. The relevant agency may also sue the sponsor for failure to repay the benefits.

Specifically, DHS intends to amend the sponsorship requirements to better ensure a sponsor has the assets and resources to support the intended immigrant at the statutorily required level. DHS also intends to update the provisions concerning household income and which household members may execute a *Contract between a Sponsor and Household Member* (Form I-864A). DHS further intends to update the provisions to allow the public benefit granting agencies to more easily obtain information from USCIS in order to seek reimbursement from a sponsor when the sponsored immigrant has received public benefits.

KPMG NOTE

The anticipated publication date for public comment is July 2020.

KPMG NOTE: In Summary

The Spring 2020 regulatory agendas appear to reflect the current government's efforts to restrict legal immigration and entry to the United States. In contrast with the recent presidential proclamations, the government regulatory agendas do not have an immediate impact.

The proposed regulations will most likely go through regular administrative procedures. This normally includes a comment period to allow stakeholders to provide feedback – though this is not guaranteed. Unless a proposed rule is put into effect by way of an interim final rule, it will generally go through the regulatory approval process before taking effect. The regulatory approval process typically takes several months to be completed.

Certain items from DHS' Fall 2019 regulatory agenda were moved to the Spring 2020 "long-term action" list. These include changes to the L-1 program, the EB-5 program, and the processing of Forms I-485, *Applications to Register Permanent Residence or Adjust Status*. The "long-term action" items could, however, move to the main agenda as early as Fall 2020.

The KPMG Law LLP team in Canada is tracking these matters closely. We will endeavor to keep readers of *GMS Flash Alert* posted on any important developments as and when they occur.

FOOTNOTE:

1 [DHS Agency Rule List - Spring 2020](#) ; [DOS Agency Rule List – Spring 2020](#) ; DHS proposed rule on [USCIS filing fee increase on 11/14/2019](#) published in the *Federal Register*.

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Contact us

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