



GMS Flash Alert

Immigration Edition

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United States - Changes Afoot for the H-1B Program

On October 23, 2023, the U.S. Department of Homeland Security (DHS) published a proposed rule to amend the regulations governing the H-1B specialty occupation program to make it more efficient, to add benefits and flexibilities, and to improve the program's integrity.¹ The DHS will accept comments on the proposed rule until December 22, 2023.

WHY THIS MATTERS

The H-1B specialty occupation is one of the most popular temporary visa options to employ foreign nationals in the United States. However, many employers and foreign nationals started to question the viability of this program following the most recent H-1B cap cycle for the federal government's 2024 fiscal year. The H-1B cap cycle or "lottery" for FY2024 had a lower initial selection rate than in prior years. The proposed rule from DHS addresses ways to prevent fraud and abuse in order to prevent the "gaming" of the lottery. The proposed rule includes other ways to improve and modernize the H-1B program.

Three Areas of Concern

The DHS's goal to modernize and improve the regulations relating to the H-1B program are meant to address three areas of concern, as noted below.

Modernize the H-1B Program and Increase Efficiency

The DHS proposes to revise the definition and criteria for "specialty occupation" to better align with modern hiring trends where employers focus on a skills-first culture. The proposed rule also clarifies that an occupation that would "normally" require a bachelor's degree does not mean that it must "always" require one. Additionally, the rule proposes

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that an employer who recruits for a position that can be performed in a range of related specialty fields would still qualify for a H-1B specialty occupation.

The proposed rule also clarifies when an amended petition or a new H-1B petition must be filed due to a material change in the conditions of H-1B employment. In addition, the rule also directs U.S. Citizenship and Immigration Services (USCIS) officers on when to give deference to prior H-1B filings and clarifies when certain employment documents are necessary.

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While the agency's goal is not to overhaul or depart from the existing regulations, it intends to consolidate and make clear when a petitioner must submit an amended or new petition.

Provide Greater Benefits and Flexibilities to Petitioners and Beneficiaries

In its proposed rule, the DHS revises the provisions under which an automatic extension of duration of status and post-completion Optional Practical Training (OPT) or 24-month extension of post-completion OPT is requested. Currently, students benefiting from the cap-gap extension where their employer has filed an H-1B cap petition through a Change of Status (COS) are only able to extend their work authorization until October 1 of the fiscal year for which the H-1B status is being requested. The proposed rule extends the student's validity period until April 1 of the fiscal year for which the H-1B status is being requested, allowing students more flexibilities, and avoiding disruptions in work authorizations for U.S. employers.

Furthermore, in an effort to avoid subsequent H-1B filings with the USCIS, the DHS's rule allows H-1B petitions to be approved or their requested validity periods extended if the petition is deemed approvable even if the period for which eligibility has been established has passed.

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While the DHS acknowledges that this change may increase the number of Requests for Evidence (RFE), it argues that it would in turn save the petitioners from subsequent filings and expedite USCIS's review.

Definition of Nonprofit Research Organization and Governmental Research Organization

The proposed rule also expands the definition of "nonprofit research organization" and "governmental research organization," both of which are exempt from the annual H-1B visa allotment. The expansion includes those whose fundamental activity is to conduct research, whereas the current rule limits it to those who are either primarily engaged or have their primary mission to conduct research.

Improve the Integrity of the H-1B Program

The DHS's proposed rule changes the registration of the H-1B cap from employer-based to employee-based. In previous years, the USCIS has received a high volume of registrations including multiple registrations for a single beneficiary. To address the seeming advantages that single beneficiaries with multiple registrations would have against a single registration for one beneficiary, the DHS's rule selects registrations based on a particular beneficiary so that all individuals have the same odds of selection even if multiple registrations have been submitted on an employee's behalf.

The rule goes on to expand on USCIS's authority over the H-1B program to help ensure its integrity. The rule:

- codifies USCIS's authority to request contracts,
- requires that the employer has actual and non-speculative work for the requested duration of the H-1B,
- helps ensure that the Labor Condition Application (LCA) supports the underlying H-1B petition,
- requires employees to have a bona fide job offer in the U.S., and
- requires the employer to have a legal presence in the U.S. with the ability to be served.

Finally, the proposed rule codifies USCIS's "Fraud Detection and National Security" (FDNS) program that, according to the agency, has uncovered significant non-compliance with the H-1B program. The agency seeks to clarify that refusal or failure to fully cooperate with an inspection may result in denial or revocation of the approval of any petition for workers who are or will be performing services at the location that is subject to inspection.

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While the proposed rule has not been finalized and has entered the 60-day public comment period, employers are encouraged to work closely with immigration counsel to prepare for changes in the H-1B program before the FY2025 H-1B cap period.

KPMG Law LLP in Canada is tracking the H-1B specialty occupation program proposals closely. We will endeavor to keep readers of *GMS Flash Alert* posted on any important developments as and when they occur.

FOOTNOTE:

1 See Department of Homeland Security, "[Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers](#)" (October 23, 2023).

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