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November 2023 Immigration Update

DHS Proposal to Modernize and Improve the H-1B Program

The Department of Homeland Security (DHS) recently [published](#) a Notice of Proposed Rule Making in an effort to improve the H-1B program for employers and beneficiaries. The rule seeks to improve the H-1B program by “(1) streamlining the requirements of the H-1B program and improving program efficiency; (2) providing greater benefits and flexibilities for petitioners and beneficiaries; and (3) improving integrity measures.” Written comments will be accepted until December 22, 2023.

Some of the rule’s more significant proposed provisions are highlighted below:

- **Streamlining Requirements**

- Revise the definition and criteria for specialty occupation.
- Clarify that a position may allow a range of degrees, although there must be a direct relationship between the degree fields and the job duties.
- Codify the deference policy that allows U.S. Citizenship and Immigration Services (USCIS) to generally defer to a prior determination involving the same parties and facts.
- Eliminate the itinerary requirement.

- **Benefits and Flexibilities**

- Update the definition of employers that are exempt from the H-1B cap, specifically changing the definition of “non-profit research organization” and “governmental research organization”.
- Automatically extend F-1 status, and any employment authorization pursuant to F-1 status, until April 1 of the fiscal year in which the H-1B petition is requested or until the validity start date of the approved H-1B

petition, whichever is earlier.

- Allow petitioners to request an H-1B start date of October 1 or later for H-1B cap-subject petitions.

- **Integrity Measures**

- During the H-1B registration process, allow USCIS to select H-1B registrations based on each beneficiary. Each beneficiary will be entered into the selection process once, no matter how many entities submit a registration on their behalf. If selected, each registrant will be notified of the selection and be eligible to file the petition on the beneficiary's behalf.
- Clarify that related entities are prohibited from submitting multiple registrations for the same beneficiary.
- Codify USCIS's ability to deny H-1B petitions or revoke an approved H-1B petition where the H-1B registration was invalid or contained a false attestation.
- Clarify that if an H-1B worker will be staffed to a third party, it is the third party's requirements that are most relevant when determining whether the position is a specialty occupation.

Frost Brown Todd's [immigration team](#) will closely monitor this proposed rule and provide additional updates as it progresses through the rulemaking procedure.

President Biden Issues Executive Order on Artificial Intelligence Highlighting the Role of U.S. Immigration

On October 30, 2023, President Biden [issued](#) an Executive Order (EO) on the "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence" (AI). One of the EO's eight overarching aims is promoting innovation and competition, and doing so, in part, by utilizing our U.S. immigration system. Specifically, the EO instructs the Department of Homeland Security (DHS), Department of Labor

(DOL), and Department of State (DOS) to modernize and streamline the nation's immigration system to ensure the U.S. continues to lead innovation and competition in AI and "other critical and emerging technologies" by taking the following steps:

- Within 90 days, DOS is to streamline processing times of visa petitions and applications, including by ensuring timely availability of visa appointments, for noncitizens who seek to travel to the U.S. to work on, study, or conduct research in AI or other critical and emerging technologies.
- Within 120 days, DOS is to consider implementing a domestic visa renewal program that would minimize disruptions to the work of noncitizens working on AI and critical and emerging technologies and, within 180 days, take steps to expand the program to J-1 research scholars and F-1 STEM students (this is likely to build on the pilot program discussed in the next section).
- Within 120 days, DOS is to consider changes to its Exchange Visitor Skills List to help attract and retain talent.
- Within 180 days, DHS is to initiate policy changes to the U.S. permanent residence process that would clarify and modernize immigration pathways and the adjustment-of-status process for experts in AI and other critical and emerging technologies.
- Within 180 days, DHS is to continue its efforts to modernize the H-1B program (see section above).
- Within 45 days, DOL is to solicit public input on the occupations, particularly those involving AI and STEM, that are experiencing a shortage of U.S. workers and should be considered for inclusion on the DOL's "Schedule A" list, thereby simplifying the U.S. permanent residence process for sponsoring employers.

The EO includes other steps to be taken beyond the major ones listed above and, notably, instructs DOS and DHS to utilize their discretionary authorities to "support and attract foreign nationals with special skills in AI and other critical and emerging technologies seeking to work, study, or conduct research in the United States."

We will track the actions DHS, DOL, and DOS take in response to the EO and, importantly, how “other critical and emerging technologies” will be defined, as this phrase will expand the reach of some of these actions beyond just AI.

Pilot Program to Resume Stateside Visa Renewal for Certain H-1B Nonimmigrant Visa Holders

On October 17, 2023, the Department of State (DOS) issued a draft [Federal Register Notice](#) that it will be moving ahead with its “Pilot Program to Resume Renewal of H-1B Nonimmigrant Visas in the United States for Certain Qualified Noncitizens.” The notice is still pending review by the White House Office of Information and Regulatory Affairs. If approved, the pilot program will allow for the stateside visa renewal for certain H-1B specialty occupation visa holders.

Stateside processing of renewals for various visa categories was discontinued in 2004, except for a few nonimmigrant diplomatic visas. Thus, most nonimmigrant visa holders must leave to process their visas or visa renewals at U.S. consulate locations abroad and then reenter the United States, which can be burdensome, stressful, and time-consuming. Additionally, the COVID-19 pandemic created significant visa processing backlogs and increased wait times for interview appointments. While DOS has made significant progress in addressing the backlogs, it has been urged to use stateside visa renewal to help further and reduce situations in which, depending on the location, foreign workers may have to wait months for a visa interview. While the scope of this pilot program remains narrow for the time being, it is a promising and logical step to reduce the visa backlogs. DOS also indicated that there is interest in expanding the program to additional visa categories after its initial introduction if the pilot program is successful.

The pilot program is anticipated to begin in early 2024 and is still in the preliminary stages, with the final details not yet released to the public. The program will be limited to H-1B visa holders only (not including H-4 dependent renewals), and it is expected to be capped at 20,000 applicants who are from countries that are not subject to reciprocity fees. DOS has published a list of U.S. Visa

Reciprocity and Civil Documents by Country accessible at the [following link](#).

The pilot program will also have additional eligibility requirements for participation that are similar to the current interview waiver program. Participation in the pilot program will be voluntary, and H-1B visa holders will still have the regular processing option of renewing their visas at consulates abroad. The final program, when published in the Federal Register, will contain the full list of eligibility criteria and more fully detail the scope of the pilot.

DHS Expects to Add Nearly 65,000 Visas to the FY 2024 H-2B Cap

As it did last year, the Department of Homeland Security (DHS) intends to supplement the congressionally mandated 66,000 H-2B visas available each fiscal year. It expects to add an additional 20,000 visas for workers from Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, and Honduras, along with another 44,716 visas to returning workers approved for H-2B visa status during one of the last three fiscal years.

The H-2B visa program allows U.S. employers who meet specific regulatory requirements to bring foreign nationals to the U.S. to fill temporary, full-time, non-agricultural jobs (agricultural jobs are covered by the H-2A program). To qualify for H-2B nonimmigrant classification, the petitioner must establish, among other things, that it has a temporary need for the workers that is a one-time occurrence, seasonal need, peak load need, or intermittent need. As covered in our [October update](#), now is the time for U.S. employers to start the process for any H-2B visa workers needed in the spring or summer of 2024.

USCIS to Issue Advance Parole with 5-Year Validity

U.S. Citizenship and Immigration Services (USCIS) has begun issuing Advance Parole (AP) documents with a 5-year validity period to some applicants that are eligible for [Five-year Employment](#)

Authorization Documents (EADs). This change is especially beneficial to adjustment-of-status applicants subject to significant priority date backlogs. Previously, AP documents were valid for one to two years. Increasing the validity period of certain AP documents should decrease AP applications and help reduce associated processing times and backlogs.

The Latest Version of the Form I-9 Is Now Required for All Employers

As of November 1, 2023, employers must now use the 8/01/2023 edition of the Form I-9. As covered in our [July 2023 update](#), this version of the form contains several notable updates:

- Reduces Sections 1 and 2 to a single-sided sheet.
- Is designed to be a fillable form on tablets and mobile devices.
- Moves the Section 1 Preparer/Translator Certification area to a separate, standalone supplement that employers can provide to employees when necessary.
- Moves Section 3, Reverification and Rehire, to a standalone supplement that employers can print if or when rehire occurs or reverification is required.
- Revises the Lists of Acceptable Documents page to include some acceptable receipts, as well as guidance and links to information on automatic extensions of employment authorization documentation.
- Reduces Form instructions from 15 pages to eight pages.
- Includes a checkbox allowing employers to indicate they examined Form I-9 documentation remotely under a DHS-authorized alternative procedure rather than via physical examination.

For more information or assistance as it relates to any of the developments above, please contact the authors or any attorney with Frost Brown Todd's [Immigration](#) practice.

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