



DHS Proposes Modernization of H-1B Visa Program to Enhance Flexibility and Integrity

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In an effort to modernize, improve program efficiency and flexibility, and strengthen integrity measures, the Department of Homeland Security (DHS) has proposed a set of significant changes to the H-1B visa program. Most importantly, DHS proposes to change the H-1B registration and selection process so that each person is counted as one entry into the H-1B lottery regardless of how many times they are submitted. The changes could also potentially benefit nonprofit and governmental research organizations, F-1 students transitioning to H-1B status, entrepreneurs, and employers seeking to hire highly skilled foreign workers. The changes would also modernize the H-1B visa program to increasingly remote work opportunities. The proposed rule is currently open for public comment, and DHS will consider all feedback before finalizing the regulations. If finalized, would take effect in early to mid-2024.

Key Proposed Changes:

Changing the H-1B Registration and Selection Process

DHS wants to make some big changes to how H-1B visas are awarded. This is because companies are submitting multiple applications for the same person, making the process unfair and confusing. These changes are meant to make things fairer and easier for everyone. Specifically, the proposed changes would:

- Shift from selecting by registration to selecting by unique beneficiary. This means everyone will have a fair chance, no matter how many companies apply on their behalf as each beneficiary would only be counted once in the lottery.
- Prohibit related entities from submitting multiple registrations for the same beneficiary.

- Allow USCIS to reject or cancel an H-1B visa if someone lies on the H-1B visa application.
- Require the submission of valid passport information, including the passport number, country of issuance, and expiration date, in addition to the currently required information.
- Only allow a beneficiary to utilize the H-1B registration and selection process with one passport regardless of whether the individual has multiple, valid passports.

Amending the Definition of a "Specialty Occupation":

DHS will update the definition of a “specialty occupation” for H-1B visas. This update aims to make the definition clearer and more consistent with the written law. The proposed amendment would:

- Make it clear that a position must require the application of highly specialized knowledge to be considered a specialty occupation.
- A position can be considered "specialized" even if it allows for a range of degrees, as long as each degree is directly related to the job duties.
- Just having a general degree like business administration or liberal arts isn't enough – the employee needs further specialization in a field related to the job. The employee can also qualify if the job requires knowledge from several very specialized areas, as long as each area is directly related to the job.

Improving Flexibility for H-1B Petitions with Extended Validity Periods

DHS is proposing a rule change that would allow H-1B petitions to be approved or have their validity periods extended even if the initially requested validity period has passed. Right now, if your application is delayed and the requested start date has passed, you have to submit a whole new application. This is a hassle and can waste time. The new rule would allow you to simply update your application with a new start date. This way, you wouldn't have to start from scratch if things get delayed. This new rule would make things easier and faster for companies and H-1B visa applicants.

Amending the Criteria for Specialty Occupation Positions

DHS is proposing to amend the criteria for specialty occupation positions in order to make it easier for employers to sponsor foreign workers for H-1B visas. Specifically, the proposed amendment would:

- Clarify that a bachelor's degree is not always required for entry into a specialty occupation, but that it is the “usual, typical, or common” requirement.
- Clarify that a baccalaureate degree must be a U.S. degree or its foreign equivalent and that a foreign baccalaureate is not necessarily an equivalent.
- Clarify that the position itself must require a directly related specialty degree, or its equivalent, to perform its duties.
- Clarify that when an employee is staffed to a third party, the third party's position requirements become the relevant criteria to determine whether a position qualifies as a specialty occupation.

Expanding H-1B Cap Exemption for Nonprofit and Governmental Research Organizations

DHS will broaden the definition of "nonprofit research organization" and "governmental research organization" to include entities that conduct research as a fundamental activity, even if research is not their primary mission.

- Currently, an organization must mainly focus on research to qualify for H-1B cap-exemption. This new rule would remove that restriction, allowing organizations that do some research, even if it's not their main focus, to participate.
- Instead of requiring an activity to directly and fully support the main goals of an organization, this rule change allows activities that simply contribute to or help achieve those goals in some way.
- Currently, non-profit organizations have to prove they have tax-exempt status for research or education from the IRS to qualify for certain benefits. This change removes that requirement, making it easier for non-profits to qualify.

Currently, only workers directly employed by certain organizations can qualify for a special H-1B visa exemption. This change would allow workers who do essential work for those organizations, even if they're not directly employed by them, to qualify for the exemption. Specifically:

- A H-1B worker who spends at least half of his/her/their time performing job duties at a qualifying institution or organization would be exempt from the cap, even if he/she/they also works for a non-cap-exempt entity.
- Right now, workers who want a H-1B cap exemption need to spend at least half their time working at a specific type of organization. This rule change would allow remote work as long as the job duties still qualify the worker for the exemption.

Enhancing Flexibilities for F-1 Students Transitioning to H-1B Status:

DHS is proposing to automatically extend the duration of the status of post-completion OPT until April 1st of the next year. This includes both those who haven't finished their studies and those who have finished and are using their optional practical training (OPT) period. This will help them stay in the U.S. while they wait for their H-1B visa application to be processed. The proposal would:

- Extend the automatic extension end date of “cap gap” from October 1st to April 1st of the next year.
- Allow companies to apply for H-1B visas with start dates anytime during the year, instead of just on October 1st.

Amending H-1B Petition Requirements for Changes in Work Location

DHS will clarify when an amended or new petition must be filed due to a change in an H-1B worker's place of employment. Specifically, the proposed amendment would:

- Require the petitioning employer to file an amended or new petition if the work location changes in geographic area (i.e. outside the current metropolitan statistical area) or results in a higher prevailing wage.
- Clarify that an amended or new petition is not required for short-term placements of H-1B workers if the placements are less than 30 days, or in some cases 60 days, and there are no other material changes.
- Clarify that an amended or new petition is not required if H-1B workers are at non-worksite locations to participate in employee development or will perform a peripatetic job (i.e. the job is primarily at one location, but the employee occasionally travels for short periods to other locations on a casual, short-term basis).

Eliminating the Itinerary Requirement for H Programs

DHS is proposing to eliminate the itinerary requirement for H-1B and H-2 petitions. This requirement currently requires petitioners to submit an itinerary with the dates and locations of the services or training that the beneficiary will perform or receive.

Revising the Definition of "United States Employer" for H-1B Petitions

DHS is considering revising the rules for who can be considered a "U.S. employer" for H-1B visas. Currently, the company has to:

1. Hire someone to work in the U.S.;
2. Be their official employer (can hire, pay, fire, etc.); and
3. Have a U.S. tax ID number.

The changes would make things simpler by focusing on whether the company:

1. Offers a real job in the U.S.;
2. Has a legal presence in the U.S.; and
3. Has a U.S. tax ID number.

This means that more companies could qualify as U.S. employers for H-1B visas.

Removing Employer-Employee Relationship Requirement

Right now, companies need to prove they actually employ someone to get them an H-1B visa. This rule change would mean companies could sponsor H-1B visas even if they don't directly employ the person, as long as they offer a real job in the U.S. The proposed change would:

Clarifying that beneficiary-owners (entrepreneurs) may be eligible for H-1B status

DHS is proposing several changes to the H-1B visa program to make it more accessible to beneficiary-owned businesses.

- The changes would allow H-1B workers to have a controlling interest in the petitioning employer. This rule change would make things simpler for entrepreneurs.
- Even though entrepreneurs could now sponsor themselves for H-1B visas, their initial visa and first extension would only be valid for 18 months each. This means they'd have to reapply more often than other H-1B visa holders.
- Under the rule change, entrepreneur H-1B visa holders could still do some non-specialty work, as long as that work is directly related to running the business. This gives H-1B visa holders more flexibility in their roles.

Strengthening Inspections and Compliance Reviews for H-1B Program

DHS wants to make sure that everyone who gets an H-1B visa is actually qualified and follows the rules. They're doing this by increasing inspections and checks of both companies and visa holders, which can be done by phone, online, or in-person. The proposed changes would:

- Allow DHS to conduct inspections of petitioner and third-party worksites, including the beneficiary's home.
- Require employers to allow access to all sites where the labor will be performed to determine compliance with applicable H-1B requirements.

Clarifying Specialty Occupation Requirements for Third-Party H-1B Placements

Currently, there's confusion about whether the company sponsoring an H-1B visa or the company where they actually work should set the job requirements. This change would make it clear that the company where the H-1B worker will be working sets the requirements, not the sponsoring company. This ensures that the job truly requires specialized skills.