



IMMIGRATION UPDATE - OCTOBER 23, 2023

Posted on October 23, 2023 by Cyrus Mehta

Headlines:

[State Dept. Intends to Resume Renewal of H-1B Nonimmigrant Visas in the United States for Certain Applicants](#) – The Department of State intends to resume the renewal of H-1B nonimmigrant visas in the United States for certain applicants, beginning with a pilot program in early 2024, and has sent its proposal to the Office of Management and Budget for review.

[DHS Plans to Amend H-1B Regulations Governing Specialty Occupation Workers](#) – The Department of Homeland Security plans to amend its H-1B regulations "governing H-1B specialty occupation workers to modernize and improve the efficiency of the H-1B program, add benefits and flexibilities, and improve integrity measures."

[Visa-Free Travel to United States Is Now Available for Israelis](#) – The Department of Homeland Security announced the start of visa-free travel for short-term visits to the United States for eligible Israeli citizens and nationals following Israel's admission into the Visa Waiver Program. Eligible Israeli citizens and nationals can apply for authorization to travel to the United States through the U.S. Customs and Border Protection's Electronic System for Travel Authorization.

[USCIS Clarifies Guidance on L-1 Petitions for Intracompany Transferees Filed by Sole Proprietorships and on Blanket L Petitions](#) – U.S. Citizenship and Immigration Services (USCIS) issued policy guidance to clarify that a sole proprietorship may not file an L-1 petition on behalf of its owner because the sole proprietorship does not exist as a distinct legal entity separate and apart from the owner. The update also clarifies guidance regarding blanket L petitions.

[DHS Announces Family Reunification Process for Ecuador](#) – The

Department of Homeland Security announced a new family reunification parole process for certain nationals of Ecuador that also allows for work authorization.

Firm in the News

Details:

State Dept. Intends to Resume Renewal of H-1B Nonimmigrant Visas in the United States for Certain Applicants

The Department of State (DOS) intends to resume the renewal of H-1B nonimmigrant visas in the United States for certain applicants beginning with a pilot program in early 2024, and has [sent its proposal to the Office of Management and Budget for review](#). Currently, the State Department can only process visa applications at its embassies and consular posts abroad and does not offer a stateside option for visa issuance.

Although full details have not yet been released, according to reports, in its initial phase the stateside visa renewal program is expected to be limited to H-1B principal visa applicants (not dependents). There will be additional eligibility requirements for participation (for example, the applicant must be renewing a visa issued within a limited number of years before the renewal submission), and the program will be voluntary—applicants will still have the option of obtaining visas abroad through regular processing.

The pilot program is expected to be limited to nationals of countries whose visas are not subject to reciprocity fees. India will be eligible for participation in the pilot program, as there is no applicable reciprocity fee. These fees vary in amount and are meant to equalize the cost of a visa for each country's nationals with the fees charged by that country to U.S. nationals seeking comparable visas. Because the fees vary and must be refunded if a visa cannot be issued, including them in the pilot program could have delayed the rollout.

The program is intended to help reduce consular delays, which were exacerbated by the COVID-19 pandemic and have continued in certain locations. The pilot program will test the operational capacity of the stateside renewal program. Availability is expected to be capped at 20,000 applicants. If successful, the program will expand to other employment-based visa categories following its initial launch, although full implementation is likely to

take some time.

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DHS Plans to Amend H-1B Regulations Governing Specialty Occupation Workers

The Department of Homeland Security (DHS) plans to amend its H-1B regulations "governing H-1B specialty occupation workers to modernize and improve the efficiency of the H-1B program, add benefits and flexibilities, and improve integrity measures." The notice of proposed rulemaking (NPRM), expected to be published in the Federal Register on October 23, 2023, would also "narrowly impact other nonimmigrant classifications, including: H-2, H-3, F-1, L-1, O, P, Q-1, R-1, E-3, and TN." A 60-day public comment period starts following publication of the NPRM in the Federal Register.

Below is a non-exhaustive summary of highlights. DHS proposes to:

- Revise the regulatory definition and criteria for a "specialty occupation" and clarify that a position may allow a range of degrees if they have a direct relationship to the duties of the position;
- Clarify when an amended or new petition must be filed due to a change in an H-1B worker's place of employment;
- Codify and clarify that if there has been no material change in the underlying facts, adjudicators generally should defer to a prior determination involving the same parties and underlying facts;
- Require evidence of maintenance of status to be included with the petition if a beneficiary is seeking an extension or amendment of stay;
- Change the definition of "nonprofit research organization" and "governmental research organization" by replacing "primarily engaged" and "primary mission" with "fundamental activity" to permit a nonprofit entity or governmental research organization that conducts research as a fundamental activity, but is not primarily engaged in research or where research is not a primary mission, to meet the definition of a nonprofit research entity;
- Provide flexibilities, such as automatically extending the duration of F-1 status, and any employment authorization granted under 8 CFR 274a.12(c)(3)(i)(B) or (C), until April 1 of the relevant fiscal year, rather than October 1 of the same fiscal year, to avoid disruptions in lawful status and employment authorization for F-1 students changing their status to H-1B;

- Clarify the requirements regarding the requested employment start date on H-1B cap-subject petitions to permit filing with requested start dates that are after October 1 of the relevant fiscal year;
- Select H-1B cap registrations by unique beneficiary rather than by registration;
- Clarify that related entities are prohibited from submitting multiple registrations for the same beneficiary;
- Clarify that beneficiary-owners may be eligible for H-1B status, while setting reasonable conditions for when the beneficiary owns a controlling interest in the petitioning entity; and
- Clarify that if an H-1B worker will be staffed to a third party, meaning they will be contracted to fill a position in the third party's organization, it is the requirements of that third party, and not the petitioner, that are most relevant when determining whether the position is a specialty occupation.

Details:

- USCIS notice of proposed rulemaking ([advance copy](#)), 88 Fed. Reg. 72870 (Oct. 23, 2023).
- USCIS [news release](#) (Oct. 20, 2023).

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Visa-Free Travel to United States Is Now Available for Israelis

On October 19, 2023, the Department of Homeland Security (DHS) announced the start of visa-free travel for short-term visits to the United States for eligible Israeli citizens and nationals following Israel's admission into the Visa Waiver Program (VWP). Eligible Israeli citizens and nationals can apply for authorization to travel to the United States through the U.S. Customs and Border Protection's (CBP) Electronic System for Travel Authorization (ESTA).

This authorization allows eligible Israelis to travel to the United States for tourism or business purposes for up to 90 days without first obtaining a U.S. visa. Israeli citizens and nationals with valid B-1/B-2 visas may continue to use them for business and tourist travel to the United States, DHS said.

DHS explained that eligible Israeli citizens and nationals must have a biometrically enabled passport book. Travelers who possess non-biometric, temporary, or emergency travel documents, or travel documents from a non-

VWP designated country, are not eligible for travel under the VWP and may instead apply for a U.S. visa. ESTA applications may take up to 72 hours for processing. The ESTA application will be available in English now and in other languages by November 1, 2023, DHS said.

Details:

- [DHS announcement](#) (Oct. 19, 2023).
- [CBP announcement](#) (Oct. 19, 2023).
- [ESTA Application](#), U.S. Customs and Border Protection.
- [S. Visa Waiver Program](#).

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USCIS Clarifies Guidance on L-1 Petitions for Intracompany Transferees Filed by Sole Proprietorships and on Blanket L Petitions

On October 20, 2023, U.S. Citizenship and Immigration Services (USCIS) issued policy guidance to clarify that a sole proprietorship may not file an L-1 petition on behalf of its owner because the sole proprietorship does not exist as a distinct legal entity separate and apart from the owner.

The USCIS guidance further clarifies that an L-1 petition where the owner and beneficiary are the same constitutes an impermissible self-petition. The update also clarifies guidance regarding blanket L petitions, noting that the failure to timely file an extension of the blanket petition does not trigger the three-year waiting period before another blanket petition may be filed.

Details:

- [USCIS Policy Alert](#), PA-2023-29 (Oct. 20, 2023).
- USCIS [announcement](#) (Oct. 20, 2023).

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DHS Announces Family Reunification Process for Ecuador

On October 18, 2023, the Department of Homeland Security (DHS) announced a new family reunification parole process for certain nationals of Ecuador that also allows for work authorization. The new process is for certain nationals of Ecuador whose family members are U.S. citizens or lawful permanent residents and who have received approval to join their family in the United States.

Specifically, Ecuadorian nationals and their immediate family members can be considered for parole on a case-by-case basis for up to three years while waiting to apply to become lawful permanent residents.

Individuals paroled into the United States under this process will generally be considered for parole for up to three years and will be eligible to request work authorization while they wait for their immigrant visa to become available, DHS said. When their immigrant visa becomes available, they may apply to become a lawful permanent resident.

Qualifying beneficiaries must be outside the United States; must meet all requirements, including screening and vetting and medical requirements; and must not have already received an immigrant visa.

Details:

- [DHS news release](#) (Oct. 18, 2023).

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Firm in the News

[Cyrus Mehta](#) was quoted in the *Times of India* in [Proposed H-1B Rule: Redefining Specialty Occupation, the Employee's Degree Must Co-Relate to the Job](#). Among other things, Mr. Mehta said, "There are some features in the proposed rule that will incentivize the USCIS to issue requests for evidence and potentially deny the H-1B application. A job-position will not be considered a specialty occupation for H-1B purposes if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position."

Mr. Mehta was also quoted in the *Times of India* in [Proposed Rule to Aid International Students Moving to H-1B](#). The article included his views on the rationale behind extending the F-1 OPT extension date from September 30 to April 1 the following year so that students could continue in that status even though they have been selected under the H-1B cap. Often times, the H-1B petition is not approved by October 1 or the student may prefer to remain in F-1 status for an extended period in case it may be inconvenient to process for the H-1B visa at a US post or the H-1B petition may still be pending as of October 1.

Mr. Mehta's views on the proposed H-1B rule were quoted in Law360 [DHS Rule to Thwart H-1B Visa Lottery Abuse Earns Praise](#). Mr. Mehta said that the "provision could unfairly exclude some foreign workers with MBAs from getting H-1B visas. Under the proposed rule, Mehta said an MBA degree holder offered a job in marketing or finance, for example, would need to prove their degree was specialized in those areas."

Mr. Mehta was also quoted extensively in Forbes [Biden Immigration Rule Copies Some Trump Plans To Restrict H-1B Visas](#). Mr. Mehta said "There is no requirement in the INA provision that the required specialized studies must be directly related to the position. A lawyer would qualify as a specialty occupation, as only a degree in law would allow entry into the occupation. But INA section 214(i)(1) reads more broadly. It also ought to encompass a marketing analyst, even though this occupation may require a bachelor's degree in diverse fields such as marketing, business or psychology." Regarding the proposed change for H-1B workers who will be staffed to client sites, Mr. Mehta said "*Defensor v. Meissner*, a case referenced in the proposed rule, involved a staffing agency for nurses that contracted the nurses to hospitals. Would USCIS understand the distinction between the nurse in *Defensor* and a software engineer providing services to the client rather than being staffed at the client? I have a feeling that this provision will still trigger Requests for Evidence."

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