# H-1B Nonimmigrant Work Visa -- DHS and DOL Interim Final Rules Summary

On October 8, 2020, the Department of Homeland Security (DHS) and the Department of Labor (DOL) each released an interim final rule (IFR) that would make changes to the H-1B nonimmigrant work visa.

**DHS**: "Strengthening the H-1B Nonimmigrant Visa Classification Program" **CIS No. 2658-20 DHS Docket No. USCIS-2020-0018**

**DOL**: "Strengthening Wage Protections for the Temporary and Permanent Employment of Certain Aliens in the United States" **DOL Docket No. ETA-2020-0006**

**Dates of Effect and Submitting Public Comments**
The Department of Labor IFR was set to go into effect on October 8, and public stakeholders may submit comments by November 9, 2020. The Department of Homeland Security IFR is set to go into effect on December 7, 2020, and public stakeholders may submit comments by this date. DHS, the regulations will only apply to petitions filed on or after the effective date.

## *Background*

According to the DHS IFR, "The H-1B nonimmigrant visa program allows U.S. employers to temporarily employ foreign workers in specialty occupations, defined by statue as occupations that require the theoretical and practical application of a body of highly specialized knowledge, and a bachelor's or higher degree in the specific specialty, or its equivalent" (pg. 12).

The number of new H-1B visas are capped at 65,000 per year, with up to an additional 20,000 per year reserved for foreign workers who have earned a graduate degree (master's or higher) from a U.S. academic institution. Congress has also exempted from the 65,000 cap H-1B workers who "are or will be employed at a nonprofit or public institution of higher education or a related or affiliated nonprofit entity, a nonprofit research organization, or a government research organization" (pg. 13). As of September 2019, the total population of H-1B workers in the U.S. was 583,420 (pg. 13).

Below is a summary of major provisions that would impact H-1B visas from the perspective of U.S. graduate education and the workforce.

## *Rationale for Publishing IFR*

DHS:

- Concern that the H-1B program is no longer functioning as it was intended (to provide U.S. employers with qualified employees to fill workforce shortages) and that it is now adversely affecting U.S. domestic workers.
- DHS has been directed by the Administration to examine whether presence of foreign workers is negatively affecting domestic workers via previous executive orders.

- There is a significant proportion of H-1B workers who are working at "third-party" sites, sites that did not directly petition for H-1B visas yet employ foreign workers. This is a particularly popular practice among IT staffing companies.
- Some employers do not pay their H-1B workers competitive wages, which may further incentivize them to hire more H-1Bs and fewer U.S. domestic workers as a cost-saving measure. Any resulting employment discrimination that may occur is a violation of the Immigration and Nationality Act (INA).

## *Major Proposed Changes*

Amending Definition and Criteria for a "Specialty Occupation"

- DHS is aligning regulatory standards and definition for "specialty occupation" to align with the statutory definition of "specialty occupation" (beginning pg. 23).
- Language in the INA defines "specialty occupation" as:
    - "an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."
- DHS would amend the rule to clarify that "there must be a direct relationship between the required degree field(s) and the duties of the position."
    - If a position could be filled by an individual who holds a bachelor's degree in any field, or if a bachelor's degree from a wide-variety of fields is sufficient, then it would not be considered a specialty occupation because it does not require highly-specialized knowledge. A general degree without further specialization would also not be sufficient to quality for a "specialty occupation" position**.**
    - Onus on the petitioner to demonstrate how their degree is relevant to the duties of a specialty occupation position. For example, a petitioner would have the responsibility to establish that their degree in either education or chemistry (of which each provide a body of highly specialized knowledge) is directly related to the duties and responsibilities of a chemistry teacher.
    - DHS states that their intent is to not restrict positions requiring a singular field of study. Degrees that are very similar that can fulfill the same position may be acceptable, and may also accept the "degree equivalent" for a position.
- DHS to strike the terms "normally" required, or "common to the industry" and "usually" when referring to whether a bachelor's degree or equivalent is necessary for an individual to perform a specific specialty occupation.
    - The petitioner would have to establish that a bachelor's degree or equivalent is a minimum entry requirement.
        - Must show that it is always the requirement for the occupation as a whole, for the relevant industry, or demonstrate the position is so

specialized as needing a bachelor's degree or equivalent to perform the work.
    - DHS will refer to the Department of Labor Bureau of Labor Statistics *Occupational Outlook Handbook* for criterion.

Third-Party Worksites

- If a foreign worker is to work at a "third-party" worksite, the H-1B petitioner shall be responsible for submitting evidence to shower that the worker and the petitioner will still maintain an employer-employee relationship, even if the worker is to be placed at a third-party location.
- Will limit petitions to one year (instead of three years, as currently offered) for a maximum of three years.

Wage Adjustments for H-1B Workers

- DOL is aiming to increase wage requirements for some H-1B workers. This is being done as a means of eliminating an incentive for American employers to favor hiring H-1B workers at a lower wage compared to what they would have to pay U.S. domestic workers, thus propagating discrimination against U.S. workers.
- This could significantly affect U.S. institutions of higher education.

Cost to H-1B Petitioners

For total costs, view the IFR language, pgs. 10-12

- $25 million for H-1B petitioners with additional time burden of 30 minutes.
- Since specialty occupation workers at third-party sites will have their work period reduced from three years to 1 year, the cost of the increase in number of I-129H1 petitions to extend their work periods.

## Concerns and Talking Points

- The IFRs could discourage prospective graduate international students from pursuing a graduate degree in the U.S. as the regulation changes could make hiring more difficult.
- The regulation changes will cause confusion and disagreement over degree requirements for specialty occupations.
- These changes could restrict U.S. employers' access to top global talent, and impact their employee recruitment efforts. This is particularly concerning for industries and fields that lack domestic talent.
- The wage requirement adjustments and costs of additional processing due to one-year periods are likely to be detrimental for U.S. colleges and universities who are responding to financial pressures due to COVID-19.
- Research by the National Foundation for American Policy shows that the presence of H-1B visa holders is associated with lower unemployment rates and faster earnings growth among college graduates. The research provides no evidence that the program has an adverse impact on labor market opportunities for U.S. workers.