

Fall 2018 Regulatory Agenda Signals Immigration Priorities for Federal Agencies

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The Department of Homeland Security (DHS), Department of Labor (DOL), and Department of State (DOS) released their fall 2018 Regulatory Agendas. Issued twice per year (fall and spring), this notice forecasts possible regulations that may be promulgated in the coming months. The Agendas describe regulations slated to roll out between October 2018 and December 2019, which may have an impact on employment-based immigration and give some insight into the mindset of the regulatory agencies. As expected with the current administration, virtually all of these proposals are ways to make an already complicated and restrictive immigration system even more complicated and restrictive. However, it is important to remember that the process of new regulations is time consuming. These aspirational regulations may never become final rules or may take much longer to implement. We summarize some of these key potential regulatory changes below.

H-1B cap electronic pre-registration. This possibility has been discussed for many years by USCIS and interested stakeholders. The proposal would establish an electronic pre-registration system for H-1B cap petitions requiring petitioners to pre-register for the H-1B lottery and submit completed petitions only if they receive cap numbers. The proposal, which could be published as early as late 2018, could be implemented as soon as April 2019 for the FY2020 H-1B cap filing season. The rule would eliminate the need to prepare and file paper-based petitions, which is time consuming and inefficient for cases that are not selected. USCIS also claims this procedure would increase efficient management of the selection process.

H-1B program definition revisions. Through a proposed rule anticipated for August 2019, USCIS seeks to redefine critical terms and phrases involved in the H-1B petition process, including "specialty occupation," "employment," and "employer-employee relationship." While revision of the latter terms aims to "better protect U.S. workers and wages," revision of the term "specialty occupation" intends to "increase focus on obtaining the best and brightest foreign nationals." In addition to these terms, DHS will propose further wage requirements on employers seeking to hire H-1B workers. In practice, these proposed regulations will likely elevate eligibility criteria, further restricting access to the H-1B visa classification.

H-4 employment authorization termination. A proposal to eliminate the eligibility for employment authorization for H-4 spouses of certain H-1B nonimmigrants has been anticipated for some time. It is now set to be published in November 2018, but the full extent of the rule remains unknown.

H-2A and H-2B recruitment process reform. Both the H-2A and H-2B programs face a change in regulatory requirements concerning the recruitment process as a result of proposed rules to be published in late 2018 by the DOL and USCIS. The proposal aims to "modernize" the requirements for H-2A and H-2B employers through technical improvements such as eliminating the print newspaper advertisement requirements.

Substantial Capital for E-2s. An interim final rule advanced by the DOS to revise the definition of "substantial amount of capital" as used for E-2 nonimmigrant treaty investor visa eligibility is expected for publication in December 2018.

Removal of International Entrepreneur Parole Program. Expected for publication in December, 2018, a USCIS final rule would eliminate the International Entrepreneur Parole Program established in January 2017 and initially proposed by the Obama administration.

Inadmissibility on public charge grounds. Published on October 10, 2018, DHS' rule proposes to define the term public charge and outline DHS' public charge considerations in order to guide inadmissibility determinations.

USCIS fee increases. DHS plans to propose an increase to USCIS filing fees, particularly for H-1B petitions, in February 2019.

Fee adjustment for Student and Exchange Visitor Program (SEVP). A final rule is slated for publication in March 2019 that would adjust fees that the SEVP charges individuals and organizations. While framed as an “fee adjustment,” the rule will likely result in a fee increase since ICE has determined it must adjust the fees in order to fully recover the increasing costs of SEVP operations and related national security initiatives.

Temporary visitors to the United States. The proposed rule, expected in September 2019, would amend DHS regulations to clarify the eligibility criteria for business visitors (B-1) and pleasure visitors (B-2). The rule will likely serve to restrict opportunities for business visitors.

EB-5 Investor Program realignment. A DHS advanced notice of proposed rulemaking slated for publication in September 2019 will solicit public comment regarding the monitoring and oversight of the EB-5 program.

Updates to adjustment of status procedure. The proposal aims to eliminate concurrent filing of immigrant petitions and adjustment of status applications in order to “improve the efficiency” of adjustment of status application processing. Expected for publication in September 2019, the proposed rule is general and its implications remain unclear. However, it will likely affect those seeking to file for employment authorization documents or advanced parole while their green card is pending.

Authorized stay maximums for F-1 students and other nonimmigrants. A proposed rule advanced by U.S. Immigration and Customs Enforcement (ICE) that is expected for publication in September 2019 would modify periods of authorized stay for certain nonimmigrants from “D/S” or “duration of status” to a specified date or a maximum period of stay and options for extensions.

STEM OPT, OPT extension modifications. Though slated for long-term action, ICE will propose a rule to modify both 12-month OPT and 24-month STEM OPT extensions. It remains unclear whether a future proposal will seek to eliminate these categories or simply modify them.

In spite of a good economy and historically low unemployment rates, new regulations that would constrict H-1B visas, circumscribe B-1 business visitor options, and impose additional requirements to EB-5 and E-2 visas, confirming the current administration's interest in narrowing immigration avenues, particularly for employment-based immigration.

Authors



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