



December 5, 2018
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Proposed Changes to H-1B Visa Cap Process

The U.S. Department of Homeland Security has proposed a new pre-cap registration rule for employer petitions filed on behalf of new applicants for H-1B visa status. The rule is not yet final but is intended to impact the upcoming H-1B cap season's filings made on April 1, 2019 for FY2020 employment beginning October 1, 2019. To that end, the brief comment period to solicit input on the government's proposed rule is only open for thirty (30) days concluding on January 2, 2019. The proposed rule is intended to improve efficiency and reduce costs. If finalized as written, the new rule will bring significant changes to the cap-subject selection and filing process for new H-1B petitions.

Historic Process

Historically, USCIS permits U.S. employers to file H-1B petitions for Temporary Workers as early as April 1 each year (six months in advance of the government's fiscal year). Typically, more petitions are received than the H-1B numerical quota permits (65,000 for Beneficiaries who hold a Bachelor's degree, with an additional 20,000 reserved specifically for Beneficiaries who have a U.S. Master's or higher degree). As a result, USCIS uses a random lottery system to select the petitions it will process and adjudicate. The computer generated random selection system first selects 20,000 petitions from the pool of advanced degree petitions. The remaining advanced degree petitions are then combined in the pool with all "regular" petitions, and the remaining 65,000 petitions are randomly selected. Remaining petitions not selected through the lottery are returned to the Petitioner, along with the filing fees.

USCIS is overly burdened by the volume of cases, assignment of numbers, storage of cases, and cost of returning hard copy petitions, thus the Department of Homeland Security has proposed this new rule.

Proposed Registration Process to Pre-Select H-1B Beneficiaries

The USCIS proposes the following changes through a pre-registration period:

1. Implementation of a 14-day registration period at least 30 days prior to April 1 (or the following business day). A registration fee has not been specified.
2. Employers will complete an e-registration, which includes basic information pertaining to the employer and the Beneficiary, including education completed. Employer must complete registration for each Beneficiary separately and cannot

register a specific Beneficiary more than once.

3. Once the registration is complete, USCIS will randomly select 65,000 petitions from the entire pool of petitions. Advanced degree petitions will then be separated from the remaining petitions and entered into a random selection process for the remaining 20,000.
4. Only selected registrants will be permitted to submit H-1B cap petitions to USCIS.
5. USCIS will notify the registrant of a 60-day H-1B cap petition submission period. Petitions will be received by USCIS in staggered periods of 60 days, with the intended effect of decreasing processing times.

How do these changes affect the current H-1B process?

USCIS intends the proposed registration period to decrease costs for U.S. employers and the government. USCIS also acknowledges the proposed selection process will have the desired effect of prioritizing H-1B petitions for workers who hold an advanced degree from a U.S. public or non-profit institution. The agency believes that increasing the likelihood of advanced degree petition selection is in line with Congressional intent to award the most-skilled and highest paid Beneficiaries. This will decrease the number of Bachelor's level candidate selections.

This proposal is intended to streamline the process, decrease costs, and prevent fraud; however, as noted above, it will affect the timing and outcome of the H-1B lottery system. If the proposal is finalized as written, the streamlining of the H-1B lottery process relies heavily on the successful implementation of the e-registration process, exact consequences of which remain to be seen. Significant challenges to the proposed rule are anticipated with respect to the limited duration of the public comment period, the agency's ability to alter the scope of the H-1B program, and other technical aspects of the proposed rule. In any event, employers are *strongly* encouraged to plan well in advance of the usual April 1 H-1B cap filing deadline.

To discuss your H-1B sponsorship needs and/or your interest in offering your comments during the proposed rule's public comment period, please contact Jenifer M. Brown, Christl Glier and/or your regular immigration point of contact at Ice Miller LLP.

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