

ANALYSIS: HOW USCIS INTENDS TO CHANGE THE H-1B VISA LOTTERY

Executive Summary

U.S. Citizenship and Immigration Services (USCIS) will soon begin the regulatory process to propose reforms to the H-1B lottery.¹ USCIS is expected to propose the following three reforms:

- **Flipping the order in which the current H-1B lotteries are conducted.** This change would increase the likelihood that an applicant with a U.S. master's degree will be awarded an H-1B slot and would be consistent with the President's goal of awarding visas to the "best and the brightest." This change, on its own, will not alter how companies prepare or file H-1B petitions. It is likely that this change will be in place for April 2019 cap filings.
- **Requiring companies to "pre-register" for the H-1B lottery.** Companies whose registrations are selected in the lottery would then be asked to file a complete H-1B petition for each selected registration. There is a possibility that this change will be in place for April 2019 cap filings.
- **Prioritizing H-1B visa number allocation based on wages, education, or other criteria.** The details of this proposal have not yet been released. USCIS may just solicit comments on how to accomplish prioritization without proposing specific text. It is too early to predict whether this change will be in place for April 2019 cap filings.

H-1B LOTTERY "REVERSAL"

Background

The Immigration and Nationality Act (INA) provides that the total number of foreign workers who may be issued H-1B visas may not exceed 65,000 during any fiscal year.² In 2004, Congress amended the INA to exempt from the annual cap H-1B workers who have earned a master's or higher degree from a United States institution of higher education "until the number of [workers] who are exempted from such numerical limitation during such year exceeds 20,000."

H-1B Demand

In each of the past eight fiscal years, demand for H-1B visas has far exceeded the 85,000 numerical limit. In each of the past six years, the H-1B cap has been reached in the first five days of the filing window. Though H-1B filings dropped 15 percent for Fiscal Year 2018, the agency still received 114,000 more H-1B petitions than may be approved under the law.

¹ The agency has signaled that it will accomplish these reforms through Notices of Proposed Rulemaking (NPRM), but we cannot rule out that the agency might try to implement some changes more quickly through an Interim Final Rule (IFR) or abbreviated rulemaking process.

² The 65,000 cap does not include H-1B workers who are employed by, or have received offers of employment at: (1) an institution of higher education, or a related or affiliated nonprofit entity; or (2) a nonprofit research organization or a governmental research organization.

H-1B FILING TRENDS	
FISCAL YEAR	FILINGS
2014	124,000
2015	172,500
2016	233,000
2017	236,000
2018	199,000
2019	198,098

Current H-1B Lottery Process

When USCIS receives more H-1B submissions than may be approved under the law, the agency conducts a random lottery to determine which petitions will be accepted for processing. USCIS initiates the lottery by first performing a limited initial review of the petitions filed to determine which petitions are marked as eligible for a visa under the master's cap exemption. If the number of cap-subject petitions claiming a master's cap exemption exceeds 20,000 during the first five business days in which cap-subject petitions may be filed, the agency conducts a "lottery" among master's cap eligible petitions.³

Master's cap filings that are not selected in the master's cap lottery are then added back into the general pool of petitions and, if USCIS receives more than 65,000 petitions subject to the general cap, a second lottery is held. Any petitions not selected in either lottery are marked for rejection along with a refund of their fees.

Expected Changes to H-1B Lottery

The agency could seek to reverse the order in which the two lotteries are conducted. All cap-subject petitions, including petitions eligible for the master's cap exemption, would be put into a general lottery. Then, only after the 65,000 cap is reached, eligible master's cap petitions not selected during the general lottery would be placed into another random lottery until the 20,000 master's cap is reached.

Policy Implications

Reversing the lottery order would give eligible master's cap beneficiaries a better chance of receiving an H-1B visa than they would have under the lottery system currently in place. The government has not released public data regarding the number of U.S. master's degree petitions that are filed each year. In its description of the proposed regulation, the agency stated that the change would increase the probability of the total number of petitions selected under the cap for H-1B beneficiaries who possess a master's or higher degree from a U.S. institution of higher education each fiscal year.

Timeline

Neither the statute nor the regulations prescribe whether a lottery must be conducted or the order in which the lotteries may be conducted. In a federal court case in Oregon last year, a federal judge recognized that the statute is ambiguous and that the agency has some latitude in its administration of the filing process. Nevertheless, the agency will be on stronger legal footing if it implements changes to the lottery through the formal rulemaking process. The agency may argue that notice and comment is not required because the changes

³ USCIS randomly selects more than the 20,000 master's cap allowance, anticipating rejection, denial, or revocation of a certain percentage of these petitions based on historical data.

are operational and only affect the government. What is clear is that USCIS intends to apply the new process to April 2019 H-1B cap filings.

Practical Implications for U.S. Employers

This change to the H-1B lottery process would occur on the government side of processing and employers would not need to do anything differently than they have in the past. The employee experience would be similar under either model. If and when a formal announcement is made, companies will want to evaluate H-1B nomination and selection criteria.

H-1B PRE-REGISTRATION

Background

USCIS proposed adding a pre-registration requirement to the H-1B lottery process in 2011. Employers would submit a registration for each prospective beneficiary prior to the H-1B filing window, and USCIS would select enough registrations to reach the cap, so that petitioners would only submit complete petitions for selected beneficiaries.

The 2011 proposal was never adopted, but a new proposal that we expect to closely mirror it has been submitted to the Office of Management and Budget (OMB) for review. USCIS states that the registration requirement would allow the agency to more efficiently manage the intake and lottery process for H-1B petitions.

USCIS Proposal

Assuming the upcoming regulation mirrors the 2011 framework, USCIS will propose that employers electronically submit a registration for each beneficiary they intend to sponsor for a cap-subject H-1B visa. The registration would include the following information:

- Employer name, Federal Employer Identification Number (FEIN), and mailing address;
- Authorized representative's name, job title, and contact information; and
- H-1B beneficiary's full name, date of birth, country of birth, country of citizenship, gender, and passport number.

A separate registration would need to be submitted for *each* prospective H-1B beneficiary, meaning an employer could not submit one registration naming multiple beneficiaries. Only one registration could be filed on behalf of a single beneficiary. It is not known at this time what the deadline would be to file the pre-registration. The 2011 proposal would not have imposed any fee or numerical limitation on the number of registrations that could be filed by each employer.

If the agency receives a number of registrations that exceeds the cap, it would select a number of registrations that roughly corresponds to the maximum number of H-1B visas that can be issued (15-20% more registrations than the 65,000 cap and 5-10% more registrations than the 20,000 master's cap). USCIS would then notify the employers whose registrations were selected. These employers would be permitted to file Labor Condition Applications (LCAs) and H-1B petitions on behalf of *only* the beneficiaries named in the registration that was

selected by USCIS. The 2011 proposal provided that employers would have at least 60 days from the date of notification of selection to file the H-1B petition. USCIS would reject any filings received after the deadline.

Timeline

USCIS sent the proposed rule to OMB on October 17. This means the agency will likely publish the proposal in the Federal Register before the end of the year. USCIS Director Cissna has stated that he plans to have a new regulation “in place, implemented” in time for the next H-1B lottery, in Spring 2019. This is an aggressive regulatory timeline but, on paper, it is possible for the agency to achieve its goal. Whether the agency meets this aggressive timeline depends on competing agency priorities, litigation, and the ability of political appointees to navigate the rulemaking process inside the government.

Practical Implications for U.S. Employers

The regulation, when in effect, will have significant operational and substantive implications for U.S. employers that sponsor H-1B workers. Operationally, most employers identify their prospective beneficiaries and begin preparing cap-subject H-1B petitions well in advance of the opening of the filing period on April 1. USCIS claims that the registration process would save employers time and money that they would normally spend compiling full H-1B petitions that might not get selected in the lottery. However, if the registration window is too close to April 1, it is possible that the intended cost savings of the rule would not materialize as companies would already be expending time and resources to prepare all of their petitions. The proposal would then result in significant new operational burdens and costs for U.S. employers. There is also a risk that the proposal could be subject to litigation that would inject an additional layer of uncertainty into the 2019 H-1B cap season.

Substantively, the final regulation could alter which companies obtain H-1B visas going forward. In 2011 the business community expressed concern that lower front-end costs could create “false demand” for H-1B visas. The pre-registration model could also favor companies with large overseas workforces as those companies may be able to submit a higher volume of candidates to the pre-lottery without incurring additional costs. U.S. companies that hire from U.S. universities and transition those employees from F-1 status may see an environment where they have a much lower probability of obtaining H-1B visas.

H-1B PRIORITIZATION

Background

In an Executive Order issued April 18th, 2017, the President directed the Secretary of State, Attorney General, Secretary of Labor, and Secretary of Homeland Security to prioritize allocation of H-1B visas for “the most skilled or highest-paid petition beneficiaries.” The USCIS regulatory agenda states that the agency will propose a “modified selection process,” and Director Cissna has stated publicly that “there may be ways that [USCIS] could by regulation achieve, to a certain degree” the goal of awarding H-1B cap slots to the most skilled or highest paid workers.

USCIS Proposal

USCIS Director Cissna has recognized that the agency has limited authority to make sweeping changes to the H-1B allocation process. Nevertheless, we expect USCIS will issue a NPRM that solicits comments on whether and how USCIS should prioritize H-1B allocation based on salary, education, or other criteria. USCIS will solicit

comments from the public, but it is not yet known whether the agency will propose actual text or just discuss the policy proposal in general terms.

Timeline

We expect USCIS will state publicly that it will finalize and implement the new regulation before the April 2019 H-1B cap filings. It is too early to say whether the agency will be in a position to implement these policy changes within six months. Of all the policy proposals under consideration, H-1B prioritization would be the most sweeping and many companies would, for all intents and purposes, lose access to H-1B workers. We therefore anticipate internal DHS debate, Congressional oversight, and litigation surrounding the proposal.

Questions or corrections:

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