

# Uncertainty Continues Due To Proposed Changes To The H-1B Visa Lottery

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It has been nearly two months since the Department of Homeland (DHS) issued proposed regulations regarding the H-1B visa program and the filing of H-1B Cap-subject petitions, but uncertainty continues to loom as H-1B Cap season quickly approaches.

The H-1B visa program allows companies in the United States to temporarily employ foreign nationals in a “specialty occupation.” A “specialty occupation” generally refers to an occupation that can only be performed by a person that possesses a bachelor’s degree and highly specialized knowledge about a specific occupation. Many positions may qualify as specialty occupations, including engineers, teachers, physicians, lawyers, and architects. However, even if a foreign national finds a prospective employer willing to employ him or her in a specialty occupation, it is not a guarantee that the applicant will be able to secure an H-1B visa. The yearly number of H-1B visas allocated by Congress is 65,000, with an additional 20,000 allocated for individuals who have earned a Master’s degree or higher from a U.S. university. Typically, there are far many more H-1B petitions submitted to U.S. Citizenship and Immigration Services (USCIS), which creates the need for a computer-generated random selection process, or “H-1B lottery” system.

The proposed rule published by DHS includes two very important changes to the H-1B visa selection process. Under the current process, H-1B employers are required to submit H-1B petitions during the first week of April. This results in USCIS receiving thousands of H-1B petitions. If the cap is reached, only those petitions selected in the H-1B lottery are adjudicated and

unselected petitions are returned. Under the proposed rule, H-1B employers seeking to file H-1B cap-subject petitions would be required to first electronically register with USCIS during a designated period. This period would be at least 14 calendar days before the H-1B filing window opens on April 1 and would remain open for at least 14 calendar days. The electronic registration process would require H-1B employers to provide basic information such as name, address, company identification number as well as the applicant's name, country of birth, and type of degree. USCIS would then conduct the H-1B lottery from the pool of timely-filed electronic registrants. Subsequently, selected H-1B petitioners would be notified that they are eligible to file an H-1B petition within a designated filing period, which is expected to be at least 60 days.

Another major change proposed by DHS is to reverse the order by which H-1B petitions are selected. Under the current process, if the "regular" H-1B Cap and advanced degree exemption is reached within the first five days, advanced degree exemption applicants are selected prior to the regular H-1B Cap beneficiaries. Under the proposed regulation, USCIS would reverse the selection order and count all petitions towards the number projected as needed to reach the regular H-1B Cap first. Once a sufficient number of petitions have been selected for the regular H-1B Cap, USCIS would then select petitions towards the advanced degree exemption. USCIS states that this would result in an increase of up to 16% of the number of beneficiaries with advanced degrees and ultimately H-1B visas would be "awarded to the most-skilled and highest-paid beneficiaries."

The April 1 filing window is just around the corner and DHS has not yet published the final rule. Submission of public comments to the proposed rule ended on January 2 and comments are currently being reviewed. Before the final rule can be published, USCIS must complete review of the comments and the rule would need to be reviewed by the Office of Management and Budget. Given the tight timing, it is uncertain whether the provisions outlined in the proposed regulation will be finalized and implemented in time for the upcoming H-1B Cap filing season. If the rule is finalized and there is insufficient time to implement the changes, USCIS may postpone the electronic registration system and continue with the current system.

Due to the uncertainty, it is important to ensure that you are represented by knowledgeable and highly competent immigration counsel who can keep you aware of the various changes and adapt as necessary throughout the entire H-1B application process. As April 1 nears, it is also important to meet with an experienced immigration attorney as soon as possible to explore whether an H-1B visa is the most suitable option for you or your company.