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The H-1B cap lottery may change to favor the highest paid foreign nationals

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On Monday, the U.S. Department of Homeland Security issued **proposed regulations** that would amend the H-1B cap registration selection process by replacing the current random process with one based on wage levels.

The proposed regulations would apply only to registrations for H-1B petitions that are subject to a cap, and only if the number of registrations exceeds the applicable cap. Registrations offering the highest wage level (Occupational Employment Statistics wage level IV) would be selected first. Registrations with lower wage levels would be selected in descending order until the applicable H-1B cap was reached.

The preamble to the proposed regulations says that the purpose is to encourage the selection of registrations with higher wage levels, consistent with the hiring of higher-skilled aliens. That purpose was expressed in President Trump's Executive Order 13788, "Buy American and Hire American." According to the preamble, E.O. 13788 "specifically mentioned the H-1B program and directed DHS and other agencies to 'suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.'" According to the preamble, the proposed regulations would also create a disincentive for "abuse of the H-1B program to fill lower-paid, lower-skilled positions..." The Trump Administration contends that abuse of the H-1B program "is a significant problem under the present selection system."

Background to the H-1B cap and registration process

All H-1B petitions require the petitioner/employer to file a Labor Condition Application specifying the wage amount and, except where a private survey is used, one of four Occupational Employment Statistics wage levels. For many years, H-1B petitions have been subject to an annual cap of about 85,000, consisting of 20,000 for individuals with advanced degrees from U.S. institutions and about 65,000 for those with bachelor's degrees. Because there are more than 85,000 petitioners each year, the U.S. Citizenship and Immigration Services conducts selections by lottery.

Beginning in March 2020, two important changes to the cap selection



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process took effect:

- The USCIS instituted a registration system that required employers to get pre-approval before they even had the right to file H-1B cap petitions. An annual registration period of at least 14 days was established. (In 2020, the registration period was from March 1 to March 20.)
- The USCIS switched the order of the lottery process, so that the regular cap lottery would take place first, followed by the U.S. advanced degree lottery. That change was made to increase the likelihood that individuals with advanced degrees from U.S. institutions would be selected. Although advanced degree candidates had “two bites at the apple” under the prior process, the first “bite” under the new process is from a pool of about 65,000, not 20,000.

The proposed regulations

The proposed regulations would apply only to

- H-1B registrations,
- Submitted by prospective petitioners seeking to file H-1B cap-subject petitions,
- Where the number of registrations exceeds the applicable numerical cap.

Other H-1B petitions do not have a registration system, so the proposed regulations do not apply to them.

According to the proposed regulations, the USCIS would rank the submitted registrations based on the OES wage level, the relevant Standard Occupational Classification code, and the area of intended employment. If the number of registrations at a particular wage level exceed the cap, then random selections will be from all registrations within that wage level.

If OES prevailing wage information is not available, then petitions will be selected “based on the appropriate wage level that corresponds to the requirements of the proffered position.”

How it would work

If the number of valid OES wage level IV registrations were *less than* the cap amount, all of the employers filing level IV registrations would be allowed to file petitions, followed by levels III, II, and I, in descending order until the cap was satisfied.

If the valid registrations at level IV were *equal to* the cap amount, then all of the employers filing level IV registrations would be allowed to file petitions, and there would be no need to go to lower wage levels.

If the number of valid level IV registrations were *greater than* the cap amount, then the employers who would be allowed to file H-1B petitions would be selected at random.

The selections would begin with the regular H-1B cap, followed by the same ranking and selection process for the U.S. advanced degree cap. The latter, of course, would include any registrants who were not selected

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under the regular cap.

In cases where the H-1B beneficiary will work in multiple locations, the USCIS would rank and select the registration based on the *lowest* corresponding OES wage level that the proffered wage will equal or exceed. The electronic registration form (and H-1B petition) would be amended to require inclusion of the highest OES wage level that the proffered wage equals or exceeds for the relevant SOC code in the area of intended employment.

The proposed regulations anticipate that some registrants may try to circumvent the new system by listing a higher wage on the registration to increase the odds of selection, but later filing directly, or through a related entity, a new or amended H-1B petition for the same beneficiary at a lower wage. If the USCIS determines that the petitioner has done this, it may deny or revoke approval of the petition. On the other hand, the USCIS will not deny an amended or new petition solely on the basis of a different proffered wage.

DHS requests comments

The DHS has specifically requested comments regarding the following:

- Alternatives to the proposed ranking and selection of registrations where there is no current OES prevailing wage information.
- A system based on “ranking and selecting all registrations or petitions according to the actual OES prevailing wage level that the position would be rated at rather than the wage level that the proffered wage equals or exceeds.”
- A process by which all registrations or petitions, while still randomly selected, would be weighted according to their OES prevailing wage level.

Challenges to the proposed regulations

Jennifer Minear, President of the American Immigration Lawyers Association, criticized the proposed regulations, saying that they are “based on the false premise that how much money you make is the only measure of how much you contribute to the economy or society. What about the doctor practicing primary care in a rural area? The teacher working in the inner city? Or the H-1B worker who is not earning six figures but is creating jobs for U.S. workers?”

Moreover, the proposed regulations may be vulnerable to challenge in the courts. The DHS has previously said that a selection process based on factors other than degree level -- including salary -- would require a change to the enabling statute. In other words, Congress would have to act. In the preamble to the proposed regulations, the DHS acknowledges that it has changed its position, but its prior position may provide a basis for a lawsuit seeking to enjoin the regulations.

What is next?

The proposed regulations are scheduled to be finalized after January 4. Whether they take effect or remain in effect may depend on the outcome of yesterday’s election.

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Comments on the substance of the proposed rule must be submitted on or before December 2. Comments about the portion of the proposed regulations relating to collection of information (including the H-1B Registration Tool and H-1B petition) must be submitted by January 4.

We will be glad to assist your company in drafting and submitting comments.

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