

## DHS Finalizes Changes to H-1B Lottery, but Delays New H-1B Prefiling Registration System Till 2020

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### Key Points

- DHS has announced that it has finalized the previously proposed rule governing the H-1B lottery. The final **rule** was published in the Federal Register on January 31, 2019.
- DHS will reverse the order of the H-1B lottery to first select beneficiaries to meet the 65,000 regular H-1B cap and then select the remaining 20,000 beneficiaries for the advanced degree cap. This should increase the number of beneficiaries with advanced degrees that are selected for H-1B visas.
- DHS will implement a computer-generated preregistration process for U.S. employers seeking to sponsor foreign workers for an H-1B visa, but the registration will not be implemented until 2020.

### Summary

On January 31, 2019, the Department of Homeland Security (DHS) published a final **rule** codifying most of the changes to the H-1B lottery system that was previously proposed on December 3, 2018. We covered the proposed rule in detail in a previous **alert**. The new rule is expected to make considerable changes to the process of allocating H-1B visas, the most commonly used work visas in the United States. The rule is issued in accordance with the April 2017 Buy American and Hire American executive order, which 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.”

The final rule codified the proposed rule virtually without changes, but it staggered their implementation. Effective April 1, 2019, DHS will reverse the order in which it selects H-1B beneficiaries. The statutory cap on H-1B visas is set at 65,000 (“regular cap”), with an additional 20,000 allotted to beneficiaries with a master’s degree or higher from a U.S. university (“advanced degree cap”). Currently, in years when DHS receives more than 65,000 H-1B petitions within the first five days of filing, the

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advanced degree beneficiaries are selected first, before the regular cap H-1B lottery is conducted. The final rule reverses the selection order so that all petitions are counted against the 65,000 regular cap lottery first. Once a sufficient number of petitions have been selected for the regular cap, DHS will then select petitions toward the advanced degree cap. DHS predicts that changing the order in which the agency conducts the H-1B lottery will likely increase the number of beneficiaries with a master's or higher degree from a U.S. university to be selected under the H-1B numerical allocations. Specifically, DHS estimates that the change will result in an increase of up to 16 percent (or 5,340 foreign workers) in the number of selected petitions for H-1B beneficiaries with a master's degree or higher from a U.S. university.

The second significant change to the H-1B lottery process is the introduction of a preregistration requirement for U.S. employers who sponsor H-1B foreign workers. This requirement has been finalized, but DHS has suspended its implementation until 2020 to complete user testing of the registration system and to ensure that the system and process are fully functional. This means that the next filing season for H-1B visas, which begins on April 1, 2019, will not be affected by the planned preregistration requirement and that petitioners will need to submit complete H-1B petitions to DHS, with filing fees, to be eligible to be considered for selection in this year's H-1B lottery.

Under the final rule, when the preregistration system is introduced in 2020, it will last for a minimum of 14 days and will begin at least 14 calendar days before the earliest date on which H-1B petitions may be filed for that year. Petitioners will be required to submit a separate registration for each beneficiary that it seeks to sponsor, and each beneficiary will have to be named. DHS will then notify petitioners whose registrations have been selected that the petitioner is eligible to file an H-1B petition on behalf of the named beneficiary, and the filing period will last for at least 90 days. In the proposed rule, DHS had indicated that it may stagger filing periods, but DHS is not proceeding with staggered filing periods in its final rule. This means that the registration period will be the same for all employers, and the filing period will also be the same for everyone.

Finally, DHS has indicated that it will engage in stakeholder outreach and provide training to the public on the registration system in advance of its implementation to ensure that petitioners understand how to access and use the system. DHS expects that the electronic registration requirement, once it is implemented in 2020, will reduce overall costs for petitioners and create a more cost-effective H-1B filing process for DHS and petitioners.