

## DHS Proposes New H-1B Prefiling Registration System and Changes to H-1B Lottery

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### Key Points

- Prior to submitting petitions for H-1B visas, employers first will be required to register electronically with USCIS during a designated registration period.
- DHS proposes to use a computer-generated process to select a sufficient number of registrations projected to meet the applicable H-1B caps.
- In order to increase the odds for selection of H-1B beneficiaries with a master's or higher degree from a U.S. university, DHS proposes to first select registrations that were submitted on behalf of all beneficiaries to meet the 65,000 regular H-1B cap and then select from the remaining registrations 20,000 beneficiaries for the advanced degree cap.
- Petitioners whose registrations are selected will have at least a 60-day period during which they may file a complete H-1B petition.
- DHS may stagger the 60-day periods in which H-1B petitions may be filed, rather than set one filing deadline for all selected registrants.

### Summary

On December 3, 2018, the Department of Homeland Security (DHS) published a proposed rule that would make considerable changes to the process of allocating H-1B visas, the most commonly used work visas in the United States. The proposed rule is issued in accordance with the 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.”

Under the proposed rule, petitioning employers would be required to register during a designated registration period to enter into the H-1B visa lottery. The lottery is necessary because, in recent years, the number of H-1B visa petitions has considerably exceeded the statutory cap on the number of H-1B visas that may be issued. The statutory cap on H-1B visas is set at 65,000 (“regular cap”), with an

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additional 20,000 allotted to beneficiaries with a master's degree or higher from a U.S. university ("advanced degree cap").

Under the proposed rule, only after the petitioner's registration for a specific beneficiary has been selected would an employer be allowed to file an H-1B petition. DHS also proposes to reverse the sequence for conducting the H-1B lottery. Currently, DHS first selects 20,000 petitions for beneficiaries with advanced degrees from U.S. universities and then conducts the regular cap lottery for all remaining petitions. Under the proposed rule, all registrations will be first considered under the regular H-1B cap, including those for beneficiaries with a master's degree or higher from a U.S. university. After the selection of registrations for the regular cap, those who are not already selected from eligible advanced degree beneficiaries will be selected to meet the advanced degree cap. This will increase the chances of selection for the H-1B lottery for beneficiaries with an advanced degree and, conversely, decrease the chances of selection for those with a bachelor's or foreign degree.

## Registration Requirements and Process

DHS proposes to establish a mandatory electronic registration requirement that would begin prior to the H-1B cap filing season, which currently begins on April 1 of every year. Under the proposed rule, petitioners would be required to create an account, electronically register through the U.S. Citizenship and Immigration Services (USCIS) website, and provide basic information regarding the petitioner and each prospective H-1B beneficiary. Under the proposed rule, the requested information may include, but is not limited to:

- the employer's name, identification number and mailing address
- the employer's authorized representative's name, job title and contact information (telephone number and email address)
- the beneficiary's full name, date of birth, country of birth, country of citizenship, gender and passport number
- whether the beneficiary has obtained a master's or higher degree from a U.S. university.

USCIS plans to provide specific details on what information will be required for the initial registration period via the USCIS website at least 30 days before opening the initial registration period. The online registration system would remain open for at least 14 calendar days. DHS proposes that the electronic registration process start prior to April 1, 2019, in advance of the period during which H-1B petitions can be filed for the next fiscal year.

Employers would be prohibited from submitting more than one registration for the same beneficiary and would be required to attest that they intend to file an H-1B petition for the beneficiary in the position for which the registration is filed. For selected registrations, DHS will not allow employers to substitute beneficiaries when the H-1B petition is filed. If the employer's registration is selected and no H-1B petition is filed for that beneficiary, the proposed rule indicates a possible investigation of that fact by DHS.

DHS has not proposed a separate fee for participating in the registration system.

## Selection Process

DHS proposes to randomly select registrations by a computer-generated process to first meet the regular cap of 65,000 and then the advanced degree cap of 20,000 from the registrations that were properly submitted by the final registration date. DHS estimates that this proposed selection process would result in an estimated increase in the number of H-1B beneficiaries with a master's degree or higher from a U.S. university by 16 percent (or 5,340 workers).

## Filing Petitions After Selection

Employers would have a period of at least 60 days to file completed H-1B petitions within the designated filing period. DHS believes that 60 days is a sufficient period to prepare the H-1B petition. Under the proposed rule, USCIS anticipates that it would stagger the filing periods during each fiscal year. For example, some selected registrants would have from April 1 to May 31, and other selected registrants would have from May 1 to June 30 to file their complete H-1B petitions. Petitions filed before the filing period begins or after it ends will be rejected.

## Effects of the Proposed Rule

DHS estimates that, as a result of this new lottery process, employers would save costs for preparing H-1B petitions because they would no longer have to prepare the petitions that are not selected in the lottery. DHS estimates that the proposed online registration process will not add considerable burden for employers.

The proposed selection process would likely result in a decrease in the number of selected beneficiaries with bachelor's degrees and foreign advanced degrees. DHS anticipates that this potential decrease could result in higher labor costs to employers under the assumption that those without advanced degrees from U.S. universities are paid less than – and would be replaced by – beneficiaries with master's degrees or higher from U.S. universities.

Employers would also need to identify earlier the employees that they would like to sponsor for H-1B visas for the upcoming fiscal year because the registration system would be open before the current filing deadline of April 1. They would then be restricted to their specific filing period and would not be allowed to submit the H-1B petition prior to or after that period. These changes in the proposed rule will require careful planning and coordination among the employer, the beneficiary and the legal counsel preparing the H-1B petition.

DHS will accept comments on the proposed rule for 30 days, until January 2, 2019.