



Employers Should Prepare For March's H-1B Lottery – But Wage-Based Selection System Pushed Off Until Next Year

Insights

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Federal immigration officials recently announced that the annual process for determining who will be able to apply for an H-1B visa will be held in largely the same manner as it was held last year – meaning that the proposed wage-based selection system will be put off until at least 2022. The February 5 announcement from U.S. Citizenship and Immigration Services (USCIS) confirmed that it will accept applications from March 9 through March 25, once again using a lottery system to select which applications would be accepted. Those individuals selected will then be able to file their petition for the H-1B visa, which comes with the significant benefit of authorizing the visa holder to work in the United States. What do employers need to know in advance of this crucial time – and what can you do to prepare?

The Basics Of The H-1B Lottery

The H-1B lottery is the annual event in which workers with specialized skills put their names into a drawing in the hopes of gaining the right to work in the U.S. Entrance requires only a \$10 fee and submission of some basic information. The randomly selected winners are granted the opportunity to apply for a visa to work in the United States for a period of up to three years, with the potential for one additional three-year extension period.

Employers use the program to supplement their work force with professional workers from abroad, while highly skilled professionals from around the world utilize the H-1B to hone their abilities while advancing their careers as nonimmigrant workers in the United States. The H-1B “lottery” was implemented as a way to distribute the finite number of applications in an equitable manner.

Up to 65,000 H-1B visas are authorized by statute, issued to applicants with the equivalent of a bachelor’s degree or higher in a specialty related to the work the applicant will do. An additional 20,000 visas are authorized by statute to be issued to applicants holding a Master’s degree or higher. There are certain other classes of H-1B visas issued each year that are not subject to this “cap,” so the total annual number of H-1B visas issued is usually higher than the 85,000 total. However, the H-1B program is wildly popular with employers and applicants, and demand for the coveted visas far outpaces supply. The full allocation of visas is usually spoken for well before the end of the established application period.

Wage-Based Selection System Delayed Until At Least A Year

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The critical portion of last week's announcement is that implementation of rules that would do away with the lottery system in favor of a system favoring high-salary applicants over all other applicants has been delayed for at least a year. Although previously scheduled to be a part of this year's H-1B distribution following rule implementations made by the Trump administration to create a system less dependent on a random draw, USCIS delayed the implementation of this planned wage-based selection system by releasing a rule on February 4.

Immigration officials scheduled hearings on the new system to tackle implementation and to address the overall necessity of such a change, but the next hearing on those rules is not scheduled to take place until December 2021. This timing will necessarily delay the implementation of any wage-based system until January 2022 at the earliest, and obviously renders the change effectively dead for this year's H-1B cycle. Given the Biden administration's avowed support for a robust immigration policy, it is possible that we could see the wage-based selection proposal scrapped altogether after this regulatory review.

What's Next – And What Should You Do?

As stated, applicants will be able to file their applications beginning March 9 at noon Eastern time, and all applications must be submitted before noon ET on March 25. USCIS has said that it intends to notify those who are selected by April 1. Those who are selected in the lottery must then submit a fee and series of documents including a Labor Certification Application that has been certified by the Department of Labor, a Form I-129, and other supporting documents.

Employers and applicants both have critical roles in completing these documents including providing information about the position to be occupied, the educational history of the applicant, and the employer's ability to pay the required compensation. However, errors in the application can lead to delays in approval, costly requests for additional evidence, or outright denial. Employers will want to partner with legal counsel with experience helping clients navigate this process successfully.

Once all documents are properly completed, they will be adjudicated by USCIS. If approved, the applicants can use the approved petition to obtain an H-1B visa and will be authorized to work in the United States beginning no sooner than October 1, 2021.

At this time, you should take the following actions:

- Decide which employees or potential employees to sponsor in the H-1B lottery;
- Gather the required vital information on the proposed applicants (Legal Name, Date of Birth, Country of Birth, Country of Citizenship, Passport Number);
- Verify that the applicants hold a bachelor's or Master's degree related to the field in which they will be employed;
- Create online registration account with USCIS at uscis.gov;

- Starting March 9 at noon, USCIS will accept applications. Applicants should be careful to submit all applications prior to March 25 at Noon eastern to guarantee themselves an opportunity to be selected. If applications are submitted after that date, it is possible that USCIS will accept their submission, but not guaranteed;
- USCIS has stated its intention to notify selected individuals by April 1. Those selected can then complete their applications, but will not be authorized to begin working until October 1.

Conclusion

Fisher Phillips stands ready to assist you as you prepare for this year's H-1B lottery process. If you have questions, please contact your Fisher Phillips attorney or any attorney in our [Immigration Practice Group](#). We will continue to monitor further developments and provide updates on this process, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information.

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