



Massive Changes To H-1B System Proposed For 2019

Insights

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The Department of Homeland Security (DHS) recently proposed a new rule that could dramatically change the way the H-1B application process works. The rule would establish an electronic pre-registration system and run the annual lottery based on the pre-registrations rather than requiring employers to file entire H-1B applications. The DHS is also considering changing the way it conducts the lottery to improve the odds of those with graduate degrees from U.S. universities. While U.S. Citizenship and Immigration Services (USCIS) is providing 30 days for public comment, the agency is attempting to fast-track the process to have the system in place for the upcoming H-1B application period, which is set to begin in April 2019.

While these proposed rule changes have the potential to save employers considerable time and money, there are major concerns about whether loopholes could exist to manipulate the proposed system. In addition, there are questions as to whether the DHS would exceed its administrative authority in adopting such changes. These issues, along with typical administrative red tape, could mean that the revised registration system may not be in place in time for the April 2019 filing season. However, employers should make themselves aware of these potential changes in the event they are adopted in the near future.

Proposed Pre-Lottery Registration

The proposed rule changes, announced on November 30, would impose a new requirement for H-1B petitioners to initially electronically register with USCIS during a designated registration period. USCIS would conduct the annual H-1B lottery from the pool of timely filed pre-registrants instead of requiring would-be petitioners to submit complete petitions.

Under the current system, 65,000 H-1Bs are available each year under the annual quota (not including petitioners exempt from the cap under various categories). An additional 20,000 are available to graduates of U.S. graduate degree programs. Petitioners submit completed applications during the first week in April since petitions can be accepted up to 180 days in advance and the annual allotment of visas becomes available on October 1 each year (the first day of the federal fiscal year). Those petitions that are selected are then adjudicated and those not accepted are returned to the petitioner (along with the filing fees).

USCIS is also proposing to change the way it conducts the lottery. There are currently two pools of applicants: regular H-1B applicants who are eligible for 65,000 H-1B visas allocated annually, and graduates of U.S. master degree programs who are additionally eligible for a separate pool of 20,000

graduate or first master's degree programs and are additionally eligible for a separate pool of 20,000 H-1Bs. Currently, USCIS puts the masters cap applicants through a lottery for the 20,000 and then conducts the general lottery which would include individuals not selected in the masters cap lottery. USCIS seeks to flip this order and require the general lottery first, putting all masters cap-eligible individuals through that system, and then process unselected eligible people through the master cap. The idea is that this system will increase the overall number of people with U.S. masters degrees and higher receiving H-1Bs.

It is important to note that the DHS has not revealed the inner-workings of the registration system so we cannot see the actual mechanics. As for what will be required to register, the DHS says only basic information regarding the petitioner and the beneficiary would be required, including, but not limited to: the employer's name, employer ID number, and mailing address; the employer's authorized representative's name, job title, and contact information; 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. institution of higher education; the employer's attorney or accredited representative, if applicable (and possibly submitting an electronic G-28); and any additional basic information requested by the registration system or USCIS. Petitioners would not have to submit a Labor Condition Application (LCA) in advance. They would need to check an attestation regarding the truthfulness and accuracy of the information and whether the petitioner intends to employ the beneficiary consistent with the registration.

During the registration period, if more registrations are received than available slots, USCIS would conduct a computer-selected random lottery of registrations received. The number selected will be determined in the same manner as is currently implemented. The main difference will be that the order for the two lotteries will be reversed from the current system, with the regular lottery happening first and the masters cap lottery second. Those not selected would be kept in reserve.

Proposed Post-Selection Process

If the rule changes are adopted, petitioners selected in the pre-registration lottery would receive a notice of eligibility to file an H-1B petition with information on the place to file and time period required for filing. No substitution of beneficiaries would be permitted. USCIS may also require petitioners submit copies of the registration information with the Form I-129 in order to verify the registration.

Once selected, DHS proposes that petitioners would have at least 60 days to properly file an H-1B petition for the named beneficiary. USCIS may choose to stagger the filing periods (for example, between April 1 and May 31, between May 1 and June 30, etc.) in the selection notice and provide periods of longer than 60 days if necessary to accommodate processing backlogs or other operational needs. Failure to file within the prescribed filing period would result in a rejection or denial, and the petitioner would forego eligibility to file based on that selection notice. By defining the filing windows and offering a 60 day window, applicants would also be able to obtain an LCA with sufficient time. DHS is proposing to amend the rule allowing filing up to 180 days in advance to accommodate this new system.

What Impact Might Employers Expect?

It is important to note that implementation of these new rules would not increase the total number of visas eligible under the quota. If the masters cap and the general cap selection order is reversed, however, this change could favor technology companies because of the general larger hiring of individuals attending masters programs in the U.S.

We will soon know whether the new rules will be adopted and put into place for 2019. Because of the technical complications of the program implementation and the potential litigation, however, you must prepare for two potential scenarios: one where the changes are adopted in advance of the April 2019 filing date, and one where the status quo will be in effect for at least another year. We generally recommend that you plan on initiating matters right at the turn of the New Year as if the current system will remain in place to address all the filings before the April 2019 filing requirement.

However, even if the new system is put into place, this preparation would be valuable to all your applicants as they have a high likelihood of being selected either this year or in future years. If your cases are not initiated in a timely manner, it could cause major concerns for the individuals who will be very interested in the progress of their cases. This is especially true of cases where the H-1B qualifications are not clear.

At this point, there is no reason to expect a change to issues associated with travel after filing or other elements of processing after filing. Based upon the past two years, it is very possible that Premium Processing will be suspended again for H-1B cap cases. Also, we can expect USCIS to come up with new basis for Requests for Evidence (RFE).

If the proposed rules are held up due to litigation or administrative concerns, the government will suspend the program for this coming year and proposed using the system at a later date. If this happens, USCIS will make an announcement on its website and inform readers of the time-frame for filing a regular H-1B petition. However, the agency would still run the lotteries for filed petitions in the way described in this proposed rule (regular first, then masters). The DHS may finalize the reversal of the lottery order as a final rule on a separate timetable from the pre-registration portion of the rule and is seeking comments on this idea.

Conclusion

The takeaway for now is that nothing has changed for employers in terms of process and expectation. News is sure to come in the upcoming months, however, which could change this analysis. For now, we recommend that employers consult with their immigration counsel and provide some limited guidance to managers and individuals who will have H-1B cap cases.

Fisher Phillips will continue to monitor developments, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. For help with compliance steps or to answer questions, please contact your Fisher Phillips attorney or any attorney in our [Global Immigration Practice Group](#).

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