

USCIS Proposes Changes to the H-1B Lottery

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12.01.2020

U.S. Citizenship and Immigration Services is wrapping up a comment period regarding a proposed, substantial change to the H-1B nonimmigrant visa program. The H-1B program applies to employers seeking to hire non-immigrant aliens as workers in specialty occupations or as fashion models of distinguished merit and ability. A specialty occupation is one that requires the application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree or its equivalent.

There is a numerical cap on the number of H-1B visas that can be issued in certain situations each year. These are referred to as "cap-subject petitions." For at least the last decade, USCIS has received more H-1B cap-subject petitions than the annual H-1B numerical allocation in those respective years. In fact, since FY2014, USCIS has received more H-1B cap-subject petitions in the first five days of filing than the entire annual allocation. This has led to the implementation of a random lottery program in April of each year. Petitions (now registrations) are filed in early April and petitioners are later notified if their case has been selected for adjudication. The USCIS indicates that "the current random lottery selection process is reasonable, but not optimal." Therefore, on November 2, 2020, USCIS issued a notice of proposed rulemaking that would prioritize the selection of registrations/petitions based on wage levels. If finalized as proposed, USCIS would first select registrations (or petitions, if the registration process is suspended) generally based on the highest Occupational Employment Statistics prevailing wage level that the offered wage equals or exceeds for the relevant Standard Occupational Classification code and area(s) of intended employment. Although this wage-based selection calculation is complicated, the goal is to incentivize companies to pay beneficiaries higher wages that equal or exceed higher prevailing wage levels.

"With this proposed rule, the Trump administration is continuing to deliver on its promise to protect the American worker while strengthening the economy. The H-1B program is often exploited and abused by U.S. employers, and their U.S. clients, primarily seeking to hire foreign workers and pay lower wages," said Acting DHS Deputy Secretary Ken Cuccinelli. "The current use of random selection to allocate H-1B visas makes it harder for businesses to plan their hiring, fails to leverage the H-1B program to

truly compete for the world's best and brightest, and hurts American workers by bringing in relatively lower-paid foreign labor at the expense of the American workforce.”

There is opposition to this proposed rule: if implemented, this rule will dramatically reduce access to the H-1B visa program for early-career professionals, including those who have completed Master's or Doctoral degrees at U.S. colleges and universities. USCIS has acknowledged that if this new regulation is implemented, no individuals who are paid a Level 1 wage, and very few who are paid at a Level 2 wage, would be selected to proceed with an H-1B petition.

We encourage our clients to participate in this rulemaking process. **Comments on the Proposed Rule are due 11:59 P.M. ET on Wednesday, December 2, 2020 (and comments relevant to the proposed information collection are due 11:59 P.M. ET on January 4, 2021).** Comments referencing DHS Docket No. USCIS–2020–0019 must be submitted through the Federal eRulemaking Portal at: [http:// www.regulations.gov](http://www.regulations.gov).