

Management Alert



USCIS Proposes Electronic Preregistration and Reversal of Lottery Selection Order for H-1B Cap

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Seyfarth Synopsis: USCIS recently proposed two significant changes to the current H-1B Cap selection process - (1) requiring employers to electronically register H-1B cap petitions during a designated period, and (2) reversing the selection order of Regular Cap and Master's Cap petitions.

Background – Current Process

Each year, employers and their foreign national employees seeking an initial grant of H-1B status may file petitions with U.S. Citizenship and Immigration Services (“USCIS”) during the first five business days of April. Congress set an annual H-1B cap of 65,000 (the “Regular Cap”) and provides an exemption for 20,000 H-1B visas for applicants with U.S. master’s or higher degrees (the “Master’s Cap”). If USCIS receives more than the allowable number of H-1B petitions within the first five business days of April, USCIS conducts a lottery to select the H-1B petitions it will continue to adjudicate. USCIS first conducts the lottery for the Master’s Cap allotment. Master’s Cap petitions not selected in the first lottery are placed back in the general pool for the Regular Cap lottery. USCIS rejects and returns petitions not selected in either lottery.

USCIS Proposed Changes

First, the proposed rule requires employers seeking to file H-1B cap petitions to electronically register each petition with USCIS during a designated registration period. USCIS would then conduct the annual lottery from the pool of timely filed electronic registrants. USCIS would notify employers when it has selected a petition, and employers would then have 60 days within which to prepare and file a complete petition, including Form I-129 and a certified Labor Condition Application (“LCA”).

USCIS would permit electronic registration during the two weeks before the traditional H-1B filing window opens each year (April 1). The registration process requires information such as the employer’s name, federal identification number, address and contact information, as well as the foreign national’s name, date of birth, country of birth, country of citizenship, passport number, gender, degree and proposed job title. As has historically been the case with actual H-1B petition filings, employers would be limited to one registration per individual for the same fiscal year. Under the proposed rule, there is no fee for electronic registration.

Second, the proposed rule changes the manner in which USCIS would select H-1B Cap petitions. The proposed selection process would reverse the current selection order to choose and reach the Regular Cap before selecting petitions towards the Master's Cap. USCIS predicts the reversed selection order will materially increase the number of H-1B cap petitions awarded to individuals holding an advanced degree from a U.S. college or university.

When Will This Become Effective?

USCIS seeks to finalize and implement the proposed changes prior to the upcoming fiscal year 2020 H-1B cap filing season. However, the rule is currently undergoing a mandatory 30-day notice and comment period, which runs until January 2, 2019. USCIS will need to review and address all concerns raised by the public to finalize the rules. Additionally, USCIS must also conduct user testing and vetting of the new electronic registration system before its implementation.

Given the tight timeframe, USCIS acknowledges that the agency may not finalize and complete the regulatory process and user testing in time for the upcoming H-1B Cap filing season. To this end, the proposed rule includes a provision that allows USCIS to temporarily suspend the electronic registration requirement for the upcoming 2020 fiscal year cap selection process if there are challenges with the implementation of the electronic registration system.

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