

One Minute Memo®



Department of Homeland Security Publishes Final Rule Regarding H-1B Pre-Registration Process

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Seyfarth Synopsis: On January 31, 2019 DHS published the final rule for the electronic pre-registration of H-1B cap petitions and changed the order of selection of filings. The DHS concurrently suspended implementation of the electronic pre-registration requirement for the current fiscal year cap (“FY 2020”). However, the USCIS will reverse the order of selection of filings for FY 2020 and estimates that U.S. master’s or higher degree holders will likely have an increased chance of selection in the lottery.

USCIS Reverses Order of Selection of Master’s Cap and Regular Cap Potentially Increasing Odds for U.S. Advanced Degree Holders

While implementation of the electronic registration portion is suspended for FY 2020, the new final rule will change the order of selection of petitions filed on April 1, 2019. As background, Congress has previously allocated a cap of 65,000 H-1B visa numbers (also called the “Regular Cap”) and provided an exemption for an additional 20,000 visas for beneficiaries who hold a U.S. master’s degree or higher (“Master’s Cap”). Historically, the United States Citizenship and Immigration Services (“USCIS”) has conducted the Master’s Cap first and those not selected in the Master’s Cap were added to the Regular Cap for further opportunity at selection. Under the final rule, the USCIS will conduct the Regular Cap selection first (including U.S. master’s degree or higher holders) and then conduct the Master’s Cap for U.S. master’s degree or higher holders who were not selected in the first round. Based on historical numbers, the USCIS estimates that during oversubscribed years this will result in an increased chance of selection for beneficiaries who possess a U.S. master’s degree or higher.

USCIS Confirms Electronic Pre-Registration System but Suspends Implementation

The Department of Homeland Security (“DHS”) announced [the final rule](#) that modifies the regulations governing USCIS’s administration of certain aspects of the H-1B cap-subject petition filing process. Taking into consideration comments from professional associations, law firms, and other stakeholders, the DHS is concurrently suspending the implementation of the electronic preregistration requirement. Thus, filings in fiscal year 2020 will proceed as in previous years. Employers may proceed to file petitions with the USCIS within the first five business days of April 2019. If the number of filings exceeds the annual availability of visas, the USCIS will conduct a random selection (“lottery”) to determine which filings it will adjudicate.

DHS Continues Working on the Implementation of the Electronic Pre-Registration System

The DHS and USCIS will continue to request feedback and engage in user testing for a fully functional electronic pre-registration system in the future. In the final rule, the DHS also makes certain favorable modifications in response to public comment. Specifically, it promises to announce the implementation of any initial registration period in the future with at least 30-calendar days' notice. Additionally, once pre-registration is implemented, the government will permit at least 90 days for filing petitions after selection, extending it beyond the initially proposed 60 days. The DHS includes a number of other adjustments and clarifications to the process that will enable employers and counsel to better plan for and prepare registrations and filings once the system is fully implemented. In the interim, FY 2020 continues to proceed "business as usual," with the added potential for an increased chance of selection for U.S. advanced degree holders.

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