

USCIS Proposed Changes to the H-1B Cap Filing Process: What You Need to Know

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On Monday, December 3, 2018, the U.S. Citizenship and Immigration Services (USCIS) published in the federal register a proposed new rule that would significantly alter the H-1B cap filing process. The proposed rule (1) introduces a mandatory electronic pre-registration system for H-1B Cap petitions; (2) changes the cap lottery process; (3) alters the filing periods for H-1B cap petitions; and (4) revises the random selection process to increase the number of selected petitions for foreign nationals who have earned an advanced degree or higher from U.S. institution. The public has 30 days (January 2, 2019) to submit comments to USCIS.

How Will the Mandatory Pre-registration Work?

The proposed rule would create a mandatory pre-registration system requiring employers who intend to file H-1B cap petitions to submit an online registration for each intended H-1B petition. USCIS will designate a registration period, which will begin at least 30 calendar days before the usual opening day of H-1B cap filing season on the first business day of April and will provide a registration period of at least 14 calendar days. During this registration period, employers would file a short online form that provides basic information about the employer (employer's name, address and FEIN Employer Identification Number), information about the offered position, and information about the prospective H-1B worker (name, date of birth, country of birth and citizenship, gender, passport number, and highest level of academic qualifications). Employers would be prohibited from submitting duplicate submissions. As written, the proposed rule appears to have no initial fee associated with the mandatory registration process.

If more petitions are registered than available H-1B visas, USCIS would conduct a lottery and select enough registrations to meet the H-1B cap numbers. If the number of registrations received during the initial registration period is fewer than the number of petitions needed to meet the regular cap (65,000), the registration period would remain open and all registrations received during that initial period would be selected.

Filing the Actual H-1B Petition

Under the proposed rule, if an employer's registration is selected, USCIS would notify the employer of each selected registration. That notification would advise the employer of the assigned 60-day filing window for that particular petition. USCIS appears to anticipate that it could have multiple, staggered filing periods so that not all petitions are not submitted within the same time frame, thereby reducing the administrative burden on USCIS. USCIS indicates that it will closely monitor data on electronic registrations versus the filed petitions, and employers may be subject to investigation for abuse of the registration system if USCIS discerns a pattern of failing to submit petitions for selected registrations.

Change in Lottery Selection Process to Benefit Advanced Degree Petitions

USCIS also proposes a change to the cap lottery selection process. The proposed rule would reverse the order in which cap petitions are selected. The current selection process first determines if there is a sufficient number of petitions to reach the 20,000 advanced-degree exemption and then conducts a random lottery of those petitions. After that, those advanced-degree petitions not selected in the initial advanced-degree lottery are added to the second selection process for the regular cap of 65,000 petitions. The proposed rule reverses the lottery order so that USCIS would first conduct the regular cap lottery against all registered petitions, including advanced degree petitions. After that first lottery is completed, USCIS would then run the advanced-degree petition lottery among any remaining advanced-degree petitions that are not selected under the regular lottery. The net effect of this change would be to increase the number

of advanced degree petitions selected in the cap lottery process.

Will This Be Ready for FY 2020 Cap Season?

The Proposed Rule was published on December 3, 2018, and with a 30-day comment period running through January 2, 2019, we may not see the implementation of the mandatory registration for the upcoming fiscal year. Once the comment period closes, USCIS must review and respond to those comments and obtain from the Office of Management and Budget (OMB) approval of a final regulation before it can implement any changes to the H-1B cap process.

Therefore, it is unclear if USCIS will have enough time to implement this rule prior to the opening of H-1B cap season on April 1, 2019. We know that USCIS is working on technology to launch the electronic registration system. However, in the proposed rule itself, there is a provision that enables USCIS to temporarily delay or even suspend the registration process during any fiscal year in which USCIS may experience technical challenges with the H-1B registration process and/or the new electronic system. This temporary suspension provision would also permit USCIS to up-front delay the implementation of the H-1B registration process past this fiscal year cap season, if necessary, to complete testing and vetting of the new H-1B registration system.

We will continue to monitor the progress of the proposed rule and report accordingly.

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