

How Does the New H-1B Cap Rule Impact This Year's Filings?

Written by Kevin J. Fitzgerald, Punam Singh Rogers

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As U.S. employers begin to prepare for the upcoming H-1B cap season, U.S. Citizenship and Immigration Service (USCIS) has published a new rule in connection with this year's H-1B cap filings. Here's what you need to know.

What is the New H-1B Rule?

We reported earlier that USCIS published proposed regulations introducing a mandatory online pre-registration for employers seeking to file a H-1B petition under the annual cap and changes to the H-1B cap lottery selection process, which would reverse the order of the regular and advanced-degree lotteries to take place.

On January 11, 2019, the proposed rule moved to the next stage of the regulatory process, and the final version was sent to the Office of Management and Budget (OMB) for review. On January 31, 2019, the Department of Homeland Security (DHS) posted the final rule amending regulations in connection with H-1B cap petitions. The final rule will go into effect on April 1, 2019. The significant takeaways are:

- Almost all of the procedural changes are deferred until 2020.
- The process for filing an H-1B cap case will remain the same this year. All such petitions must be filed in the first five business days of April so, if you have H-1B cap petitions to file, we need to get started on them soon.
- USCIS has reversed the order in which it will conduct the two H-1B cap lotteries. The purpose of this change is to increase the number of advanced-degree cap petitions selected in the two lotteries (USCIS projects approximately a 15% increase), consistent with the Administration's stated goal of favoring the best and the brightest.

The new lottery selection process will allow USCIS to select first, the 65,000 regular cap petitions. Those advanced degree petitions that are not selected, will then be added to the advanced degree cap subject cases, and then generate the second lottery selection process for the remaining 20,000 visa numbers.

What is an H-1B?

By way of background, the H-1B program allows U.S. companies to temporarily employ foreign workers in professional occupations typically requiring a minimum of bachelor's degree or higher or its equivalent. Congress has a mandated cap of 65,000 H-1B visas (commonly known as the "regular cap") and an additional 20,000 H-1B visas for beneficiaries who have earned a U.S. master's degree or higher (commonly known as the "advanced degree cap"). For nearly a decade, USCIS has received more H-1B petitions than it can accept for processing, which results in a computer generated random selection process (the "H-1B Lottery").

How to Plan for This Year's H-1B Cap?

It is expected that once again there will be a continued high volume of H-1B petitions filed like years past where the number filed in the first week will exceed the annual cap triggering the computer generated H-1B lottery. Therefore, it is imperative to plan ahead so you can get your petitions filed accurately and timely. In order to prepare for this year's H-1B Cap season, we recommend the following:

- Identify H-1B Candidates (typically, they may be employees working in F-1/OPT EAD (STEM or non-STEM) status; or professional

H-4 EAD workers; TN NAFTA workers or E-3 Australian Nationals worker who may want to pursue permanent residence; or L-1B professional level specialized knowledge employees, or others.)

- Review and finalize job offers, descriptions and salaries. It is important to make sure that job descriptions are detailed and show a direct connection between the candidate's bachelor's degree (or higher degree) field is related to the offered job duties. In addition, if you can avoid paying a level 1 prevailing wage, we certainly recommend this.
- Gather the relevant documents needed to prepare the H-1B petition.

It is important to note, that universities and colleges, nonprofit research organizations, and other related entities are exempt from the H-1B cap as is H-1B extension petitions and H-1B change of employer petitions for foreign nationals who have already been counted against the cap. For these filings, the April 1, 2019 filing window does not apply.

If you would like to discuss whether the H-1B visa or other visa option is appropriate for a particular employee, please contact our office.

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