

# Mobility: immigration alert

December 2018

## United States

### USCIS proposes Electronic H-1B Registration Rule

#### Executive summary

On December 3, 2018, the U.S. Citizenship and Immigration Services (USCIS) proposed a rule that would change the current H-1B cap process. The proposed rule would require petitioners (employers) to electronically register with USCIS during a designated registration period. Of registrations timely received, USCIS would then select a sufficient number to meet H-1B allocations. Only if selected, would a petitioner then file a complete H-1B petition in support of a specific beneficiary.

The proposed rule would also change the order by which USCIS selects H-1B petitions. Under the current rule, USCIS would first select 20,000 advanced degree exemption registrations and then select 65,000 petitions from the remaining filings, including those unselected from the advanced degree exemption. Under the proposed rule, USCIS places all registrations filed under the H-1B regular cap and advanced degree exemption together for selection. First, 65,000 registrations are selected under the regular cap and then an additional 20,000 advanced degree exemption registrations are selected. The stated rationale is that this new structure would likely increase selection toward beneficiaries with a master's degree or higher from U.S. post-secondary institutions. Such a rationale aligns with the *Buy American and Hire American Executive Order* which directed reforms to "ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries." USCIS estimates this process would increase the number of selected H-1B beneficiaries with a U.S. master's degree or higher by up to 16%.

Pre-registration of H-1B petition filings under the annual cap could save employers significant resources. That is, they would not need to prepare complete petitions for individuals who, under the current system, could be rejected from the lottery selection process. USCIS estimates that this measure could save employers between \$47.3 million and \$75.5 million in fees associated with the preparation of filings that are later rejected in the cap.

Under the new proposed rule, instead of filing full paper-based petitions:

1. Employers would file electronic registration forms for beneficiaries they wish to enter into the H-1B cap.
2. After the registration period closes, USCIS would randomly select registrations from the entire registration pool. This would include those with a U.S. master's degree or higher to fulfill the 65,000 quota for the regular H-1B cap.
3. USCIS will then randomly select the 20,000 H-1B advanced degree exemption registrations who were not selected for the regular H-1B cap.
4. Those selected under the new process would be notified and employers would be required to file full H-1B petitions on their behalf within at least 60 days.

The proposed regulation was published in the Federal Register on December 3, 2018 for a 30-day public comment period. USCIS must respond to submitted comments as part of issuing a final regulation. If finalized, USCIS plans to implement this new registration system for the upcoming fiscal year 2020 cap. In other words, this would apply to those filing in April 2019 and wishing to commence H-1B status as of October 1, 2019.

#### Summary points

- ▶ USCIS intends to create an online electronic H-1B cap registration process that will commence annually at least 14 calendar days prior to the opening of cap season (i.e., at least 14 calendar days prior to the first business day of April).



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- ▶ Instead of being required to file complete paper-based petitions prior to selection, an employer must first register electronically with USCIS on behalf of beneficiaries it intends to file for under the H-1B cap.
- ▶ USCIS will also change the order of H-1B cap selections to first fulfill the quota for H-1B regular cap with all registrations followed by the selection to fulfill the quota for H-1B advanced degree exemptions for eligible unselected registrations.
- ▶ USCIS estimates this process could increase the number of selected H-1B beneficiaries with a U.S. master's degree or higher by up to 16%.
- ▶ Employers of selected beneficiaries will be notified and required to submit complete paper-based H-1B cap-subject petitions within a designated filing period of at least 60 days.
- ▶ This process may result in significant savings for employers by not having to prepare petitions for beneficiaries whose H-1B application is rejected under the existing lottery process. USCIS estimates that this process could save employers between \$47.3 million to \$75.5 million from not having to prepare such petitions.
- ▶ Employers will not be allowed to substitute another beneficiary in place of a selected registrant.

### Impact and next steps

The proposed rule, if implemented, will eliminate the need to prepare and submit paper-based petitions for unselected cases. The petitioner will only need to file the complete H-1B cap petition if a registration is selected in either process. By switching the order of the selection process, the proposed rule will likely increase the number of beneficiaries selected with a US master's degree or higher.

Although intended to go into effect in 2019, it remains unclear whether a version of a final rule will give employers sufficient time to benefit from the new proposal for the new fiscal year starting October 1, 2019. It is also unclear whether the proposed rule will be implemented as currently drafted.

Petitioners should continue their H-1B planning and preparation as usual, including identifying potential beneficiaries, and be ready to shift to an electronic registration process if a final rule is implemented prior to March 2019 and the electronic registration system goes live.

### How we can help

EY Law will continue to monitor the comment and rulemaking process and update you with any developments. We will also assist you on an individual basis to best plan for the electronic registration and H-1B filing process. We encourage you to contact one of our US immigration professionals to discuss these proposed provisions.

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EYG No. 05272-181US

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