

CLIENT ALERT

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IMMIGRATION

JANUARY 2 MARKS THE COMMENT DEADLINE ON THE USCIS PROPOSED CHANGES TO THE H-1B VISA LOTTERY PROCESS - NOW WHAT?

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[January 2](#) marked the end of the public comment period on the notice of proposed rulemaking (NPRM) published on December 3, 2018 by the Department of Homeland Security (DHS) regarding a radical change in the annual H-1B petition filing process. The main changes outlined in the proposal would:

1. Require employers filing H-1B cap-subject petitions to register electronically with the U.S. Citizenship and Immigration Services (USCIS) first during a designated registration period. (Normally, H-1B cap subject petitions are first filed on or about April 1 and have been subject to a [lottery](#) due to high demand above the H-1B numeric cap limits.)
2. Reverse the order applied by USCIS to select cap-subject H-1B petitions, which is expected to benefit applicants with a U.S. master's degree or higher.

So will the new process be implemented in 2019 for the fiscal year 2020 H-1Bs?

USCIS has indicated that there is insufficient time to apply the new system in 2019 and that it could suspend the implementation of the new registration system and accept complete H-1B petitions with support documents as in prior years. Please note that USCIS now publishes [checklists](#) of required documents post its announced guidance on when to deny petitions versus issue requests for evidence (RFE), which has increased concerns as to potential petition [denials](#). According to a recent report published by the National Foundation for American Policy (NFAP), the number of H-1B denials increased 41% from the third to the fourth quarter of fiscal year 2017.

It is important to remember that USCIS must have time to review the public's comments submitted and any final version of the regulation must respond to concerns raised by the public. Perhaps the most compelling reason that the rule will not be finalized by April 1, 2019 is that before a final rule can be published, it must be reviewed by the Office of Management and Budget (OMB). Once the rule is finalized, the government must publish a date for the rule to go into effect.

If the new process of registration is not implemented, are there still possible changes to H-1B adjudications based on the NPRM, if the regulatory process is completed?

Apparently, yes. Even if USCIS delays the implementation of the new registration process, the agency could still apply the new advanced degree selection process.

Currently, when the H-1B cap and the advanced degree exemptions are both reached, the advanced degree exemption beneficiaries are

selected before the H-1B regular cap beneficiaries are selected. The proposed rule would reverse the selection order and count all applicants towards the number projected to reach the regular H-1B cap first. Once a sufficient number of applicants are chosen for the regular H-1B cap, USCIS would then select applicants towards the advanced degree exemption. USCIS's rationale for the change is that it will result in an increased number of beneficiaries selected with U.S. master's degrees or higher from a U.S. institution of higher education by up to 16%.

How would the electronic regulation process work in theory?

A. Pre-register - U.S. employers who seek to file H-1B cap-subject petitions would be required to pre-register electronically with USCIS during a designated registration period and be approved to participate. The electronic registration period would begin at least 14 calendar days before April 1 (e.g., March 18, 2019) and remain open for at least 14 calendar days. **USCIS proposed to give U.S. employers at least 30 calendar days' notice of the registration period on its website (e.g., March 2).** The registration process would require basic information regarding the employer and the beneficiary, including:

- The employer's name, identification number (EIN), and address;
- The employer's authorized representative's name, job title, and contact information;
- The beneficiary's name, date of birth, country of birth, country of citizenship, gender, and passport number, as well as whether the beneficiary has obtained a master's or higher degree from a U.S. institution of higher education;
- The employer's attorney or accredited representative, if applicable; and
- Any additional basic information requested by the registration system or USCIS.

A number of attestations would be required including that employers must attest that they intend to file an H-1B petition for the beneficiary in the position for which the registration is submitted. In addition, U.S. employers must file a separate registration for each beneficiary and would be limited to one registration per beneficiary for the same fiscal year. USCIS did not propose to charge a fee for electronic registration in the NPRM.

B. Selection for Filing - USCIS would conduct the annual H-1B lottery from a pool of timely-filed electronic registrants. U.S. employers whose pre-registration applications are selected would then be notified that they are eligible to file an H-1B petition within a designated filing period.

C. Filing - The duration of the filing period for selected registrants **would be at least 60 days**. According to the NPRM, a registered employer would have to wait until they have been notified of selection before submitting H-1B petitions on behalf of a named beneficiary. USCIS would reserve some unselected H-1B registrations so that additional cases could be filed, if the required quota is not reached. USCIS could also **reopen** the registration period, if the annual quota was not reached.

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Did USCIS expect litigation?

Short answer, yes. It was also clear in the NPRM that USCIS expected litigation regarding the changes proposed. As part of its proposed rulemaking, USCIS included a “severability clause.” The severability clause would permit DHS to continue to implement either program: the electronic registration system **or** the new selection process by which the agency would select H-1B petitions, if one or the other process was subject to court injunction.

What to do now?

Employers and their legal counsels are left with preparing to file H-1B petitions as they have in the past due to the paucity of notice time from USCIS and be ready to react to a possible new registration requirement quickly. In addition, they must prepare for the reality of a reduced percentage of potential selection for those potential employees without a U.S. master’s degree or above as outlined in this article as well as a potential increase in denials due to insufficient supporting documents.

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