

PROPOSED CHANGES TO H-1B CAP PROCESS

The Department of Homeland Security ("DHS") recently announced a notice of proposed rulemaking that would require employers seeking to file cap-subject H-1B petitions to first electronically register with U.S. Citizenship and Immigration Services ("USCIS"). The proposed rule would also reverse the order that USCIS selects H-1B petitions under the H-1B cap and the advanced degree exemption. This change is intended to increase the number of selected beneficiaries with a master's degree or higher and move towards a selection of beneficiaries that is more merit based in the eyes of USCIS.

OVERVIEW

On April 18, 2017, President Trump signed the Buy American and Hire American Executive Order, which told DHS to "propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of U.S. workers in the administration of our immigration system." The Executive Order mentioned the H-1B program and instructed agencies to "suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries."

The current H-1B program allows companies in the United States to temporarily employ foreign workers in specialty occupations that require a bachelor's or higher degree in the specific specialty. Each year during H-1B cap selection, when USCIS receives more than enough petitions to reach H-1B cap, a random lottery is used to select the petitions that are counted towards the H-1B cap.

1. Electronic Registration

The proposed rule would require petitioners seeking to file cap-subject H-1B petitions to first electronically register and includes a provision that would enable USCIS to temporarily 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.

2. Cap Selection

In the current system, when the H-1B cap and the advanced degree exemption are both reached within the first five days that H-1B cap petitions may be filed, the advanced degree exemption petitions are selected prior to the regular H-1B cap petitions. The proposed rule would reverse the selection order and count all registrations or petitions towards the number needed to reach the H-1B cap first. USCIS notes that this proposed change would likely increase the chances that beneficiaries with a master's or higher degree from a U.S. institution of higher education would be selected under the H-1B cap.

PRACTICAL TAKEAWAYS

USCIS has determined that shifting to electronic registration would reduce overall costs for petitioners and create a more efficient and cost-effective H-1B cap petition process for USCIS. However, this proposed rule only applies to cap-subject petitions, so cap-exempt petitions would likely continue to be filed via mail for the time being.

The proposed temporary suspension provision would allow USCIS to delay the implementation of the electronic H-1B registration process past the fiscal year 2020 cap season if necessary to complete all required testing. If there is not sufficient time to implement the process after the rule is passed, USCIS would likely push the start date to the next fiscal year.

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