

Getting Ready for the FY 2025 H-1B Season and Upcoming Changes to the H-1B Program

It is time for employers to begin evaluating their H-1B needs for fiscal year FY 2025. The US Citizenship and Immigration Services (USCIS) is expected to release dates for the H-1B cap registration processes this month and we expect that like in previous years registration will open at the beginning of March. It is important to prepare well in advance to improve chances of selection and avoid errors or last-minute glitches especially since the past three years the USCIS has received registrations way beyond the 85,000 cap. In fact, the USCIS received more than 780,000 total H-1B registrations during the FY 2024 registration period.

To prepare for registration employers should review the immigration status of their current employees and potential requirements for foreign national employees and identify individuals they would like to sponsor for an H-1B visa or H-1B status.

These individuals could include:

- Recent college and university graduates employed in F-1 optional training status;
- Candidates abroad who are subject to the annual H-1B cap;
- Candidates in another nonimmigrant status (e.g. L-1B) who are approaching the maximum limits of their status and would benefit from a change of status to H-1B;
- Candidates currently employed pursuant to an H-4 employment authorization document (EAD) who wish to become independent of their spouse's H-1B status or who are concerned about continuity of the H-4 EAD program;
- Candidates in another nonimmigrant status who work for a different employer and would require an H-1B visa to change jobs;
- Candidates in TN, E, or H-1B1 status for whom an employer is considering pursuing permanent residence.

There is a congressionally mandated quota of 65,000 cap-subject H-1B visas per fiscal year. By law, 6,800 of those visas are allocated as H-1B1 visas to nationals of Chile and Singapore. An additional 20,000 H-1B visas are available for foreign nationals who hold a master's or other advanced degree from a U.S. institution of higher education.

This quota or cap does not apply to (i) foreign nationals who have been previously counted against the H-1B cap in the last six years; and (ii) foreign nationals employed by institutions of higher education, nonprofit research organizations, or governmental research organizations.

The Registration Process

In 2020, the USCIS introduced a two-step process for H-1B cap-subject petitions, beginning with electronic preregistration. Petitioners must first electronically register each potential H-1B candidate, on the USCIS portal, during a stipulated period and pay a \$10 nonrefundable fee for each H-1B registration. At the time of registration, petitioners are required to provide (1) the name of the employer, its Employer Identification Number (EIN) and mailing address, (2) details and contact information about the employer's authorized representative, (3) each beneficiary's full name, date and country of birth, country of citizenship, gender and passport number, (4)

information about a master's or higher degree from a U.S. institution of higher education; and if applicable (5) the name of the employer's attorney or accredited representative.

The registration period is expected to begin early in March and last for 14 to 21 days.

The H-1B Lottery

Once the registration period ends, if the USCIS has received more than enough registrations to reach the cap, it will randomly select registrants to identify the potential 85,000 eligible candidates for whom employers can file H-1B petitions.

Upon completion of the random selection process, the USCIS will individually notify all employers and they will be able to file H-1B petitions for only those beneficiaries that were selected in the lottery.

The unselected registrations will remain as "submitted" in the system for the applicable fiscal year. If the USCIS does not receive enough H-1B cap petitions to meet the quota during the initial filing period, it will conduct a second lottery and it will inform employers about additional selections. In 2023, the USCIS conducted a second lottery in July.

Potential Changes to the Registration and Lottery Process

On October 23, 2023, the USCIS, published a notice of proposed rulemaking (NPRM) with a view to "strengthening integrity" in the H-1B registration process. The NPRM was open for public comment through December 22, 2023, and the USCIS is likely to adopt a new "beneficiary-centric selection" under the revised regulations and will take effect for the FY 2025 H-1B registrations.

The proposed changes are expected to reduce "fraud and abuse" and ensure that each beneficiary has an equal chance of selection. In previous years, beneficiaries who had multiple registrations from different employers had an increased chance of selection. The proposed new selection process will be based on each unique beneficiary identified in the entire registration pool as opposed to each registration. As a result, each beneficiary will be entered in the selection process once, even if multiple employers have separate registrations for an employee.

The proposed regulations also prohibit multiple registrations submitted by related entities. This is a change from the current rules, where one entity can register a beneficiary only once but there is no bar on multiple registrations by related entities for the same employee.

Filing Period

Petitioners may file petitions only on behalf of H-1B beneficiaries whose registrations were selected. The USCIS is expected to announce a filing window of up to 90 days beginning around April 1, 2024 during which period petitioners may file petitions on behalf of selected registrants.

If there is a second or even a third lottery, the USCIS will provide additional windows of time within which the newly selected petitions must be filed.

Upcoming Changes to the H-1B Criteria

Late in 2023, the US Department of Homeland Security (DHS) released a notice of proposed rulemaking (NPRM) with an aim to improve the H-1B program. The NPRM seeks to streamline eligibility requirements, enhance program efficiency, provide greater benefits and flexibilities for

employers and workers, and strengthen integrity measures. The public comment period ended on December 22, 2023 and once finalized the regulations are expected to take effect within the first six months of 2024.

The proposed rule if implemented will amend certain areas of the H-1B regulations as well as clarify and codify existing rules that are currently established through case law and the USCIS policy guidance. Some of the key changes as described below will be:

Specialty Occupation Position and Its Criteria

Modify the regulatory definition of a "specialty occupation" to emphasize that a position may accept a range of degrees, provided there is a direct correlation between the required degree field(s) and the job responsibilities.

Amend the criteria for a "specialty occupation" to clarify that an employer "normally" requiring a bachelor's degree does not imply an employer "always" must mandate a bachelor's degree within the specialty occupation criteria.

Amendment Petitions

Provide clarity regarding the policy that any change of work location necessitating a new labor condition application (LCA) is considered a significant change. This change mandates the employer to file an amended or new petition with the USCIS before the H-1B worker can engage in work at the new location.

Deference Policy

Formalize and elucidate the existing deference policy, which guides officers to consider prior determinations involving the same parties and facts when there is no material error, no substantial change in circumstances, or no new material information affecting the petitioner's, applicant's, or beneficiary's eligibility.

Itinerary Requirement

Eliminate the requirement for itineraries in H petitions that necessitate services or training in multiple locations.

Validity Expires Before Adjudication

Allow H-1B petitions to be approved or have their requested validity periods extended if the USCIS deems the petition approvable through a favorable motion to reopen, motion to reconsider, or appeal.

H-1B Cap Exemptions

Broaden the definition of 'nonprofit research organization' and 'governmental research organization' to include nonprofit entities or governmental research organizations that primarily conduct research, even if research is not their primary mission.

Clarification on H-1B Beneficiary Eligibility

Clarify that H-1B beneficiaries who are not directly employed by a qualifying cap-exempt institution, organization, or entity and who spend at least half of their work time performing job

duties for a cap-exempt entity may still be eligible for cap exemption. Emphasize that the work duties do not need to be physically performed onsite at the qualifying institution.

Automatic Extension of Authorized Employment Under Cap Gap

Extend the duration of status and post-completion optional practical training (OPT) or 24-month extension of post-completion OPT, if applicable, until April 1 of the relevant fiscal year for which the H-1B petition is requested. This change aims to provide flexibility and continuity for U.S. employers employing F-1 students while an H-1B cap-subject petition is pending.

Start Date Flexibility for Certain H-1B Cap-Subject Petitions

Clarify the existing policy that allows H-1B cap-subject petitions to have a start date of October 1 or later if it does not exceed six months beyond the petition filing date, even during the initial registration period.

Establishing a Bona Fide Job Offer for a Specialty Occupation Position

Codify the USCIS's authority to request contracts, work orders, or similar evidence to establish a bona fide job offer for the beneficiary to work within the United States.

Nonspeculative Employment

Codify the requirement that a petitioner must demonstrate, at the time of filing, a nonspeculative position in a specialty occupation available for the beneficiary as of the requested validity period start date.

LCA Correspondence with the Petition

Update regulations to explicitly include DHS's authority to ensure that the Labor Condition Application (LCA) aligns with and supports the accompanying H-1B petition.

Revising the Definition of 'US Employer'

Replace the requirement that the petitioner "[e]ngages a person to work within the United States" with the requirement that the petitioner has a legal presence and is amenable to service of process in the United States.

Employer-Employee Relationship

Remove the employer-employee requirement from the definition of an H-1B employer to eliminate barriers for beneficiary-owned petitioners.

Bona Fide Job Offer

Codify the requirement that the petitioner has a bona fide job offer for the beneficiary to work within the United States. Clarify that this offer may include telework, remote work, or other off-site work within the United States.

Legal Presence and Amenable to Service of Process

Introduce a new requirement that the petitioner has a legal presence in the United States and can be served legal documents within the United States. Legal presence implies that the petitioner is legally established and authorized to conduct business in the United States.

Beneficiary-Owners

Codify a petitioner's ability to qualify as a U.S. employer even when the beneficiary holds a controlling interest in that petitioner.

Site Visits

Codify DHS's authority to conduct site visits and clarify the scope of inspections and the consequences if a petitioner or third party refuses or fails to cooperate with these inspections.

Third-Party Placement

Codify that when an H-1B worker provides services for a third party, the USCIS would assess whether the proffered position qualifies as a specialty occupation based on the third party's requirements for the beneficiary's position, rather than the petitioner's stated requirements.

These proposed revisions aim to streamline and clarify H-1B visa regulations while addressing various aspects of the program to adapt to changing employment dynamics and market demands.