

DHS Proposes Changes to the H-1B Visa Lottery Process.

David Nachman, Esq., Managing Attorney at NPZ Law Group, says “for the new year there are some really big changes “on the cusp” for the [H-1B Visa Lottery program](#)”. The US and Canada Immigration and Nationality Lawyers at the Nachman Phulwani Zimovcak (NPZ) Law Group continue to closely monitor the changes.

On November 30, 2018, the Department of Homeland Security (DHS) announced a notice of proposed rulemaking that would require petitioners seeking to file H-1B cap-subject petitions to register electronically with the U.S. Citizenship and Immigration Services (USCIS) during a designated registration period. Under the proposed rule, USCIS would also reverse the order by which the agency selects H-1B petitions under the H-1B cap and the advanced degree exemption. The proposed regulation was published in the Federal Register on Monday, December 3, 2018. USCIS will accept public feedback on the proposed regulation until January 2, 2019.

Electronic Registration Process

Under the proposed regulation, petitioners seeking to file H-1B cap-subject petitions would be required to register electronically with USCIS during a designated registration period. The electronic registration period would begin at least 14 calendar days before the first date the H-1B filing window opens each fiscal year, commonly April 1, and would remain open for at least 14 calendar days. USCIS would give at least 30 calendar days' notice of the registration period on the USCIS website.

USCIS would then conduct the annual H-1B lottery from the pool of timely-filed electronic registrants. The rule proposes that petitioners whose petitions are selected will be notified that they are eligible to file an H-1B petition within a designated filing period. The duration of the filing period for registrants who are selected would be at least 60 days. According to the proposal, a registrant therefore could wait until they have been notified of selection before submitting the corresponding H-1B petition on behalf of the beneficiary named in the selected registration. USCIS would hold some unselected H-1B registrations in reserve so that additional cases could be filed if the quota is not reached due to petition rejections, denials or withdrawals, or if an employer does not file an H-1B petition on behalf of selected beneficiary. USCIS could reopen registrations if more cases are needed to fulfill the annual quota.

The registration process would require basic information from both the employer and the beneficiary, including:

1. the employer's name, identification number (EIN), and address;
2. the employer's authorized representative's name, job title, and contact information;
3. 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;
4. the employer's attorney or accredited representative, if applicable; and
 5. any additional basic information requested by the registration system or USCIS.

Employers would also be required to attest that they intend to file an H-1B petition for the beneficiary in the position for which the registration is filed, among other attestations.

Petitioners would need to file a separate registration for each beneficiary and would be limited to one registration per beneficiary for the same fiscal year. USCIS is not proposing to charge a fee for electronic registration at this time.

Allocation of H-1B Cap Numbers

The second major change proposed by DHS is to reverse the order by which the agency selects H-1B petitions under the H-1B cap and the advanced degree exemption. Currently, in years when the H-1B cap and the advanced degree exemption are both reached within the first five days in which H-1B cap petitions may be filed, the advanced degree exemption beneficiaries are selected before the H-1B cap beneficiaries.

The proposed rule would reverse the selection order and count all applicants towards the number projected as needed to reach the regular H-1B cap first. Once a sufficient number of applicants have been selected for the H-1B cap, USCIS would then select applicants towards the advanced degree exemption. USCIS projects that this change in the process would result in a 16% increase in the number of selected beneficiaries with a master's degree or higher from a U.S. institution of higher education.

The proposed rule contains a severability clause which provides that DHS could continue to implement either the electronic registration system or the allocation process by which the agency would select H-1B petitions under the H-1B cap and the advanced degree exemption independently in the event it cannot implement the both together, for example, if one of the processes is enjoined or invalidated by a court.

Timeline for Finalizing the Regulation

USCIS has indicated it would like to finalize and implement the regulation and the electronic registration system in time for the opening of the upcoming Fiscal Year (FY) 2020 H-1B cap filing season on April 1, 2019. However, the likelihood that USCIS will finalize both by April 1, 2019 is slim, given the tight timeframe by which the agency must complete the regulatory process.

The 30-day notice and comment period opened on December 3, and will remain open until January 2, 2019. USCIS must then review the comments and any final version of the regulation must address concerns raised by the public. Before a final rule can be published, it would first be reviewed by the

Office of Management and Budget (OMB). Once the rule is finalized, the government would identify a date for the rule to go into effect.

In the notice of proposed rulemaking, USCIS acknowledges that it might not be possible to implement the electronic registration process in time for FY2020 H-1B cap filing season, particularly if additional user testing and vetting of the new system is required. Thus, if the rule is finalized as proposed, but there is insufficient time to implement the registration system in time for the FY2020 cap selection process, USCIS would accept complete H-1B petitions with supporting documents as it has historically done in the past.

Clients should be aware of the uncertainty of the timing in which the agency could finalize and implement the proposed regulation, and plan to prepare H-1B cap subject petitions for FY2020 as they have in the past.

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