

WHAT EMPLOYERS SHOULD KNOW ABOUT PROPOSED CHANGES TO THE H-1B VISA LOTTERY

On December 3, 2018, U.S. Citizenship and Immigration Services (USCIS) published a Notice of Proposed Rulemaking (NPRM) in the Federal Register entitled “Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens.” The agency will accept comments on the proposal until January 2, 2019.

The proposal makes significant reforms to the H-1B lottery process. First, the proposal switches the order in which USCIS will conduct the lottery for the “regular cap” and “advanced degree cap” to increase the likelihood of selecting individuals with advanced degrees from U.S. universities. It is expected that the agency will implement this change by the next H-1B filing season in April 2019.

Second, the proposal imposes a new, mandatory electronic registration requirement on employers seeking to sponsor employees for H-1B visas under the annual cap. Under the new system, USCIS would randomly select enough registrations to meet the caps. Employers would then have 60 days to file an H-1B petition on behalf of each selected beneficiary. There is widespread concern that the government will not be ready to implement a new electronic system before April 1st, 2019. Additionally, there are important questions about how changes to the lottery process will drive H-1B sponsorship going forward and whether current long-term users of the visa program, including major U.S. tech companies, will see a reduction in the number of H-1B visas that they obtain each year.

FLIPPING THE “REGULAR” AND U.S. ADVANCED DEGREE LOTTERIES

The proposed rule would reverse the order in which H-1B cap beneficiaries are selected for adjudication. Under the current process, USCIS first determines if there are sufficient number of petitions to reach the 20,000 U.S. advanced-degree exemption and conducts a random lottery on that population first. Then USCIS adds unselected petitions from that group to the second pool and conducts a lottery for the regular cap of 65,000.

Under the proposed rule, USCIS would include all U.S. advanced degree holders in the lottery for the regular cap which would be conducted first, and then would conduct a second lottery if there are enough remaining advanced degree holders to meet the advanced-degree exemption. All advanced-degree registrations would count towards the regular cap first, even in years when a lottery is not required. This change is intended to increase the odds of selection for individuals who hold advanced degrees from U.S. universities.

The practical effect of this change is that a higher percentage of the 85,000 cap-subject H-1B visas issued each year will be awarded to advanced degree graduates of U.S. universities. In the proposal, USCIS states that this reformed H-1B selection process may be finalized independently of the H-1B registration process, suggesting a

high probability that this change will be applied to April 2019 cap filings regardless of whether the registration system is in place. Employers will not need to do anything differently with their H-1B cap filings.

ONLINE H-1B LOTTERY REGISTRATION PROCESS

How Online H-1B Lottery Registration Will Work

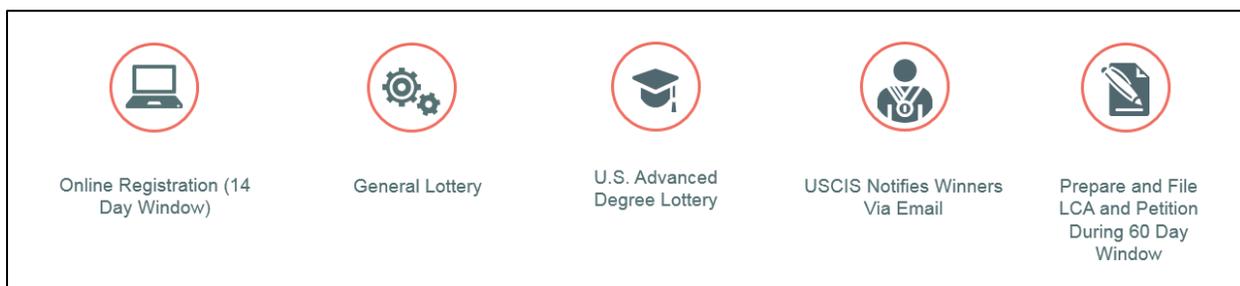
USCIS will create an electronic system through which an intending H-1B petitioner must submit a registration containing certain preliminary information about the company and beneficiary. USCIS will notify the public at least 30 days in advance through its website of the date the registration period will open. The registration period will open at least 14 days before H-1B petitions can be filed.

An employer will have 14 days to submit registrations through the electronic system for individuals they intend to sponsor. Employers will receive an electronic notification that USCIS has received the registration, which will include a unique identifying number for tracking and identification purposes. Registrations cannot be edited after they are submitted.

After the 14-day registration period, USCIS will conduct a lottery to select a sufficient number of registrations projected to reach each H-1B cap. USCIS will send a “selection notice” to each petitioner whose registration is selected that provides a period of time during which the H-1B petition for that beneficiary may be filed.

The H-1B filing period will be at least 60 days. The government intends to create multiple 60-day filing periods and will notify each petitioner of the window in which the company may file the H-1B petition. An H-1B petition can only be filed during the window specified in the selection notice.

There will be no filing fee for the electronic submission. An employer must file one single registration for each prospective H-1B beneficiary and an employer will not be allowed to substitute (i.e. switch) beneficiaries. If an employer violates that limitation, all registrations filed for that beneficiary will be considered invalid and rejected.



Information That Will Be Required

USCIS will specify what information is required when it announces the opening of the first registration period. The proposal states that requested information may include, but will not necessarily be limited to:

- The employer's name, employer identification number (EIN), and employer's mailing address;
- The employer's authorized representative's name, job title, and contact information (telephone number and email address);
- The beneficiary's full name, date of birth, country of birth, country of citizenship, gender, and passport number;
- If 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 (a Form G-28 should be also submitted electronically if this is applicable); and
- Any additional basic information requested by the registration system or USCIS.

Suspension of Online Registration System

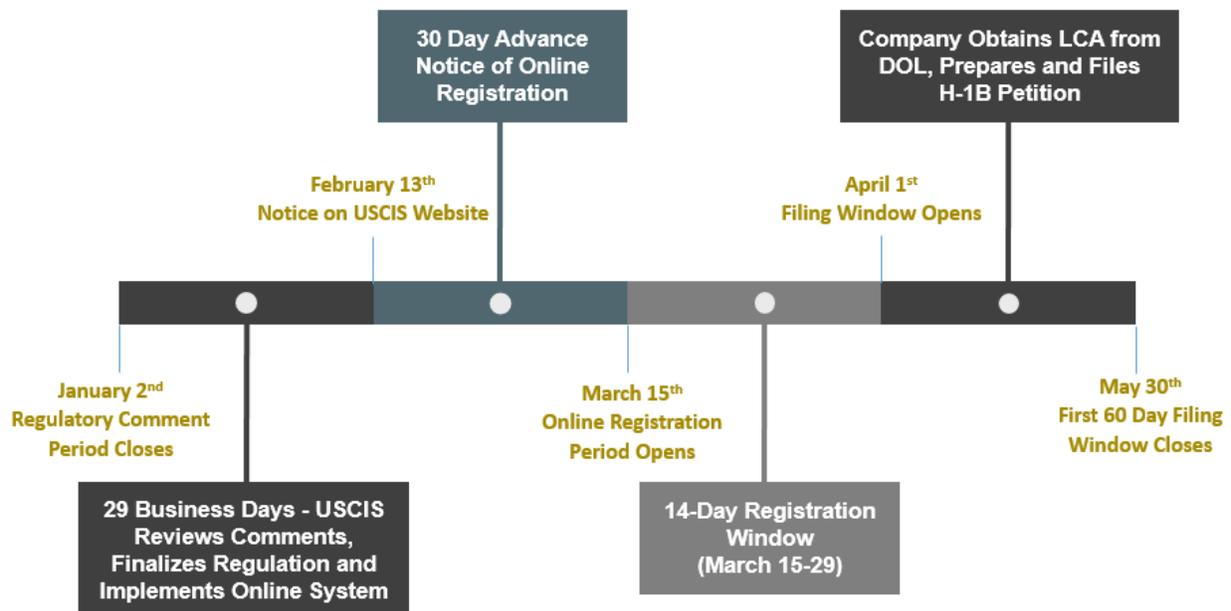
Under the proposed regulation, the agency may proceed with a final rule and then, at any time, suspend the online registration process by making an announcement on the USCIS website. In the event that the agency suspends the online registration system, employers would be required to revert back to the current H-1B process and would need to prepare and file paper H-1B petitions as they do today. The current regulatory timelines would remain in effect, meaning employers would be required to obtain certified Labor Condition Applications (LCAs) and file H-1B petitions during the first five (5) days of April.

Will USCIS flip the lottery process for April 2019 filings?

We think there is a strong likelihood that the government will finalize this policy change and apply it to April 2019 H-1B cap filings. The regulatory timeline is always uncertain.

Will USCIS be able to implement the online registration system before April 2019?

This is difficult to predict. On paper, the agency has enough time to implement the online registration system before April 1st, 2019. Below is an *approximate* timeline that shows how the agency could achieve its stated goal:



How should employers prepare for the April 2019 cap filing season?

Because of uncertainty surrounding the government’s ability to implement an online registration system by April 1st, 2019, U.S. employers are advised to approach the H-1B cap in the same manner as in prior years.

Is the online H-1B lottery registration proposal good or bad for my company?

In the upcoming weeks, companies and trade associations will need to consider the following questions and potential issues:

Technical problems with USCIS online registration system

After the Department of State transitioned the Diversity Visa lottery to an electronic lottery, the government experienced a technical failure and was forced to invalidate lottery results *after individuals had been notified* that they had won the lottery. More recently, the Department of Labor experienced widespread technical problems when it implemented the new Labor Condition Application. Has the government had sufficient time to test the new online registration system?

Unanticipated policy outcomes

How companies participate in the online registration system will shape public perception of and congressional support for the H-1B program. With IT consulting companies experiencing high H-1B denial rates, and no

financial cost to submit an online H-1B registration, those companies may submit more requests for H-1B status than in prior years to ensure their staffing goals are met. Is there a scenario where IT consulting companies increase their share of the 85,000 cap subject petitions as a way of offsetting high H-1B denial rates under the Trump administration?

Harm to small businesses

When the pre-registration regulation was first proposed in 2011, business associations including the U.S. Chamber of Commerce and the Small Business Administration (SBA) opposed the regulation on the grounds that small businesses would be harmed by the new lottery system. USCIS has not added any changes to the current proposal to address those concerns.

Delays in adjudication of H-1B petitions

USCIS still has not adjudicated thousands of H-1B petitions that were filed when cap season opened eight months ago. The proposed regulation would potentially delay H-1B filing for many companies whose registrations are selected by requiring them to file as late as August and September. As a practical matter, this means that many H-1B petitions may not be approved until June or July of 2020.

Uncertainty regarding process and timing

Under the proposed rule, USCIS could change the starting dates for the lottery registration, the length of the lottery registration period, information required in the registration, and the H-1B petition filing window through website updates with no opportunity for public notice or comment. Will there be a predictable process for companies going forward, or will the timelines and requirements change each year? Will companies still need to prepare paper filings for all intended beneficiaries just to be prepared for a potential suspension of the online registration system, negating any potential cost savings?

Potential for fraud and abuse in H-1B program

Will the final rule incorporate sufficient safeguards to protect foreign nationals, and the H-1B program, from abuse? Will unscrupulous employers require H-1B beneficiaries to pay for the opportunity to be included in the online registration?

The regulatory comment period closes on January 2nd, 2019. If you or company is interested in providing feedback on any of the above issues, either confidentially or on the record, please send an email to BALGov@balglobal.com.