



GMS Flash Alert

Immigration Edition

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United States - DHS Proposes Changes to H-1B Lottery Selection Process

The U.S. Department of Homeland Security (DHS) intends to release a new rule amending the process by which the U.S. Citizenship and Immigration Services (USCIS) selects H-1B cap-subject applications or registrations, replacing the computer-based random lottery selection process currently in place.¹ The proposed rule would prioritize allocation of H-1B cap visa numbers to applicants who have received salary offers meeting the top end of the U.S. Department of Labor's (DOL) four prevailing wage levels – essentially a ranking system.

The DHS aims to implement the new H-1B cap selection system for the Fiscal Year 2022 H-1B cap filing period, which is projected to begin in Spring 2021.

WHY THIS MATTERS

The new proposed regulation will have a major impact on the H-1B cap program and the selection opportunities for applicants at both ends of the wage level spectrum. Based on the new ranking system proposed, H-1B cap registrants earning salaries that meet the top end of the prevailing wage levels in their respective occupations and geographic areas of employment will have greater chances at receiving H-1B visas. On the other hand, H-1B registrants such as recent university graduates who are typically entry-level professionals earning salaries meeting the lower prevailing wage levels could have their chances of receiving H-1B visas significantly diminished under the new system.

As the proposed rule would favor H-1B applicants who earn higher salaries, employers may need to reassess the types of positions and applicants their company will put forth for H-1B cap registration based on the likelihood of selection. Employers may also consider increasing the salaries of their H-1B registrants in order to meet higher prevailing wage levels, with the objective of increasing their likelihood of H-1B selection under the new ranking system.

Background on the H-1B Cap Program and Lottery Selection

The H-1B program allows companies in the United States to temporarily employ foreign workers in specialty occupations requiring a bachelors degree or higher degree, or its equivalent. Annually, USCIS selects at least 65,000 H-1B visas under the H-1B regular cap and reserves another 20,000 visas for those holding advanced degrees from U.S. higher

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education institutions. When USCIS determines that it has received a sufficient number of H-1B petitions to reach the congressionally-mandated H-1B cap, a computer-generated random selection process, or lottery, is used to select the petitions that are counted towards the H-1B cap.

Looking to discontinue the computer-based lottery selection currently in place, if the rule comes into effect, it will aim to prioritize allocation of cap visa numbers to H-1B applicants offered wages meeting the higher prevailing wage levels. Under the revised system, the USCIS would rank and select the registrations received on the basis of the highest wage level met by the offered wage, beginning with wage level IV and proceeding in descending order with wage levels III, II, and I. If during the initial filing period USCIS were to receive an insufficient number of applications projected as needed to reach the H-1B numerical limit, the USCIS would select additional registrations, or reopen the registration process, as applicable until the agency receives the number of petitions projected as needed to reach the H-1B numerical cap.

KPMG LAW LLP NOTE

The new rule is expected to be published by the DHS for public feedback in the coming days with a 30-day public comment period. In similar fashion to the legal challenges mounted against the DHS and the DOL on the agencies' recent changes to the general H-1B program, the proposed new rule could also meet with opposition in the federal courts from employers across a wide spectrum of industries that believe the new ranking system would impede their organization's ability to retire and hire foreign talent. (For prior coverage on these recent court challenges see [GMS Flash Alert 2020-438](#), 22 October 2020.)

KPMG Law LLP in Canada will continue to monitor for updates to the H-1B program and cap-selection process, and will endeavor to keep *GMS Flash Alert* readers informed as developments occur.

FOOTNOTE:

1 For the text of the proposed rule, see: https://www.dhs.gov/sites/default/files/publications/20_1028_uscis_h-1b-registration-selection-by-wage-levels-nprm-508.pdf .

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