

GMS Flash Alert

Immigration Edition

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United States - DHS Publishes Final Rule Amending H-1B Lottery Selection Process

Further to our earlier report in [GMS Flash Alert](#), on January 8, 2021, the U.S. Department of Homeland Security (DHS) published the final 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.

The regulatory text is the same as the text in the Notice of Proposed Rulemaking published on November 2, 2020.¹ The final rule prioritizes 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 final rule is set to take effect 60 days from publication, namely on March 9, 2021, as the DHS aims to have the new rule in effect for the Fiscal Year 2022 H-1B cap filing period which is projected to begin in Spring 2021. As of the date of this *Flash Alert*, the USCIS has yet to announce the registration period for the FY2022 H-1B cap season.

WHY THIS MATTERS

The new H-1B cap selection system 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, 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 an H-1B visa. On the other hand, H-1B registrants such as recent university graduates including recent graduates from medical programs seeking residency positions, who typically earn entry-level salaries meeting the lower prevailing wage levels, could see their chances of receiving an H-1B visa significantly diminished under the new system.

As the final rule would favor H-1B applicants who earn higher salaries, employers may wish 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 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 bachelor's 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 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 process used since the H-1B visa program's inception, the final rule aims to prioritize allocation of cap visa numbers to H-1B applicants offered wages meeting the higher prevailing wage levels. Under the revised selection system, distribution would occur as follows:

- USCIS will 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.
- If the beneficiary will work in multiple locations, USCIS will rank the filing according to the lowest corresponding Occupational Employment Statistics (OES) wage level that the offered wage will equal or exceed.
- Where an offered wage is lower than the OES wage level I because an alternative wage survey is used, USCIS will rank the registration in the same category as OES wage level I.
- Where there is no available OES prevailing wage information for the offered position, USCIS will rank the filing based on the OES wage level that corresponds to the requirements of the position.

The DHS is currently revising its online H-1B cap registration form to request information on the OES wage level associated with the offered wage and position in preparation of this year's cap cycle. These changes will become effective upon implementation of the final rule.

KPMG LAW LLP NOTE

The final rule is set to take effect 60 days from publication. However, the implementation of the final rule may be delayed as the incoming Biden Administration reviews other rules finalized in the last days of the Trump Administration. Additionally, in similar fashion to the legal challenges mounted against the DHS and the DOL on the agency's recent changes to the general H-1B program, it is anticipated this new rule could 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 retain and/or hire foreign talent.

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 See: <https://public-inspection.federalregister.gov/2021-00183.pdf> .

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