



# GMS Flash Alert

Immigration Edition

2021-050 | February 8, 2021



## United States - DHS Delays Effective Date of H-1B Selection Final Rule

The U.S. Department of Homeland Security (DHS) has delayed, to December 31, 2021, the implementation of the recently-published regulation seeking to modify the H-1B lottery process for cap-subject H-1B petitioners, moving from the current random selection process to a salary-based selection process.<sup>1</sup> The 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.

As we anticipated in our earlier report in [GMS Flash Alert](#), on January 22, 2021, the DHS has delayed the implementation of the regulation seeking to modify the H-1B lottery process for cap-subject H-1B petitioners, moving from a random selection process to a salary-based selection process. The delay stems from the memorandum issued by the current administration, directing all federal agencies to freeze any rule that has not taken effect.<sup>2</sup>

The DHS had previously aimed 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. Due to the delay in the implementation of the new H-1B cap selection system, the existing system will remain in place for this year's cap season. On February 5, 2021, the USCIS updated its website announcing the initial registration period for FY 2022 H-1B cap will open at noon Eastern Time (ET) on March 9 and run through noon ET on March 25.<sup>3</sup>

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### WHY THIS MATTERS

As noted in our earlier report in [GMS Flash Alert](#), on January 12, 2021, the implementation of the new H-1B cap selection system would have had a major impact on the H-1B cap program and the selection opportunities for applicants at both ends of the wage-level spectrum.<sup>4</sup>

The ranking system would favor H-1B-cap registrants earning salaries that meet the top end of the prevailing wage in their respective occupations and geographic areas of employment, while H-1B registrants who are applying for entry-level positions – such as recent university graduates including recent graduates from medical programs seeking residency positions – would have their chance for being selected diminished.

The delay in implementation of the H-1B selection final rule is to provide USCIS more time to develop, test, train staff,

and implement the modifications to the H-1B registration system and selection process. The delay also provides employers and prospective employees time to adjust to the new rule.

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## Background

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.

Under the H-1B- cap wage-allocation rule, 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.

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## KPMG NOTE

KPMG Law LLP is tracking this matter closely. We will endeavor to keep readers of *GMS Flash Alert* posted on any important developments as and when they occur.

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## FOOTNOTES:

- 1 See USCIS [website](#).
- 2 For our prior coverage on President Biden's Immigration Actions, see *GMS Flash Alert 2020-418* (January 22, 2021).
- 3 See the USCIS website "[H-1B Electronic Registration Process](#) .
- 4 For more details on the DHS' Final Rule Amending the H-1B Lottery Selection Process, read *GMS Flash Alert 2020-471* (January 12, 2021).

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