



December 12, 2018

Special Immigration Alert

USCIS Proposes New Registration Requirement to File H-1B Cap Petitions for Fiscal Year 2020 and Reverses Order of H-1B Cap Lottery

On December 3, 2018, U.S. Citizenship and Immigration Services (“USICS”) [proposed new regulations](#) that would significantly change how USCIS will process H-1B cap-subject petitions for fiscal year 2020. Historically, employers would file new H-1B cap-subject petitions on behalf of nonimmigrant beneficiaries in the first week of April. Usually most of these nonimmigrant beneficiaries are recent F-1 graduates employed under Optional Practical Training (OPT). After the first week of April, USCIS closes any further acceptance of H-1B cap-subject petitions and implements a computer-generated lottery. The lottery picks the first 65,000 regular cap-subject petitions, and then another computer-generated lottery picks an additional 20,000 cap-subject petitions for those individuals who received their U.S. master’s degree or higher. USCIS implemented this annual “H-1B cap lottery” for the past several years due to more petitions being filed than H-1B cap numbers being available.

The proposed regulations would require a new “Registration Requirement,” in lieu of filing the H-1B petitions, as a means to streamline the H-1B cap lottery process. Under the Registration Requirement, an employer must submit an online registration application through USCIS’s website for each employee to be sponsored under the H-1B cap. According to the proposed regulations, the electronic registration period would begin at least 14 calendar days before the first filing date of April 1 and stay open for at least 14 calendar days thereafter. Before implementing this registration process, USCIS, through its website, would provide a 30-calendar-day advance notice of when the agency plans to open the registration period. If the number of H-1B cap-subject petitions received during the initial 14-calendar-day window exceeds 85,000, then USCIS will stop accepting further registrations once the 14-calendar-day window closes.

After receiving more than 85,000 petitions, USCIS would then conduct its annual H-1B cap lottery to randomly select the registrations that it will accept for adjudication. Those selected will be notified to file their H-1B petition within a designated 60-day filing period. The proposed regulations include a clause to lessen the backlog of adjudicating 85,000 H-1B cap-subject petitions at one time by allowing the agency to stagger the 60-day filing

periods. For example, USCIS may open the 60-day filing period to a portion of those accepted. After that portion has been adjudicated, USCIS may allow another group to file their H-1B cap-subject petitions within a different 60-day window. The concern with such staggered adjudications of H-1B cap-subject petitions is how such adjudications would affect those F-1 OPT employees who are given extended employment under the “cap-gap.” The cap-gap allows certain F-1 OPT employees continued employment up to October 1 so long as (1) they timely filed their H-1B cap-subject petition and (2) their OPT-authorized employment period expires between April 1 and September 30. This proposed staggering prejudices those F-1 OPT employees whose cases will be adjudicated at a later date than those whose cases are accepted earlier for processing. It remains to be seen whether the final regulations amend or work around this issue.

The following information would be needed to properly register under the proposed regulations:

1. The employer's name, federal tax identification number (“EIN”), and address;
2. The employer's authorized in-house 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, with electronically submitted Form G-28;
5. Any additional basic information requested by the registration system or USCIS; and
6. An attestation that the employer intends to file an H-1B petition for the beneficiary in the position for which the registration is filed.

The proposed regulations do not include any filing fee. Once the registration is complete, the system would provide an online registration confirmation through a “unique identifying number.” That “unique identifying number” would have to be kept and used to file with the H-1B petition if that registration was chosen for the H-1B cap lottery.

The proposed regulations also mention that the registration system would (1) be monitored for fraud and abuse; (2) keep registrations not picked for the cap available on a waiting list in case further cap numbers open due to chosen cap cases getting denied or not timely filed; and (3) restrict similar companies, such as a parent, subsidiaries, or affiliates, from filing H-1B petitions for the same beneficiary (unless there is a “legitimate business need” to do so).

In addition to the electronic registration requirement, the proposed regulations will reverse the order by which USCIS selects H-1B petitions for the H-1B cap lottery. Traditionally,

USCIS chooses the first 20,000 that are eligible for the U.S. master's degree cap. Afterwards, USCIS takes the left over master's degree cap petitions and adds them to the rest of the H-1B petitions when choosing the remaining 65,000 under the regular H-1B cap. Under the proposed regulations, USCIS would reverse the order and choose the first 65,000 under the regular cap and then choose the remaining 20,000 under the master's degree cap. USCIS proposes this change because it "would likely increase the number of beneficiaries with a master's or higher degree from a U.S. institution of higher education to be selected for further processing under the H-1B allocations."

USCIS is accepting public feedback on these proposed regulations until January 2, 2019. **Please note that these proposed regulations may not be finalized and implemented in time for the upcoming H-1B cap that is set to begin on April 1, 2019. Therefore, until further announcement by USCIS, employers should still prepare for the upcoming H-1B cap as they have done for the past several years.** Epstein Becker Green will keep you updated as soon as we hear further announcements on this issue.

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