

IMMIGRATION

DHS MODIFIES H-1B SELECTION PROCESS TO PRIORITIZE HIGHEST PAID WORKERS

On January 8, 2021, the U.S. Department of Homeland Security (DHS) published a final rule replacing its randomized H-1B lottery process with a new system that prioritizes filings for the highest paid H-1B workers.

While the rule is scheduled to take effect in time for this year's H-1B lottery (which begins in March), the incoming Biden administration has announced a plan to delay for 60 days the implementation of the outgoing Trump administration's most recently enacted rules. Depending on how the 60-day period is calculated, this could prevent the rule from taking effect before this year's H-1B lottery process. Alternatively, the rule could be set aside by a court challenge, as has been the case with many of the Trump administration's proposed immigration rules.

If the rule proceeds, employers should work with legal counsel to develop a careful strategy for their H-1B lottery filings, in order to provide their foreign national employees with the best chance of selection in the annual lottery. This rule change will not impact any employees already selected through the H-1B lottery and will not apply to employers exempt from the H-1B lottery process.

Current H-1B Selection Process - Randomized Lottery

Many U.S. employers hire foreign nationals to work in the U.S. under H-1B visa status, especially recent college graduates or others coming from abroad to work in the U.S. Approximately 65,000 new H-1B visas become available each federal fiscal year, with an additional 20,000 set aside for those who obtained a master's degree or higher in the U.S.

In recent years, the annual demand for H-1B visas has significantly outpaced their availability. To address this, U.S. Citizenship and Immigration Services (USCIS) has conducted a randomized lottery process each year to allocate the limited visas. One lottery is conducted for the 65,000 H-1B visas, followed by a second lottery for the remaining 20,000 master's degree cases.

New Process Under Final Rule

Under the new rule, USCIS will categorize all H-1B filings into one of four groups by salary, according to the Department of Labor's Occupational Employment Statistics (OES) wage system. The OES system provides four levels of wage data for each occupation and geographic region with Level I wages being the lowest and Level IV the highest.

USCIS will allocate H-1B visas first to those workers whose offered salary equals or exceeds the OES Level IV wage for their occupation and geographic region, followed by those that equal or exceed Level III, and so on, until all the H-1B visas have been allocated. If there are not enough H-1B visas available for all filings at the lowest remaining wage level, USCIS will use a randomized lottery to allocate the remaining visas. As

with the randomized lottery, USCIS will first complete this process for the 65,000 H-1B visas, and then again for the additional 20,000 master's degree cases.

In publishing this rule, DHS predicts that no individuals in the wage Level I group will be selected, and only about 25% of individuals in the wage Level II group will be selected.

As noted, it is unclear whether this rule will actually proceed, given the change in administration and the likelihood of legal challenges to the rule. Please contact our [Immigration](#) Practice Group with any questions regarding this new rule at 585.232.6500.

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