

# The H-1B Visa: An Update And Look Ahead

**On May 17, 2019, the United States Citizenship and Immigration Services (USCIS) announced that it had completed the initial data entry of all FY2020 H-1B cap cases selected in the lottery. For those of you unfamiliar with the H-1B visa, you might be asking, “Aren’t we in 2019?” “What is the H-1B visa lottery?”**

The H-1B visa is a professional worker visa utilised by U.S. companies to employ foreign workers in a specialty occupation. In order to qualify, the U.S. job must require at least a bachelor’s degree in a specific field and the H-1B workers must hold that degree or its equivalent. H-1B visas are numerically limited, and the demand for H-1B visas far exceeds the supply. As a result, the government runs a “lottery” every year in order to allocate the 85,000 H-1B visas available each fiscal year. The government fiscal year runs from October 1st to September 30th, and USCIS regulations allow employers to file petitions up to 6 months in advance of the anticipated start date, so employers who want to enter the H-1B cap lottery have 5 business day (during first week in April, 6 months in advance of the new October 1st fiscal year) to file petitions for an October 1st start date.

## **Has The Cap Has Been Reached? What About Change Of Employer Petitions?**

The agency received 201,011 filings between April 1 and April 5, 2019, an increase of 10,913 petitions, or 5.7 percent, over last year’s 190,098 filings. This year’s filing volume is the highest since 2016, when a record 236,000 filings were submitted for the FY 2017 H-1B cap. Because of the operational challenges of high volume, it will take USCIS some time to perform initial intake, run the selection lotteries, and issue receipts. Employers and foreign nationals should expect to wait at least several weeks to learn whether their cap petitions were selected in the lotteries.

Employers can continue to file H-1B cases that are not subject to the cap. These include extensions, amended petitions, changes of employer, and concurrent filings for existing H-1B workers. Petitions sponsored by institutions of higher education and

their related or affiliated nonprofit entities, government research institutions and nonprofit research institutions are exempt from the cap. However, a current H-1B employee may be subject to the cap if his or her previous H-1B was sponsored by a cap-exempt employer.

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## **New This Year: Reversing The H-1B Cap Lotteries**

After initial intake is completed, USCIS will run two selection lotteries. In a reversal of past practice, USCIS will run the standard H-1B cap lottery, followed by the advanced-degree lottery, pursuant to the new H-1B registration rule. The change is intended to increase the number of H-1B employees with U.S. advanced degrees, pursuant to President Trump’s “Buy American, Hire American” Executive Order. Cases not selected in the lotteries are rejected and returned with their filing fees.

In the first lottery, USCIS will select enough cases to meet the regular H-1B cap of 65,000. In the second lottery, USCIS will select enough cases to meet the cap exemption of 20,000 for beneficiaries who hold a U.S. advanced degree; any advanced-degree holder not selected in the first lottery will be entered in the second lottery.

## **Receipting And Adjudication**

Employers who filed H-1B cap cases with a request to change status and a concurrent request for premium processing should get email filing receipts by May 20, though receipting could begin earlier. Employers whose regular-processed cases were selected in the lottery should begin to get filing receipts by late-May, if not earlier. Receipting could continue for several days or weeks after it begins. Adjudicators should begin working on premium processed cases by May 20. USCIS should complete initial adjudication of premium cases by June 4. By this date, employers should receive an approval, request for evidence (RFE) or denial in their premium cases. USCIS is expected to begin working on regular processed cases by early to mid-June. In past years, USCIS has typically aimed to finish initial adjudication by late August, though the FY 2019 adjudication period extended well into calendar 2019; premium processing was suspended for most of this time.

## **Impact Of H-1B Cap Processing On Other Case Types**

During the busy cap season, USCIS devotes significant resources to the processing of H-1B cap petitions. This may prolong the processing of other case types, including extensions of stay. Though USCIS makes an effort not to unduly delay the processing of non-cap cases, employers and foreign nationals should plan for the possibility that their extensions may take longer than usual. As a reminder, H-1B, H-1B1, L-1, E-1/E-2, E-3, O, P, TN and certain other nonimmigrants are given an automatic 240-day extension of work authorisation beyond the expiration of their current period of stay if an extension is filed on time. USCIS aims to complete extension processing within this timeframe, but if it does not, the foreign national’s employment authorisation could be affected.

## **Next Year (Early 2020 For FY2021): Pre-Registration Requirement: A Closer Look**

U.S. Citizenship and Immigration Services (USCIS) is moving forward with a plan to require employers to pre-register for the H-1B cap selection system. The agency could also propose other changes to the H-1B

cap petition process. USCIS has sent a draft regulation to the Office of Management and Budget (OMB) for review, which is the first step toward altering H-1B cap procedures. Though details of the draft plan are confidential for now, USCIS made a similar proposal in 2011, which could be a model for the agency's forthcoming regulation. Features of the 2011 proposal included:

- **Initial pre-registration period** - To register for the lottery, employers would file a short form that provides basic information about the company, the job offer and the prospective foreign employee. Employers would file a separate registration for each foreign beneficiary. As under current rules, an employer would be prohibited from submitting more than one registration per foreign national – though registrations submitted by different employers could be accepted if each registration represents a different bona fide job offer. The pre-registration period could occur before the usual April 1 opening day of cap filing season
- **Cap selection lotteries** - It is anticipated that USCIS would retain the cap lottery system and use the lottery to select H-1B petitions eligible for filing. Once the pre-registration period closed, USCIS would

run the standard and master's cap selection lotteries and choose enough registrations to meet the 85,000 H-1B quota. The agency could propose some changes to the way cases are selected in the lotteries and the way cases are counted against the annual quota

- **Petition filing period** - Full H-1B petitions and supporting evidence would be filed only for registrations that were selected in the lottery. If their cases are selected, employers would be required to submit their cap petitions within a specific timeframe, which could be brief
- **Waiting list** - USCIS could create a waiting list so additional cases could be filed if the quota is not reached due to petition rejections or withdrawals, or if an employer decides not to file a petition for a winning registration.

### What This Means For Employers

Once USCIS completes the cap selection process, employers and foreign nationals should be prepared to wait up to several weeks to learn whether their petitions were accepted in the H-1B cap lotteries. If any of your organisation's cap filings are not chosen, you should work with your immigration provider to assist in identifying alternatives for affected employees.



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