

USCIS Proposes Rule to Select More U.S. Master's Degree Holders in H-1B Lottery and Establish Electronic Pre-Filing Lottery for H-1Bs

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By William A. Stock and Steven R. Miller

On Monday, December 3, the Department of Homeland Security (DHS) [published a notice of proposed rulemaking](#) that would put in place an electronic pre-registration system for cap-subject H-1B filings as well as reverse the order of selection for cap and advanced degree cap-subject petitions, calling holders of U.S.-issued master's degrees "more meritorious" than other beneficiaries.

This proposal is the Administration's first attempt at regulatory change to an H-1B program already under siege from [administrative and policy changes](#). The important thing to remember right now is that DHS has only issued a notice of *proposed* rulemaking. While whatever comes of this proposed change to policy might indeed alter the face of the program, nothing has happened yet, and the scope of what could happen is yet to be seen.

There are two elements of the proposed rule: an electronic "pre-registration" system first proposed by DHS in 2011 and abandoned, and a new proposed change to the order of selection for the H-1B lottery. According to the DHS announcement, the pre-registration system would allow cap-subject employers to register for their desired number of H-1B visas before filing, and then the computer-generated random selection process would be run on these registration entries, returning to each employer a list of the petitions they may file for specific selected individuals.

[DHS has said](#) it would like to implement a final rule before the next H-1B filing season (April 1, 2019), but also said that even if the regulation is finalized, the electronic infrastructure necessary for the H-1B "pre-registration" process to work will not be in place by March of 2019. DHS's expressed desire to finalize a rule before March of 2019 likely has more to do with the re-prioritization of the lottery in favor of U.S. master's degree holders than it does with the "pre-registration" idea.

The reversal of available visa allocation is more likely to be implemented than pre-registration should the rule be finalized before April 2019 (in fact, it may be the only part of the rule implemented by April 2019). As it stands, the regulation governing the H-1B lottery selection mandates a two-step process: first,

petitions are counted toward the 20,000 available master's cap visas. Once that number is reached, the remaining master's-level petitions are put in the regular cap pool with non-master's cap petitions vying for the 65,000 available regular cap visas. Under this proposed rule, these two phases of selection would be reversed. All petitions would first contend for the 65,000 available regular cap visas, with unselected petitions for individuals holding a master's or higher being given a second chance under the 20,000 available master's cap visas. According to DHS, reversing the order of selection will increase the number of visas allotted to individuals holding a master's or higher by 16%. The rule does so by changing the composition of the pools of petitions at each step of the lottery. Under both systems, 20,000 visas go to petitions for holders of U.S. master's degrees. Under the old system, the basic 65,000 cap is then applied to a pool that was about 45% U.S. master's degree holders, based on FY2019 numbers. Under the new system, the basic cap would be applied to a pool that is closer to 51% U.S. master's degree holders, likely increasing the proportion of selectees from that pool.

Federal rulemaking is a two-part process. First, an agency must propose the rule. Then, it must allow for a period of public comment following the publication of the proposed rule. As of today, the rule is available for review [in the Federal Register](#), and public comments may be submitted up through January 2, 2019. The agency must then consider public comments on the rulemaking record. Whether and how public comments end up influencing the content of the rule is up in the air, though there are options for challenging an agency's response to the record of public comment if the agency rejects the public's input. For a thorough explanation of the rulemaking process, please see the Federal Register's guide [here](#). We will be reaching out to employers with model comments that can be submitted before the deadline.

One reason for being cautiously optimistic that this proposed rule might not reach implementation in the form presented is that neither proposal conforms to the statutory requirements for the H-1B program—something that is sure to be raised during the public comment period. The Immigration and Nationality Act dictates that petitions be selected for available visa numbers in the order in which “petitions are filed” with the government. The currently lottery regulation has been upheld as a reasonable interpretation of Congressional intent regarding what should be done when more petitions are filed on the first day of visa availability than are available under the caps. The pre-registration regulation, however, contemplates that employers will not “file a petition” with the government unless and until the government has allocated them a visa number – and that they will do something other than “filing a petition” by “registering” for a visa number with an electronic system. Similarly, the supplemental H-1B cap of 20,000 for U.S. master's degree holders is in the statute as an exemption from the cap that applies “until” 20,000 petitions are granted the cap exemption, and the word “until” clearly implies that Congress meant that U.S. master's cap holders would first be pulled out of the basic cap, and only considered as part of the basic cap once the 20,000 petition exemption was exhausted.

The DHS says it plans to complete rulemaking before filing season, but as noted above, its announcement acknowledges that even if the rule were to make it through public comment unscathed, the software infrastructure would not be ready, and 2019's filing season will likely proceed without the electronic pre-registration element of the proposed rule.

While the DHS announcement is jarring for employers and potential H-1B visa-holders alike, the new rule is not yet set in stone. We will be providing instructions on how you can get your voice heard and updates on how we at Klasko are working to influence the rulemaking process in a later post.

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