

H-1B Visas: What You Need to Know About Filing in 2019

Labor & Employment Law Update

By Jacqueline Lentini McCullough on January 30, 2019

The Department of Homeland Security (DHS) announced a proposed rule on November 30, 2018 that would require H-1B cap subject petitioners to register electronically with USCIS which would then conduct the annual H-1B lottery from the pool of timely-filed registrants.

The registration window would open 14 days before the H-1B filing window opens on April 1 and remain open for 14 days after that date. Petitioners selected during the lottery would be notified that they are eligible to file their petition and would have a 60-day window to do so.

The proposed rule would also reverse the order that USCIS selects H-1B petitions under the H-1B cap and the advanced degree exemption. Currently the agency selects the advanced degree beneficiaries before filling the H-1B cap. Under the new rule, USCIS would count all applicants selected against the H-1B cap first, and then select the ones to receive the advanced degree exemption. Even with the reversal, those with advanced degrees will still have two chances in the lottery.

USCIS estimates that the proposed change would result in a 16 percent increase in the number of beneficiaries holding a master's degree or higher from a U.S. educational institution.

The proposed rule was published in the Federal Register on December 3, 2018. USCIS accepted comments on it through January 2, 2019. On January 11, 2019, USCIS sent a final version of the proposed rule to the Office of Management and Budget (OMB) for review. The OMB completed its review on January 25th, and a final rule must be published in the Federal Register for it to take effect.

USCIS aspires to finalize and implement the new rule in time for the Fiscal Year 2020 filing season which begins April 1, 2019. Given that the OMB is scrambling in the wake of the shutdown, and the time it would take for the normal review process, it is uncertain that the proposed rule will apply this year.

What is true for this year is that H-1B petitions will require more strategic planning and upfront preparation than in prior years. Following the Trump Administration's Buy American Hire American Executive Order on April 18, 2017, requests for evidence tripled for the past two years. I expect this level of scrutiny to continue for this year, too.

This means that we need to begin your application earlier, especially if you have never filed before. Companies filing for the first time need to apply to have the DOL verify their business and approve a Labor Condition Application (LCA) *before* they can file the H-1B petition. Each of those two processes takes at least 7 days.

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