

# Creation of New H-1B Cap Registration Process for New Slots

The U.S. Citizenship and Immigration Services (USCIS) on March 1, 2020, will establish a new mandatory internet-based electronic registration and lottery process for employers seeking to file H-1B petitions for beneficiaries that are required to be counted under the annual allocation of new H-1B slots.

An H-1B cap slot must be obtained in order for a foreign worker to engage in "new" H-1B employment. "New" H-1B employment generally refers to H-1B petitions that are filed for foreign nationals who are not currently in H-1B status. When new H-1B employment requires an H-1B cap visa, it is generally referred to as "cap subject." Foreign workers whose employment is cap subject may not begin their H-1B employment until the beginning of the federal fiscal year for which their H-1B cap visa was issued (*i.e.*, October 1). However, there are exceptions when both new H-1B and continued H-1B employment is not subject to the annual H-1B cap allocation—these are generally referred to as "cap exempt" petitions.

Under these new regulations for the 2021 Fiscal Year (October 1, 2020, to September 30, 2021), employers seeking an H-1B cap slot for an employee will be required to register their company and the intended beneficiary online with USCIS and pay a \$10 nonrefundable lottery fee for each electronic registration. The registration process is not required for cap-exempt H-1B petitions.

USCIS grants 65,000 new H-1B visas per federal fiscal year to employers who hire foreign workers for positions that require at least a bachelor's degree in a specialty field. An additional 20,000 new H-1B visas are available to employers who hire foreign workers with a master's degree from a U.S. university or college. These annual allocation limits are generally referred to as the "H-1B cap."

To participate in the 2021 H-1B Cap electronic registration process, which will occur from March 1 to March 20, 2020, employers must provide for each registration entry:

- The employer's name, federal employer identification number (FEIN), and mailing address
- The name, job title, and contact information (telephone number and email)

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address) of the employer's authorized representative

- The beneficiary's full name, date of birth, country of birth, country of citizenship, gender, and passport number
- Whether the beneficiary has obtained a master's or higher degree from a U.S. institution of higher education
- The employer's attorney or accredited representative, if applicable
- Any additional basic information requested by the registration system or USCIS

USCIS will use this information solely to select enough H-1B petitions to adjudicate under the 2021 H-1B cap and will not review the merits of any of the supplied information. The selection of registrants will occur through a computer-aided random selection process. Duplicate registrations for the same beneficiary by the same employer are strictly prohibited. Employers must also attest as part of the registration that they intend to employ the beneficiary. This attestation is being required in order to deter employers from submitting registrations in the lottery but then not pursuing petitions if selected.

USCIS will notify by March 31, 2020, employer selected in the lottery that they are eligible to file an H 1B cap subject petition on behalf of the named beneficiary. The notice of selection will indicate a filing location as well as the designated filing period during which the H 1B petition must be filed, and provide instructions on how to file the petition. Employers then will be provided with a specified period of time to properly file a completed H 1B cap-subject petition and pay all applicable H-1B filing fees for the named beneficiary. The exact duration of the filing period has not been provided by USCIS as of the date of this Client Alert, but it is believed that the period will be at least 90 days from March 31, 2020. Employers will not be permitted to substitute beneficiaries.

Exempt from the H 1B cap are the following:

- H 1B petitions filed to extend the amount of time a current H 1B worker may remain in the United States.
- Individuals who have already been counted toward an H 1B cap within the past six years, unless he or she would be eligible for another full six years of admission (e., unless the individual has been outside the United States for at least one full year since he or she last held H 1B status).



- H 1B petitions filed for employment at an institution of higher education or a related or affiliated nonprofit entity, or for employment at a nonprofit or governmental research organization.
- H 1B petitions filed to change the terms of employment for current H 1B workers.
- H 1B petitions filed to allow current H 1B workers to change employers. However, where the H 1B worker is moving from a cap exempt nonprofit organization to a cap subject for profit company, the case will likely be considered to involve new employment and, as such, would be subject to the H 1B cap.
- H 1B petitions filed to allow current H 1B workers to work concurrently in a second H 1B position, including those workers whose original H 1B position is with a cap exempt employer.
- H 1B petitions for J 1 foreign medical graduates who have received a "Conrad 30" waiver of the two year foreign residence requirement.

USCIS grants H 1B status in three year increments for up to six years to qualifying foreign workers who will work in professional occupations (*i.e.*, occupations which normally require a bachelor's degree or higher). The H 1B worker is authorized to work only for employers who have filed an H-1B petition on the worker's behalf. Employers must offer H-1B workers a wage that meets the prevailing wage for the position in the specific geographic area and satisfy certain mandatory notice requirements.

Winning an H-1B cap slot in the electronic registration process is no guarantee that the H 1B petition will be ultimately approved. Instead, USCIS appears once again to be intent on challenging the eligibility of a significant number of H-1B cap filings through its "Request for Evidence" process as well as through outright denial of many H-1B petitions. Preparation for the 2021 H-1B cap will, therefore, require a significant amount of pre-analysis and preparation of new H-1B cases in order to ensure that employers are well-prepared to file the necessary paperwork and to make the required eligibility arguments once their cap registration has been selected in the narrow amount of time granted by USCIS within which the petition may be filed.

Reinhart's attorneys can assist in determining how best to prepare for the upcoming H 1B filing season and they look forward to speaking with you soon.



For more information, please contact Attorney Ben Kurten at [bkurten@reinhartlaw.com](mailto:bkurten@reinhartlaw.com) or 414 298 8222.

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