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BUSINESS IMMIGRATION AND COMPLIANCE BRIEFING: WEIGHTED SYSTEM CHANGE PROPOSED FOR ANNUAL FISCAL YEAR H-1B VISA QUOTA SELECTION PROCESS

The 30-day comment period concluded with respect to the notice of proposed rulemaking (NPRM) published in the Federal Register on September 24, 2025 by U.S. Citizenship and Immigration Services (USCIS) to amend the process by which the agency selects H-1B registrations toward the annual fiscal year visa quota. The proposed rule replaces the current, random H-1B selection system with a weighted selection system to prioritize allocation of the annual fiscal year quota of H-1B visas to higher-skilled and higher-paid visa beneficiaries.

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) jointly submitted a comment in opposition to the proposed rule (AILA is a voluntary bar association of more than 18,000 attorneys and law professors working in the field of immigration and nationality law; and the Council is non-profit organization established to increase public understanding of immigration law and policy and the contributions of immigrants, as well as to advocate for fair administration of immigration laws and protect the legal rights of noncitizens). The comment contends that by adding new qualitative requirements to the H-1B visa selection process, USCIS has exceeded the statutory authority granted to it by Congress in the Immigration and Nationality Act (INA). AILA and the Council assert that Congress provided clear and unambiguous instructions on how petitions subject to the H-1B visa cap should be selected. The INA simply provides that visas shall be issued in the order which petitions are filed and does not delegate authority to USCIS to consider qualitative factors such as salary in the selection process. Furthermore, AILA and the Council point out that Congress has previously attempted to legislate on the consideration of wage levels in the H-1B selection process, signaling that Congress has yet to grant USCIS this authority. Once USCIS publishes its notice of final rule in the Federal Register and codifies the rule in the Code of Federal Regulations, the final rule may be challenged in court on similar grounds to the argument presented by AILA and the Council.

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It will likely take the Department of Homeland Security (DHS) several months to review comments and publish a final rule for its USCIS agency to implement. Therefore, it is uncertain whether the final rule will apply to the upcoming Fiscal Year 2027 H-1B visa quota registration and selection process in March 2026. Employers should monitor agency updates closely and consult immigration counsel as H-1B quota season nears.

KEY TAKEAWAYS OF PROPOSED WEIGHTED SYSTEM RULE

- A weighted system awards more H-1B registration entries to beneficiaries working in positions with higher wage/skill levels. While beneficiaries in entry-level roles remain eligible for the H-1B registration process, chances of selection diminish significantly. The probability of an employer registrant's submission for an H-1B beneficiary position being selected under the weighted system versus the random system is as follows:
 - **Skill/Wage Level 1:** 48% decrease
 - **Skill/Wage Level 2:** 3% increase
 - **Skill/Wage Level 3:** 55% increase
 - **Skill/Wage Level 4:** 107% increase
- Employers are responsible for reporting accurate wage and job information during the initial registration process, such as the Occupational Employment and Wage Statistics (OEWS) wage level of the beneficiary, the Standard Occupational Code (SOC), and the location of intended employment.
- Once the beneficiary registration is selected, employers must file an H-1B quota-subject petition. USCIS will verify that the wage offered to the beneficiary is the same as the wage reported during registration. USCIS reserves the right to deny or revoke approval if it determines that the employer attempted to unfairly increase the odds of selection by reporting a higher wage level during registration. However, USCIS will not revoke approval if the offered wage meets or exceeds the wage level reported during registration. Employers should work closely with Human Resources and immigration counsel to ensure wage and job information are accurate. Any changes to wage or job information after selection will be scrutinized by USCIS and may result in revocation.

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This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

- DHS estimates that the additional requirements for registrants will increase the time burden on employers by 20 minutes per registration. There is likely to be additional time required for diligence review and compliance.
- A weighted system may also increase immigration related costs for employers. Since higher skill/wage level roles are more likely to be selected during the H-1B registration process, employers are incentivized to offer higher-level positions/wages to improve the chance of being selected. For example, an employer may consider raising a position level/salary from Level 1 to Level 2 to double the chances of being selected. The incentive to raise wages coupled with the recent Presidential Proclamation, imposing a one-time \$100,000 fee on employers submitting new H-1B petitions for beneficiaries outside of the U.S. will make it riskier and costlier to petition for lower level positions. Higher costs and increased risk are likely to disproportionately burden smaller employers, emerging companies, and educational/research, religious, and healthcare employers who generally have less resources to dedicate toward work authorization sponsorship and often cannot find qualified candidates to fill critical roles in target worksite areas of employment.

BACKGROUND ON H1-B WAGE/SKILL LEVEL

Employers are legally required to pay the H-1B worker (and any other H-1B workers with similar experience and qualifications) the prevailing wage or the actual wage for the occupation category under which a position is classified, whichever is higher. While the wage obligation only applies to H-1B workers, the actual wage is determined based on what the employer pays all other employees (including U.S. workers), if any, with similar experience and qualifications for the specific employment. In determining the actual wage, legitimate business factors such as experience, education, position responsibility and specialized knowledge can be considered. A test based on reported earnings and authorized deductions will be used to establish whether the employer has met the required wage.

The employer must also determine the prevailing wage for the occupation in the area (location) of intended employment. If the prevailing wage is higher than the employer's actual wage, then the employer must pay the H-1B worker the prevailing wage.

The salary offered on all H-1B petitions must be 100% of the prevailing wage or the actual wage, whichever is higher. The Department of Labor has wage surveys to reflect four levels of wages commensurate with experience, education, and level of supervision. An employer may also determine the prevailing wage by using union contracts (if the job is unionized), an independent authoritative source/occupational survey, or any other "legitimate" source. The employer is not required to use any one specific method or source over another.

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Pursuant to the Employment and Training Administration Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs (Revised November 2009), the four OEWS wage levels reflect positions and skill-levels as outlined below:

- **Level I (Entry)** wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation.
- **Level II (Qualified)** wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation.
- **Level III (Experienced)** wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation. and have attained, either through education or experience, special skills or knowledge
- **Level IV (Fully Competent)** wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques.

THE CURRENT H1-B VISA LOTTERY SYSTEM (RANDOM)

The H-1B visa is a nonimmigrant visa that allows employers to hire nonimmigrant aliens in specialty occupations. A specialty occupation is one that requires the application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree or its equivalent.

Historically, Congress makes 65,000 H-1B visas available each fiscal year, with an additional 20,000 H-1B visas reserved for individuals holding a Master's degree or higher from a U.S. institution. While there are technically 65,000 visas made available by Congress, 6,800 of these are reserved for nationals of Singapore and Chile. Due to supply/demand, there are often more registrations than the number of available visas. As a result, USCIS conducts a randomized general selection process for 58,200 applicants (the "Regular H-1B CAP"), and once completed, the agency conducts a second randomized selection (the "Master's H-1B CAP") among applicants who were not selected in the general lottery and who possess an advanced degree from an accredited U.S. university. The H-1B selection process is unweighted, meaning that each registered beneficiary has an equal chance of being selected, regardless of the wage/skill level of the qualifying H-1B position to be assumed.

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In 2023, USCIS introduced a beneficiary-centric model for the H-1B selection system. The 2023 USCIS rule limits each beneficiary to a single entry into the selection pool, regardless of the number of registrations submitted by employers on the beneficiary's behalf. Thus, the 2023 rule reformed the registration process to give beneficiaries an equal chance of selection but did not mandate the consideration of qualitative factors such as wage and job information.

THE NEW H1-B VISA LOTTERY SYSTEM

- The weighted system would apply to both the Regular and Master's H-1B CAP.
- The weighted selection system divides registrants into four wage categories and assigns more entries to higher-skilled/paid registrants, thereby increasing the likelihood that higher-skilled/paid registrants will be selected. Categorization is based on the wage that the employer intends to pay the H-1B beneficiary.
- The new system would allocate entries in the following manner:
 - o **Wage Level 1** Entry-level positions: 1 entry in the selection pool
 - o **Wage Level 2** Qualified worker positions: 2 entries in the selection pool
 - o **Wage Level 3** Experienced worker positions: 3 entries in the selection pool
 - o **Wage Level 4** Fully-Competent worker positions: 4 entries in the selection pool
- During the registration process, employers will need to provide the OEWS wage level, the SOC code, and the location of intended employment. In selecting the appropriate OEWS wage level, employers must select the highest OEWS wage level that the beneficiary's proffered wage would equal or exceed for the relevant SOC code in the area(s) of intended employment. Where a registrant is being sponsored by multiple employers or will work in multiple locations, or in multiple positions, the petitioner must select the lowest corresponding OWES wage level that the beneficiary's proffered wage will equal or exceed.
- In instances where the occupation does not have current OEWS prevailing wage information available, the employer would follow the Department of Labor's guidance on prevailing wage determinations in selecting the appropriate OEWS wage level.

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RESOURCES

- [USCIS Proposed Rule](#)
- [AILA and the Council Comments on Proposed Changes to H-1B Registration Process](#)
- [NPWHC_Guidance_Revised_11_2009.pdf](#)
- [Wiggin and Dana: Presidential Proclamation Targets H-1B Employers](#)

Law Clerk (Admission Pending) William Butler contributed to this article.

This alert is for informational purposes only and is not intended to be construed or used as legal advice. Wiggin and Dana's Business Immigration and Compliance Practice Group will continue to provide briefings with material employment-based immigration case updates. If you have any questions, please contact the practice group leader, Najia Khalid, at 203.498.4314 or nkhalid@wiggin.com.