Transition – A Presidential Change Update

September 2025

Trump Administration Continues to Target the H-1B Visa Program, Now Proposing to Favor Higher Paying Positions

Key Notes:

- DHS is publishing a proposed new rule to change the H-1B lottery from a randomized system to a weighted lottery favoring higher-paying positions.
- Comments on the proposed rule can be submitted within 30 days of September 24, 2025.

Last week, President Trump signed an Executive Order imposing a new $100,000 fee for H-1B petitions. There are many questions remaining on the scope (and even the enforceability) of that executive action. In the meantime, though, the administration is continuing its attempt to revamp the H-1B visa program. The Executive Order calling for the $100,000 fee also directed the "Secretary of Homeland Security [to] initiate a rulemaking to prioritize the admission as nonimmigrants of high-skilled and high-paid [foreign nationals]."

The proposed new rule that would change the availability of H-1B visas, favoring higher-paid positions, was published in the *Federal Register* on September 24, 2025.

The Current System for Allocating H-1B petitions

The regulations governing the H-1B visa program limit the number of new H-1B petitions to 85,000 annually, which are allocated through a random lottery program. Employers submit registrations for the H-1B candidates they intend to employ under the H-1B program, if the candidate is selected for one of the 85,000 openings. 20,000 H-1B petitions are reserved for U.S. master's degree holders and are allocated first. Any workers eligible for that pool of lottery selections are also eligible for the general 65,000 lottery. In other words, if a U.S. master's degree holder candidate is not selected for the reserved 20,000, he or she could be selected for the general 65,000—providing the U.S. master's degree holder greater odds of selection. Other than having a U.S. master's degree, there is no way to increase the likelihood of selection; there is no prioritization for positions that are in short supply in the U.S., no prioritization for the duration of time the candidate has been in the U.S., and no prioritization for the industry in which the sponsoring employer operates.

The Proposed New System for Allocating H-1B Petitions

Under the proposed new rule, there will be a weighting that favors higher-paying positions. Each registration will be assigned a wage level under the DOL system (which ranges from level I entry level, to level IV more senior-level positions). Registrations for positions assigned wage level IV would be entered into the selection pool four times, those assigned wage level III would be entered into the selection pool three times, those assigned wage level II would be entered into the selection pool two times, and those assigned wage level I would be entered into the selection pool one time.

The proposed rule appears clear for the scenario of one H-1B candidate having a single employer submit a registration listing only one worksite. Application of the proposed rule becomes unclear in situations in which an H-1B candidate has multiple employers submitting registrations, or an employer contemplates multiple possible worksites for the H-1B candidate.

If an H-1B candidate might work in multiple locations with varying required prevailing wages, the rule seeks to set the level based on the lowest prevailing wage, requiring the registration to be submitted only at the lower level with less weighting. The language used to do that, however, lacks the clarity needed for employers to implement correctly, especially employers who rely on alternative wage surveys instead of the government-issued wage data.

The overall goal of the new rule is to incentivize employers to utilize the H-1B program only for highly-paid candidates. The language of the rule, however, dilutes the value of a highly-paid offer if it is not the only offer a candidate has. Now, foreign nationals seeking H-1B employment can have several employers submit registrations for them with the intention to go with the one that is selected. Under the new rule, if a foreign national has a level IV registration submitted by one employer and a level I registration submitted by another employer, the candidate will be put into the lottery selection with the weighting assigned to only level I, entering the lottery only once. The impact of this process is that employers offering higher wages may not even gain the intended weighted benefit of that increase if the foreign national has additional registrations submitted on his or her behalf by other employers, and those registrations are tied to lower-paying positions.

For instance, a software developer might receive an offer of employment, contingent on H-1B approval, to earn $100,000 from a large global software company working in a role that aligns with the requirements of a level IV position. Additionally, the software developer might receive an offer of employment for $75,000 from a small startup to work in a role aligned with a level I position. Unknowingly to the employer that offered a higher salary, the registration submitted by the small startup will dilute the benefit of the higher offered wage from the global software company. The candidate will only be entered into the lottery once as level I rather than four times as level IV.

Employers who rely on the H-1B visa program should consider submitting comments on how this proposed rule would impact their business, the talent pipeline, and wages.

Comments are due within 30 days of the publication of the proposed rule in the *Federal Register*. Instructions on how to submit comments can be found at https://regulations.gov

FOR MORE INFORMATION

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