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THE TIMES OF INDIA

# H-1B selections now upon salary levels

TNN | Jan 7, 2021, 11.06 PM IST



MUMBAI: With just a few days left for the Biden administration to take charge, the annual H-1B cap lottery process has been replaced with a salary-based selection process.

The proposal was issued by the Trump administration a few days before the US elections and public comments were invited. Now this final rule has been published and will come into effect in 60 days. However, it can be rescinded by the new administration.

TOI in its [earlier report](#) had analysed this proposal.

Under the new rule, H-1B cap visas would be allocated according to wage levels, giving priority to those earning the highest salaries in their respective occupations and geographic areas of employment.

In effect, the H-1B cap visas would be awarded first to beneficiaries (individuals being sponsored by US companies) in Level 4 (which is the highest of the four wage categories and covers very experienced workers), then to those at Level 3, and so on, until the annual quota of 85,000 has been met.

According to the US Department of Homeland Security (DHS), this rule will reduce abuse and provide incentives for employers to use the H-1B program to primarily fill relatively lower-paid, lower skilled positions.

According to Rajiv S Khanna, managing attorney at Immigration.com, “This drastic policy shift will almost certainly be found untenable by courts, who have in various contexts held that the Trump administration cannot usurp the law-making power of Congress, which has permitted hiring at all skill levels.”

“Also, the Congress can reverse any regulation within sixty days of passage through a joint resolution of the two chambers of the Congress, which seems doable,” he adds.

Charles Kuck, managing partner of Kuck Baxter Immigration LLC has tweeted, “The new H-1B lottery system regulation was just published. It is now a lottery illegally based upon salary. Litigation will shortly be filed to enjoin this nonsense. The ‘Rule of Law’ continues to not matter to Trump and his nativist minions.”

The new #H1B lottery system regulation was just published. It is a now a lottery illegally based upon salary. Lit...  
<https://t.co/YO0YibpeNk>

— Charles Kuck (@ckuck) [1610034071000](https://t.co/1610034071000)

According to immigration experts, while it was almost impossible to obtain H-1B visas for those at Level 1 (entry level), the new rules will make it challenging to even obtain visas for those at Level 2. In fact, an illustrative study done earlier by DHS rules out visa allotment at Level 1.

Indians constitute the largest chunk of beneficiaries of H-1B visas. Nearly 2.78 lakh (or 72%) of H-1B visas issued or renewed during the fiscal year ended September 30, 2019 were allotted to Indians. The new rule could make hiring of international workers more challenging and would significantly impact Indian aspirants.

According to the Open Doors Report, for the year 2019-20, nearly 18% of the total contingent of international students (or 1.93 lakh) were from India. 81,173 were engaged in the optional practical training (OPT) program.

DHS has refuted the charge that this will impact prospects for international students, many of whom stay on to work under H-1B

visas. It points out that the OPT (which provides employment for one to three years to international students) will remain unaffected.

“This rule will increase the chance of employment at the higher wage levels and thus may facilitate the selection of the best and brightest students for cap-subject H-1B status. To the extent that this change does negatively affect the potential of some colleges and universities to recruit international students, DHS believes that any such harm will be outweighed by the benefits that this rule will provide for the economy overall.”

In the backdrop of the ongoing pandemic, the biggest fear is that it would adversely impact the health sector which is significantly dependent on immigrant medical professionals. According to Kripa Upadhyay, managing attorney at Orbit Law, “This would adversely affect scientific research and certain hospital positions. Hopefully, the Biden administration will rescind it before it comes into effect.”

DHS has also refuted this charge, by stating that many foreign medical professionals are eligible for cap-exempt H-1B status and will not be impacted by this rule. “Additionally, DHS believes that this rule will provide benefits to the greater US workforce that outweigh any potential negative impacts on the relatively small subset of H-1B cap-subject healthcare workers,” states DHS.