



## H-1B VISA CONTEST: US MASTER'S DEGREE V. FOREIGN DEGREE

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The Trump Administration has [proposed a rule](#) that would require petitioners seeking to file H-1B cap-subject petitions to first electronically register with U.S. Citizenship and Immigration Services (USCIS) during a designated registration period. USCIS said the proposed rule would also reverse the order by which the agency selects H-1B petitions under the H-1B cap and the advanced degree exemption, with the goal of increasing the number of beneficiaries with master's or higher degrees from U.S. institutions of higher education to be selected for H-1B cap numbers and introducing "a more meritorious selection of beneficiaries."

The H-1B program allows companies in the United States to temporarily employ foreign workers in specialty occupations that require the theoretical and practical application of a body of highly specialized knowledge and a bachelor's or higher degree in the specialty, or its equivalent. When USCIS receives more than enough petitions to reach the congressionally mandated H-1B cap, a computer-generated random selection process, or lottery, is used to select the petitions that are counted toward the number of petitions projected as needed to reach the cap.

Currently, in years when the H-1B cap and the advanced degree exemption are both reached within the first five days in which H-1B cap petitions may be filed, the advanced degree exemption beneficiaries are selected before the H-1B cap beneficiaries. The proposed rule would reverse the selection order and count all registrations or petitions toward the number projected as needed to reach the H-1B cap first. Once a sufficient number of registrations or petitions have been selected for the H-1B cap, USCIS would then select registrations or petitions toward the advanced degree exemption. This proposed change

"would increase the chances that beneficiaries with a master's or higher degree from a U.S. institution of higher education would be selected under the H-1B cap and that H-1B visas would be awarded to the most-skilled and highest-paid beneficiaries," USCIS said. The proposed process would result in an estimated increase of up to 16 percent (or 5,340 workers) in the number of selected H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education, the agency noted.

USCIS said it expects that shifting to electronic registration would reduce overall costs for petitioners and create a more efficient and cost-effective H-1B cap petition process for the agency. The proposed rule would "help alleviate massive administrative burdens on USCIS since the agency would no longer need to physically receive and handle hundreds of thousands of H-1B petitions and supporting documentation before conducting the cap selection process," USCIS said. "This would help reduce wait times for cap selection notifications." The proposed rule also would limit the filing of H-1B cap-subject petitions to the beneficiary named on the original selected registration, "which would protect the integrity of this registration system."

On the one hand, there are compelling policy justifications to skew the allocation of scarce H-1B visas towards employers who hire foreign nationals with advanced degrees from US educational institutions. The H-1B reform Act of 2004 exempted the first 20,000 from the H-1B cap who had a US master's or higher degree. After the first 20,000 were exempted, the remaining applicants with master's degrees are considered under the overall 65,000 cap minus the H-1B1 numbers for Singapore and Chile. This counting methodology, deployed since 2004, is a faithful interpretation of INA § 214(g)(5)(C), which exempts an applicant master's or higher degree from the H-1B cap "until the number of aliens who are exempted from such numerical limitations during such year exceeds 20,000."

It remains to be seen whether the proposed methodology of counting all petitions first under the 65,000 cap, and then selecting those left out under the regular cap to qualify under the 20,000 master's degree exception, would still be a faithful interpretation of both INA § 214(g)(5)(C) and the overall H-1B visa program as defined in INA § 101(a)(15)(H)(i)(b) and § 214(i)(1). If there is a lawsuit, a federal court would have to make that determination

Under INA § 214(i)(1), the H-1B visa requires the qualified foreign national to

perform services in a specialty occupation, which requires “theoretical and practical application of a body of highly specialized knowledge” and “attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” Thus, the minimum threshold degree to qualify for H-1B visa classification is a bachelor’s degree and not a master’s degree.

Moreover, INA § 214(i)(1) contemplates one who has a foreign degree to be able to qualify by establishing that it is equivalent to a US bachelor’s degree. See also 8 C.F.R. § 214.2(h)(4)(iii)(C). Even experience can count as equivalent to a bachelor’s degree. See INA § 214(i)(2)(C). The skewing of H-1B visas towards those with master’s degrees from US institutions may in some senses be counter to Congressional intent, which was to permit those with foreign degrees, and equivalent work experience, to qualify for H-1B classification. Hence, a foreign physician with a master’s degree in medicine from a foreign university who intends to provide critical medical services in a shortage area in the United States may have less chances of nabbing an H-1B visa under the new proposal. So would a highly skilled IT worker with a bachelor’s degree in computer science from a reputed Indian institution such as the Indian Institute of Technology. Both the physician and the IT worker with foreign degrees have the potential of making contributions to the US in the same way, or even greater, as one who has graduated with an MBA from a US university.

In recent times, H-1B workers from India have in IT fields have [been perceived to be taking away the jobs of US workers](#) notwithstanding their acknowledged contributions to US businesses. Whether intentional or unintentional, the proposed rule will adversely impact the ability of IT consulting companies to sponsor such workers from India, even though the use of IT consulting companies is widespread in America (and even the US government contracts for their services), and was acknowledged by Congress when it passed the American Competitiveness and Workforce Improvement Act of 1998 (AWWIA) by creating onerous additional attestations for H-1B dependent employers. It is this very business model has provided reliability to companies in the United States and throughout the industrialized world to obtain top-drawer talent quickly with flexibility and at affordable prices that benefit end consumers and promote diversity of product development.

The new rule, unfortunately, has begun to create divisions within the H-1B community. Those who have paid tuition fees to US universities to earn

master's degrees feel that they are entitled to get preference in the H-1B lottery. At the same time, those who have earned bachelor's degrees in the US will not get a preference, although US universities also gain from fees paid by foreign undergraduate students. Others with degrees from abroad, including their employers who have sought them out for specialized skills that may not be found in the United States, feel equally entitled. Moreover, it is not always the case that one with a master's degree will be paid a higher wage than others. A skilled professional with a bachelor's degree and many years of experience could be paid more than an entry level worker with a master's degree. Also, as noted before, applicants are selected under the H-1B advanced degree exception not because they are entering into a specialty occupation that requires a minimum of a master's degree, but only because they graduated with an advanced degree from a specified US institution under INA § 214(g)(5)(C). The position may require a bachelor's degree even though the H-1B worker possesses a higher degree, and will thus get the commensurate wage that would be paid to a comparable US worker with a bachelor's degree.

In a perfect world, the solution is for Congress to create more H-1B visa numbers that would serve all constituencies, which in turn, would also serve the US national interest. Unfortunately, the national interest is defined differently by the Trump administration. The proposed rule is being issued in response to the Buy American Hire American (BAHA) executive order instructing DHS to "propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of U.S. workers in the administration of our immigration system." The executive order specifically mentioned the H-1B program and directed DHS and other agencies to "suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries." BAHA has already been deployed to wreak havoc to the legal immigration system by either delaying the processing of visa applications or denying them, and this rule may also cause more harm than good in the long run.

There is some chance that the proposed rule may not take effect by April 1, 2019, which is when H-1B petitions may be filed for FY2020 commencing October 1, 2019. It includes a provision that would enable USCIS to temporarily suspend the registration process during any fiscal year in which USCIS "may experience technical challenges with the H-1B registration process and/or the new electronic system." The proposed temporary suspension provision would

also allow USCIS to "up-front delay the implementation of the H-1B registration process past the fiscal year (FY) 2020 cap season, if necessary to complete all requisite user testing and vetting of the new H-1B registration system and process." If the rule is finalized as proposed but there is insufficient time to implement the registration system for the FY 2020 cap selection process, USCIS said it would likely suspend the proposed registration requirement for the FY 2020 cap season.