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EVISCERATION OF THE H-1B VISA PROGRAM THROUGH EXECUTIVE ACTION

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By Cyrus D. Mehta

The H-1B visa program has been eviscerated through the promulgation of a final rule that would prioritize the allocation of H-1B visas in the lottery to those who are higher skilled and higher paid and through executive action. Relatedly, President Trump issued an executive order that would impose a $100,000 fee on H-1B petitions filed on behalf of beneficiaries who are outside the US. The $100,000 fee will not apply to H-1B petitions filed on behalf of beneficiaries who are already in the US and will also be requesting a change of status to H-1B from another nonimmigrant status such as F-1 or J-1. This executive order was recently upheld by a federal district court. These combined actions have radically changed the H-1B visa program through the stroke of a pen and without any legislation from Congress.

DHS Finalizes H-1B 'Weighted Selection' Rule

On December 23, 2025, the Department of Homeland Security (DHS) announced a final rule implementing a weighted selection process that generally favors the allocation of H-1B visas to those who are, in the administration's view, "higher-skilled and higher-paid." The rule governs the process by which U.S. Citizenship and Immigration Services (USCIS) selects H-1B registrations for unique beneficiaries for filing of H-1B cap-subject petitions (or H-1B petitions for any year in which the registration requirement is suspended). DHS received 17,000 comments and made no changes from the proposed rule. Court challenges are expected to follow.

Under the new process, instead of a random lottery, registrations for unique beneficiaries or petitions will be assigned to the relevant Occupational

Employment and Wage Statistics wage level and entered into the selection pool as follows: (1) registrations for unique beneficiaries or petitions assigned wage level IV will be entered into the selection pool four times; (2) those assigned wage level III will be entered into the selection pool three times; (3) those assigned wage level II would be entered into the selection pool two times; and (4) those assigned wage level I will be entered into the selection pool one time. Each unique beneficiary will only be counted once toward the numerical allocation projections regardless of how many registrations were submitted for that beneficiary or how many times the beneficiary is entered in the selection pool, DHS said. The new final rule is expected to make it significantly less likely that companies will hire international students when they graduate from U.S. universities.

The final rule, published on December 29, 2025, is effective February 27, 2026, and will be in place for the Fiscal Year 2027 H-1B cap registration season.

District Court Rules Against Plaintiffs in $100,000 H-1B Fee Lawsuit, Plaintiffs Appeal

In *Chamber of Commerce v. Department of Homeland Security*, a district court has ruled in favor of the Department of Homeland Security (DHS), finding that imposition of a $100,000 fee for new H-1B applications and related actions were legal under a Presidential Proclamation pursuant to INA 212(f).

“Defendants have the stronger position,” U.S. District Judge Beryl Howell said. “The lawfulness of the Proclamation and its implementation rests on a straightforward reading of congressional statutes giving the President broad authority to regulate entry into the United States for immigrants and nonimmigrants alike.”

Judge Howell noted, “To be clear, this decision in favor of defendants is not to dismiss or discount the past and ongoing contributions of H-1B workers to the American economy that plaintiffs highlight. Important as those contributions may be, the effects of the H-1B program on the American economy or national security, whether positive or negative, are simply not at issue in this case. The Supreme Court has long maintained that matters of economic and foreign policy are generally entrusted to the political branches of government and ‘rarely proper subjects for judicial intervention.’ ”

The plaintiff groups, the US Chamber of Commerce and the Association of

American Universities, have sought expedited review in the DC Circuit Court of Appeals. The groups said in their emergency consent motion to expedite appeal that neither section of the Immigration and Nationality Act that Trump cited in his proclamation that imposed the hefty fee for the H-1B nonimmigrant visa program "contains the clear statement necessary to delegate to the president Congress's power to impose taxes on U.S. employers."

"What is more, the proclamation takes a wrecking ball to Congress's carefully crafted design of the program — in overriding the program in this manner, it exceeds the bounds of the president's lawful authority," the groups said.

Furthermore, multiple states joined an amicus brief supporting plaintiffs in *Global Nurse Force v. Trump*, filed in the Northern District of California. There is hope that the DC Circuit Court of Appeals and another district court will rule differently from Judge Howell's decision. The brief in *Global Nurse Force v. Trump* asks the judge to temporarily block a new Trump administration policy to charge new H-1B immigrant visa applicants a $100,000 fee. Among other things, the states and other plaintiffs argue that the fee would exclude from hiring qualified H-1B workers nonprofits and schools that are unable to afford it.

The amicus brief includes the attorneys general of Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.

Impact of the Combination of the Wage Prioritization Rule and the $100,000 Fee

For further insights, watch my interview on CNBC/TV18 with esteemed colleague Steven Brown regarding the H-1B new rule that will give priority to those being offered level 4 wages and the $100,000 H-1B fee that was upheld by a federal district court.

https://youtu.be/1wRHiQzW5tw

I have opined that with the $100,000 there will be fewer H-1B petitions filed on behalf of beneficiaries outside the US and most of the beneficiaries competing for the limited 85,000 H-1Bs per year will be mainly students in the US in F-1 status. They may have a better chance of selection even if they are not paid the

highest-level wage.

While the $100,000 may help students in F-1 status in the US, it will not benefit employers who need to also hire workers based overseas especially nonprofits, universities and startups. Even those who were previously counted under a prior H-1B lottery but are based overseas, a new petition filed on their behalf will have to be accompanied by the $100,000 fee.

The two actions from the Executive Branch will not just kill the H-1B visa program but will also stymie innovation and prevent the entry of talented foreign nationals who will ultimately contribute to the US. It is hoped that courts will find both the actions unlawful and contrary to the INA.