

The H-1B Cap: What You Should Know

Your employer is seeking to enter you into the FY2025 H-1B lottery. All new H-1B petitions will be subject to the annual limitation or “cap”, and a number of special circumstances will apply to this process. This message explains what these circumstances are and addresses questions that commonly arise with respect to the filing of cap-subject H-1B petitions.

What is the H-1B Cap?

By law, the United States Citizenship and Immigration Services (USCIS) may not approve more than 65,000 H-1B petitions for new employment each fiscal year (running from October 1 to September 30). There is a set-aside or separate cap of 20,000 for holders of advanced degrees from United States universities. Once these caps are reached, USCIS will not accept any more H-1B petitions subject to these caps.

What is the pre-registration process?

In 2020, USCIS implemented a new, 2-step process for selection of H-1B cap-subject submissions. Under the new system, employers need to register each foreign national for which they seek H-1B authorization in a USCIS online platform. Each registration will require the submission of basic information regarding the employer and foreign national.

The FY25 H-1B Cap registration period will run between March 6 through March 22, 2024. If the number of foreign nationals submitted for registration during this period exceeds the cap limits, the registration period will close and USCIS will conduct a random selection process among the registered foreign nationals.

For the first time this year, USCIS will select registrations by the individual foreign national. If a foreign national is selected, each employer that submitted a registration on that foreign national’s behalf will be notified of the selection and will be eligible to file an H-1B petition on that foreign national’s behalf. USCIS has allotted a period of 90 days to submit H-1B petitions, with the earliest filing date being April 1, 2024.

If USCIS does not receive enough H-1B cap petitions to meet the quota during the initial filing period, a second lottery will be conducted. Last year, the second lottery was conducted in August. USCIS will select from among the H-1B registered foreign nationals that were filed during the March registration period but not selected in the initial lottery. USCIS will notify employers and their immigration counsel of the results of a second selection.

What happens if either or both caps are reached before the end of the registration window?

If USCIS determines that it has received enough foreign nationals’ registrations to meet or exceed either or both of the 65,000 or 20,000 caps during the registration period, a random selection will be held to determine the registrants who will be eligible to file a petition. The selection process will be computer generated and will select registrations on a purely random basis. The last time

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that such a random selection was run was last April (although, at the time, it was referred to as the H-1B “lottery”).

Under the new pre-registration system, the random selection takes place significantly earlier than in prior years, and those selected will be notified by April 1. Thus, the new system provides earlier clarity in identifying the individuals selected in the random selection as compared to the old system.

How likely is it that a random selection will be held this year?

A random selection is certain.

Does submission of my registration during the March registration period guarantee that I will obtain an H-1B number?

No. Submission of a registration only guarantees a chance of selection in the H-1B lottery. If the foreign national is selected in the lottery, then an H-1B petition may be filed on behalf of that individual with USCIS.

How and when will I know that my registration has been selected in the random selection?

USCIS will confirm the registered foreign nationals that were selected after the registration period ends. The agency announced the selection will occur on March 31. The selection notices are electronically uploaded into the same platform through which the registrations are filed. We will notify your employer as soon as we receive an update on the status of your registration. For selected individuals, the corresponding petition will be submitted to USCIS during a 90-day filing period, which will begin on April 1, 2024. USCIS will issue a receipt notice confirming receipt of the petition and providing a receipt number once the agency receives the corresponding petition.

Once the petition receipt notice is issued, we will note the receipt number in your case management file. You can check the case management system at any time, and can also track the progress of your case through the following case status link: <https://egov.uscis.gov/casestatus/landing.do>

Will premium processing be available for my H-1B petition if it is selected in the registration?

Historically, USCIS would suspend premium processing during H-1B cap season, and such suspensions were typically announced in March. However, since the new registration and selection process was implemented in 2020, premium processing has been available during the cap season. If this changes, Morgan Lewis will provide an update.

What is the likelihood of success in the random selection?

This will depend on the volume of filings. Last year, USCIS received a record 758,994 of cap eligible registrations, including registrations for the advanced degree allocation. The large number of eligible registrations (a 60% increase from the previous year) for foreign nationals with multiple eligible registrations proved that the system was being used in a way that afforded an unfair

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advantage to those working together to submit multiple registrations on behalf of the same foreign national. Now that USCIS has implemented a foreign national focused selection process for the FY25 registration system, we believe that the probability of selection will improve.

What happens if the submission on my behalf is not selected in the random selection?

The company will not be eligible to file the H-1B petition on your behalf. If you are in the United States and maintaining a nonimmigrant status, you may continue to hold this status until it expires. If your status does not expire until after April 1, 2025, your employer may be able to submit another H-1B registration for you in March of next year. If your status is F-1 with OPT, you may be eligible for a STEM OPT extension. If your status has expired, or will expire within the next few months, both your employer and Morgan Lewis will partner closely with you to ensure you understand your status, how it impacts your work authorization and your ability to remain in the United States, as well as any possible options available to you.

What happens if my registration is selected in the random selection?

A petition will be submitted by your employer on your behalf to USCIS during the 90-day petition filing period, which will begin on April 1, 2024. Selection of a registration in the random selection is not a guarantee of an approval, and any final adjudication might not occur until after October 1.

What happens once my petition is approved?

The original hard copy I-797 approval notice will be sent to us within a few days of approval. We will notify you once it is received.

Change of Status

If the petition requested a change of status, the approval notice will indicate that your change of status to H-1B has been approved and that the petition is valid starting on October 1, 2024, or the date of approval, whichever is later. This means that on the validity start date, your status will automatically change to H-1B.

Consular Notification

If your case was filed as a consular petition, then you will need to activate your H-1B status by travelling abroad and reentering on or after September 21, 2024 (ten days before the start date). Unless you hold a Canadian passport, you will need to obtain an H-1B visa through a U.S. consular appointment before you can reenter in H-1B status.

If the registration on my behalf is selected in the random selection and my H-1B petition is approved, must I begin work on October 1 in H-1B status?

As mentioned above, if your H-1B is filed as a change of status petition, your status will automatically “convert” to H-1B on October 1. If you are in a different work authorized status and you wish to postpone the beginning of your period of work/stay in H-1B status (for example, if you are in F-1

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status working pursuant to a period of OPT and you wish to continue to do so for a period beyond October 1), then your petition should NOT be filed as a change of status but rather as a “consular notification” petition. This will allow you to continue to work beyond October 1 in your current status. In order to “activate” or start working pursuant to the H-1B, you will have to depart the United States, obtain the H-1B visa stamp in your passport, and re-enter the United States in H-1B status. (If you are Canadian, you will need to depart and re-enter showing your H-1B approval notice, but you do not require an H-1B stamp in your passport.)

If you want us to prepare the petition for consular processing rather than a change of status, please inform your employer and send us your employer’s approval in writing as soon as possible. We need to learn about this decision in the early stages of preparation in order to accommodate the request.

Does filing the registration and/or H-1B petition impact my ability to travel?

The filing of the registration will not impact your ability to travel. If your registration is selected in the random selection and a petition is filed with USCIS, you should not travel abroad while the H-1B change of status petition is pending. If you travel abroad while the H-1B change of status petition is pending, USCIS will adjudicate the underlying H-1B petition, but deny the change of status request. If the H-1B petition is approved and the change of status request is denied, then you will need to obtain an H-1B visa at a U.S. consulate abroad before you can return to the United States to work in H-1B status. (As noted above, if you are Canadian, you will need to depart and re-enter showing your H-1B approval notice but will not need to obtain an H-1B visa in your passport.) You may travel internationally after the filing of the petition if it is submitted with a request for consular notification or after H-1B approval.

May I travel outside the United States after approval of the H-1B petition?

After approval of the H-1B petition, you may travel outside the United States, provided that (unless you are Canadian) you have a valid visa that allows you to re-enter in the relevant status. If you wish to travel after October 1, 2024 and are in H-1B status, you must (again, unless you are Canadian) obtain an H-1B visa at a consulate abroad in order to re-enter in H-1B status. We will provide details about the H-1B visa application process with your H-1B approval package.

F-1 Student Visa Cap Gap & Travel

Submission of the registration alone does not have any bearing on your status. If your registration is selected in the random selection, and the H-1B petition with a change of status request is approved, you may be able to travel abroad and return in F-1 status provided that your F-1 visa is still valid, you possess a valid EAD under OPT, and you have a properly endorsed I-20. In contrast, if you are in a protected “cap-gap” situation but do not have a valid EAD and an endorsed I-20, then you will **not** be able to obtain a new F-1 visa abroad. Even with a valid EAD and an endorsed I-20, a consular officer may deny your application for an F-1 visa. Accordingly, we advise that you travel abroad only if you possess an unexpired F-1 visa, a valid EAD under OPT or STEM OPT, and a properly endorsed I-20 at the time of your planned return. If you must travel and you do not have the requisite documents for admission in F-1 status, then the alternative is to remain abroad until you are eligible to apply for an H-1B visa. You may return to the United States on an H-1B visa up to 10

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days prior to the petition validity date, which is typically October 1. Individuals who have F-1 curricular practical training (CPT) rather than OPT are not covered by cap-gap protection. Those with CPT may be eligible to remain lawfully in the United States until an approved H-1B petition takes effect but they will not be employment authorized during the gap.

When may I apply for an H-1B visa?

The general rule is that you may apply for a nonimmigrant visa no earlier than 90 days before the start date indicated on the approved petition. Since the start date of the approved H-1B petition would be no sooner than October 1, the earliest date on which you could apply for your H-1B visa would be July 3. Specific consular practices may vary, and not all consulates may be willing to accept a visa application this far in advance. Please let us know if you wish us to make an inquiry on your behalf with a specific consulate.

When may I enter the United States in H-1B status?

The earliest date on which you can enter the United States in H-1B status will be 10 calendar days before October 1 (September 21). You may not, however, start work for your employer in H-1B status until October 1.

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