

Mobility: immigration alert

February 2021

United States

DHS delays effective date of H-1B selection final rule to 31 December 2021

Executive summary

On 8 January 2021, the U.S. Department of Homeland Security (DHS) published the final rules instituting a wage-based selection system for registered, cap-subject H-1B cases. The DHS intended to replace the existing lottery system for H-1B registration with the new rules on 9 March 2021.

The DHS now announces that it will delay the implementation of the new system until 31 December 2021.

Background and impact

An H-1B work visa is intended for nonimmigrant workers in a specialty occupation. The DHS may approve a maximum of 85,000 new H-1B work visas in a year and typically receives petitions in excess of the maximum each year.

On 8 January 2021, the DHS announced that it will institute a wage-based selection system for H-1B cap-subject (i.e. new H-1B) registrations, by generally ranking and selecting registrations based on proffered wages and corresponding prevailing wage levels. Specifically, rather than a random selection process, and under the proposed rules, the DHS would first select registrations where the proffered wage is equal to or higher than the relevant Standard Occupational Classification (SOC) code in the area of intended employment, beginning with the highest level (highest paid) and descending to the lower levels.

The wage-based selection system, from highest to lowest wages offered, is expected to impact U.S. employers who wish to hire foreign workers on H-1B visas for roles with lower wage levels, such as recent graduates, and employers who cannot afford to pay higher wages.

Implementation delayed from March to December

On 8 February 2021, the DHS delayed the effective date of the above-described new wage-based lottery system from 9 March 2021 to 31 December 2021. The DHS explained this delay by revealing that its agency "will not have adequate time to complete system development, thoroughly test the modifications, train staff, and conduct public outreach needed to ensure an effective and orderly implementation." The DHS will be using the remainder of 2021 to prepare its systems and staff for a smoother transition to the new system in 2022.

What this means

The upcoming fiscal year 2022 H-1B cap season will be on familiar grounds for U.S. employers, who can anticipate the H-1B selection to follow the same lottery system as before, with 20,000 reserved for individuals with a U.S. Master's degree or higher.

Implementation of the wage-based lottery system is still possible for fiscal year 2023 H-1B cap season, and employers are encouraged to use the remainder of the



EY Law LLP

2021 to prepare for the new system by reviewing its affected population. Notably, though, the DHS further noted that during this delay, the “DHS leadership will also evaluate the [wage-based lottery system] and its associated policies, as is typical of agencies at the beginning of a new Administration.” Therefore, while employers should still prepare for the possibility, it seems likely that we will see further amendments to the system before its final implementation on 31 December 2021, or even the possibility that the DHS chooses to forego implementation of the new rules altogether.

EY Law will continue to monitor these developments. Should you have any questions, we encourage you to contact one of our US immigration professionals.

EY | Building a better working world

EY exists to build a better working world, helping create long-term value for clients, people and society and build trust in the capital markets.

Enabled by data and technology, diverse EY teams in over 150 countries provide trust through assurance and help clients grow, transform and operate.

Working across assurance, consulting, law, strategy, tax and transactions, EY teams ask better questions to find new answers for the complex issues facing our world today.

For more information, please visit ey.com/ca.

Follow us on Twitter @EYCanada.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Information about how EY collects and uses personal data and a description of the rights individuals have under data protection legislation are available via ey.com/privacy. EY member firms do not practice law where prohibited by local laws. For more information about our organization, please visit ey.com.

About EY Law LLP

EY Law LLP is a Canadian law firm, affiliated with Ernst & Young LLP in Canada. Both EY Law LLP and Ernst & Young LLP are Ontario limited liability partnerships. EY Law LLP has no association or relationship with Ernst & Young LLP in the US, or any of its members. Ernst & Young LLP in the US does not practice law, nor does it provide immigration or legal services. For more information, please visit EYLaw.ca.

© 2021 EY Law LLP.

All Rights Reserved.

A member firm of Ernst & Young Global Limited.

EYG no. 001031-21GbI

This publication contains information in summary form, current as of the date of publication, and is intended for general guidance only. It should not be regarded as comprehensive or a substitute for professional advice. Before taking any particular course of action, contact EY or another professional advisor to discuss these matters in the context of your particular circumstances. We accept no responsibility for any loss or damage occasioned by your reliance on information contained in this publication.

ey.com/en_ca

George Reis, Managing Partner
+1 416 943 2535
george.reis@ca.ey.com

Batia Stein, Partner
+1 416 943 3593
batia.j.stein@ca.ey.com

Roxanne Israel, Partner
+1 403 206 5086
roxanne.n.israel@ca.ey.com

Authored by:
Joo Young Seo, Attorney at Law
+1 416 943 3548
Joo.Young.Seo@ca.ey.com

Alex Israel, Partner
+1 416 943 2698
alex.d.israel@ca.ey.com

Christopher Gordon, Partner
+1 416 943 2544
christopher.d.gordon@ca.ey.com

Jonathan Leebosh, Partner
+1 604 899 3560
jonathan.e.leebosh@ca.ey.com