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Analysis

Salary-Based H-1B Visas May Leave Out Foreign Grads

By [Suzanne Monyak](#)

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Law360 (October 29, 2020, 10:12 PM EDT) -- The Trump administration's proposal to eliminate the H-1B visa lottery and instead award the coveted visa slots to candidates offered the highest salaries will affect startups and cut off a key pathway for international students to work in the U.S. after graduation, experts say.

H-1B visas, which are reserved for foreign professionals with college degrees, are capped at 85,000 per year. With demand consistently outstripping supply, [U.S. Citizenship and Immigration Services](#) has been holding a lottery each spring for the spots. Under the new proposal, USCIS would rank each visa request by salary and award the slots to employees of companies promising the highest pay.

In its [proposed rule](#), the agency predicted that no entry-level hires paid at the lowest level of the four-tier salary

ranking would be selected under the new system, and three-quarters of new hires paid at the second level and all candidates paid salaries in the top two tiers would be picked.

Immigration lawyers predicted that this could force top foreign graduates of U.S. universities into other countries, while deterring prospective students abroad from attending American schools if they know they are unlikely to be able to stay in the U.S. after graduating.

"We're talking about really bright kids who are very ambitious, who are extremely hardworking, who are earning highly technical degrees," said Eric R. Welsh, a partner at [Reeves Immigration Law Group](#). "That, from my perspective, you would want in the workforce, you would want at your business."

Entry-level hires in less technical fields, such as those with liberal arts degrees, would likely fall into the lowest salary level and thus be unable to obtain an H-1B visa under the new system. But the impact could extend into more technical areas as well, with less experienced workers in math and science fields, such as scientific researchers at universities and engineers and analysts at startups, also less likely to be selected for a visa, attorneys said.

Liz Espín Stern, a partner at [Mayer Brown LLP](#) who leads the firm's global mobility and migration practice, said that the allocation of work visas by salary "seems completely at odds with our desire to cultivate new talent in this country" and will disrupt the flow of top foreign-born graduates "that other countries are competing for fiercely."

The prospect of having to return home after graduation could deter some international students — who generally must pay full tuition — from studying in the U.S., particularly at smaller and lesser-known schools.

"Certain students aren't going to be as interested or will think twice about studying in the United States if they feel that their job prospects won't be as good," said Courtney Noce, an immigration attorney at [Greenberg Traurig LLP](#).

Attorneys also said that excluding less-experienced employees, who are often younger, could also stymie U.S. innovation and foreign talent, as more recent graduates may know more about the most updated technology platforms and have more energy and ideas.

"I think it is going to hurt innovation because many times it's the people right out of grad school who have been doing cutting-edge research," said Stephen Yale-Loehr, an immigration professor at [Cornell University Law School](#).

Jon Baselice, executive director for immigration policy at the [U.S. Chamber of Commerce](#), said in a statement that the proposal "will significantly disrupt the operations of many businesses by denying them access to the talent they need to grow and create jobs."

Eleanor Pelta of [Morgan Lewis & Bockius LLP](#) said she recently took a call from a client in the pharmaceutical industry who was worried about losing a key employee, a process engineer.

"Here we are in a race, an all-out war, against coronavirus. How can we afford to shut out scientific and other related drug-development talent at any level? We shouldn't be doing that. That's just shooting ourselves in the foot," Pelta said.

A spokesperson for USCIS said in a statement to Law360 that the proposal "does not prevent any specific population, demographic or class from obtaining an H-1B visa and benefiting from the program."

"The intent behind the proposed rule is to create a more effective selection process when compared to demand; ensure that businesses are using the program for high-paid, high-skilled foreign workers; and protect the economic interests of American workers while still enabling U.S. employers to meet their personnel needs and

remain globally competitive," the spokesperson said.

The new proposal is the latest in a slew of policies under the Trump administration aimed at tightening eligibility for work visas, purportedly to free up jobs for U.S. workers, particularly as the coronavirus pandemic has left thousands unemployed.

The proposed change comes just weeks after the [U.S. Department of Labor issued a policy](#), which took effect immediately, jacking up the required salary for foreign worker programs by as much 50% for some occupations.

The required wages are set by the federal government based on the industry and location.

Under the new calculations, an entry-level software developer in New Jersey, for instance, would need to be paid a more than six-figure salary to clear even the bottom wage tier, which, under the government's projections for the proposed new system, would be too low to be selected for an H-1B visa.

The increased salary requirements have already taken effect, after government officials fast-tracked the regulatory process, citing high levels of U.S. unemployment because of the coronavirus pandemic.

However, plans to scrap the H-1B visa lottery long predate the COVID-19 outbreak and were first indicated in President Donald Trump's "Buy American, Hire American" executive order in 2017, which called for "reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries."

The [U.S. Department of Homeland Security](#) said in the proposed rule that the new system would prevent companies from abusing the foreign worker program and underpaying foreign workers, pointing the finger at companies like [The Walt Disney Co.](#) and Hewlett-Packard, which were reported to have laid off their U.S. workers and replaced them with H-1B workers.

"The change in the selection process is expected to help militate against this kind of practice by reducing the influx of cap-subject H-1B workers for lower-paid positions," the department said.

However, immigration lawyers who represent employers seeking to hire foreign workers stressed that smaller companies, like startups, which hire more Americans than foreign workers and do not abuse the program, could bear the brunt of a salary-based allocation system.

"This is an attempt to shoehorn a standard into a very blunt instrument that's artificial. It's skewed against our talent goal as a country," Espín Stern said.

Unlike larger corporations, which may be able to afford to pay a crucial employee more, startups may find themselves unable to afford to pay a key analyst enough to win a work visa under a salary-based selection process once the employee's postgrad work permit expires.

Startups also may be more likely to offer forms of compensation beyond salary that are not considered when setting wage levels. For example, they may give an employee a lower base salary but also stock in the company, according to Nadia Yakoob of [Nadia Yakoob & Associates](#), an immigration lawyer who specializes in representing startups.

"That's how these startups work. They want you to have skin in the game," Yakoob said.

Nonprofits and other small businesses could similarly struggle to hire foreign workers under the salary scale, attorneys said. U.S. companies without foreign offices would also lose out to international firms, attorneys said.

A company with an office in Canada, for instance, could transfer a talented employee to Toronto under the country's merit-based immigration system and even bring the employee back to the U.S. later on an L visa for internal transfers.

"This is very, very hard on small business. Not only do they have to compete with the bigger companies for talent, but they might not have access to foreign talent at all because of this rule," Pelta said.

Attorneys also argue that salary isn't always a clear indicator of talent and economic contribution.

Private-school teachers or doctors who recently finished medical school, for instance, work in H-1B visa-eligible specialty occupations, but they would find themselves less likely to win a visa in the lottery if they aren't paid as highly as others in their profession.

"You could be a law clerk at the Supreme Court, and your salary is really low," Yakoob said.

But the rule may not be built to last. Congress had created the four H-1B wage tiers to allow employers to hire highly skilled foreign workers at all levels, not just for roles requiring more experience, attorneys said.

DHS in fact acknowledged this concern in another immigration policy issued last year, where the department said that "prioritization of selection on other factors, such as salary, would require statutory changes."

However, the department said in its latest proposal that "upon further review and consideration of the issue" the immigration statute is "silent" as to how H-1B visa requests should be allocated when demand exceeds the cap.

Attorneys said that a decision about how to best allocate limited work visas is a substantial policy change that should go through Congress, not a fast-tracked regulation issued just days before a presidential election.

"We may choose to make those decisions as a country, but to make them without the benefit of legislation, debate and a completely open view of the situation is dangerous," Espín Stern said. "And it's particularly dangerous at a time that we have an aging population and a challenged economy."

--Editing by Jill Coffey and Brian Baresch.

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