

National Foundation for American Policy

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New Research: Ending the H-1B Lottery Will Harm International Students

Analysis Finds International Students May Be 54% More Likely To Get An H-1B Petition Under The H-1B Lottery Than Under The Trump Administration's Regulation

Arlington, Va. – A regulation published in the final weeks of the Trump administration will make it less likely that international students would receive H-1B petitions, according to a [new analysis](#) by the National Foundation for American Policy (NFAP), a nonpartisan policy research organization. The new regulation would end the H-1B lottery and instead award H-1B petitions from highest to lowest salary level. By making it more difficult to work after graduation, the rule would provide a disincentive to study in the United States at a time when new enrollment of international students has [fallen significantly](#) at U.S. universities. The Trump administration designed a series of measures to discourage international students from coming to the United States and working after graduation, making it fair to conclude the regulation to end the H-1B lottery was intended to disadvantage international students. The Biden administration [delayed implementation of the rule](#), but has signaled support for a regulatory change that would award petitions based on salary level.

Selecting H-1B petitions by salary level would favor those with the most experience in the labor market over those with the least experience, something not present under the current lottery system, which awards H-1B petitions by random selection when more applications (or “registrations”) are received than the annual limit allows.

The National Foundation for American Policy (NFAP) found that an international student may be 54% more likely to get an H-1B petition under the current H-1B lottery system than under the Trump administration's regulation that would end the H-1B lottery, based on an NFAP analysis of actual cases of recent international students and filings for H-1B petitions obtained from an immigration law firm. The data demonstrate the new regulation would have a significant negative effect on the ability of international students to gain an H-1B petition.

The study, “The Impact on International Students of Ending the H-1B Lottery,” can be found at <https://nfap.com/>.

The law firm Curran, Berger & Kludt provided NFAP with 170 cases of F-1 students with applications for H-1B cap selection for FY 2018, FY 2019, FY 2020 and FY 2021. Under the current system that randomly selects H-1B petitions, 60% of the F-1 students were chosen through the H-1B lottery. However, the law firm provided information on the pay levels (Level 1 through 4) for the students' H-1B applications, and NFAP found if the new regulation had been in effect, only 39% of the students' H-1B petitions would have been selected.

The main reason the rule harms students is most international students are paid at the Department of Labor's Level 1 or Level 2 salary level due to their lack of labor market experience

while the rule favors those with years of experience over new entrants to the labor market, preventing people at Level 1 and many at Level 2 from obtaining an H-1B petition.

According to the Department of Homeland Security (DHS), which performed an analysis of the rule, under the new regulation, *no individuals paid Level 1 wages would be selected for H-1B petitions* (either the regular cap or the advanced degree exemption), while *only about half of the people paid at Level 2 wages would get H-1B petitions*. (Individuals with little work experience would expect to be paid at Level 1 or Level 2 wages.) In contrast, under the new regulation, all H-1B applicants paid at Level 3 and Level 4 wages (generally people with most experience in the labor market) would be able to obtain an H-1B petition under the regular cap and the advanced degree exemption, according to DHS.

Because some employers may choose to boost salaries artificially to Level 3 to improve an applicant's chance at being selected, it may be even more difficult for international students to obtain an H-1B petition under the new rule than the NFAP analysis indicates. Many more individuals paid at Level 2 could be shut out entirely from obtaining an H-1B petition.

Based on the law firm's cases, designing a system that prevents people at Level 1 (entry level) from receiving H-1B petitions would likely exclude most international students who apply for H-1B petitions. Among the firm's cases for the four cap years examined (FY 2018 to FY 2021), 53% of international students were paid at level 1 and 37% were paid at Level 2 (i.e., 90% combined). As noted, DHS states in the rule that under its simulation no one at Level 1 would receive an H-1B petition and only about half the individuals paid at Level 2 wages would be selected for an H-1B petition.

NFAP also found other problems with the regulation. The new rule shifts H-1B petitions away from people in many higher-skilled occupations into jobs that 1) require less skill and training and 2) actually pay less, defeating the stated intention of the regulation.

NFAP discovered 11 occupations, including physicians, internists, pediatricians, dentists and computer and information systems manager, for which the individuals paid Level 1 salaries would be unable to obtain an H-1B petition under the rule even though their Level 1 salaries are higher than the median salary for Level 3 for all occupations (\$109,886).

Another significant problem with the rule is it would make it more difficult for physicists, microbiologists and medical scientists (among others) to gain H-1B petitions, since more than half of the of the labor condition applications for those occupations in FY 2019 were for Level 1, and close to 90% were paid at Level 1 or Level 2. Under the rule, many schools also would be unable to hire teachers on H-1B petitions in middle school or high school, since around 90% are paid at Level 1 or Level 2. Unlike universities, middle schools and high schools must compete for the 85,000 H-1B petitions subject to the annual limits.

Before the pandemic, fewer international students were enrolling at U.S. universities. Immigration and Customs Enforcement [reported](#) a 72% drop in new international student enrollment in calendar year 2020 due to the coronavirus pandemic. This rule would make it more challenging for universities to regain international students.

An [amended complaint](#) from the U.S. Chamber of Commerce, other business groups and education organizations has challenged the legality of the regulation to eliminate the H-1B lottery. Two years earlier, in the final rule establishing a system of submitting registrations rather than full H-1B applications, DHS stated that it did not possess the legal authority to select petitions based on salary or other criteria without a change in the law.

Instead of imposing new restrictions on who can receive an H-1B petition, a better solution is to increase the annual number of H-1B temporary visas and employment-based green cards.

If the Biden administration defends the rule in court, or argues on its behalf publicly, it will need to explain why making it more difficult for international students to work in the United States after graduation is a sound policy objective.

Although a Biden administration National Security Guidance called for an immigration policy that “incentivizes the world’s best and brightest to study, work, and stay in America,” the regulation to end the H-1B lottery is incompatible with that policy objective.

About the National Foundation for American Policy

Established in 2003, the National Foundation for American Policy (NFAP) is a 501(c)(3) non-profit, non-partisan public policy research organization based in Arlington, Virginia focusing on trade, immigration and related issues. The Advisory Board members include Columbia University economist Jagdish Bhagwati, Ohio University economist Richard Vedder, Cornell Law School professor Stephen W. Yale-Loehr and former INS Commissioner James W. Ziglar. Over the past 24 months, NFAP’s research has been written about in the *Wall Street Journal*, the *New York Times*, the *Washington Post* and other major media outlets. The organization’s reports can be found at www.nfap.com. Twitter: [@NFAPResearch](https://twitter.com/NFAPResearch)

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