

AN ANALYSIS OF THE PROPOSED RULE ON H-1B SELECTION

EXECUTIVE SUMMARY

A proposed rule would significantly change H-1B selection by heavily weighting the process in favor of individuals in positions that require more experience and against early-career professionals, such as recent international students. U.S. immigration law does not appear to authorize U.S. Citizenship and Immigration Services to award H-1B petitions based on salary level. The proposed rule follows an unsuccessful 2021 Trump administration rule that similarly disadvantaged international students in the H-1B selection process. The new rule uses a Department of Labor wage scale that ranks the minimum required salary based on the experience needed to perform in the position. An individual offered a salary at Level I, the lowest level, is 48% less likely to be selected for an H-1B petition under the proposed rule than under the current system, according to USCIS. In contrast, an individual offered a salary at Level IV, the highest level, would be 107% more likely to be selected for an H-1B petition under the proposed rule compared to the current system. The rule is subject to a 30-day comment period and will likely be challenged in court. H-1B visas are essential because they generally represent the only practical way for a high-skilled foreign national, including an international student, to work long term in the United States and have the opportunity to become an employment-based immigrant and a U.S. citizen.

A CONTROVERSIAL RULE

The proposed rule is controversial for at least two reasons. First, the law does not appear to allow USCIS to select H-1B petitions by seniority or salary level. Second, the method chosen to prioritize H-1B petitions does not measure skill level, as the proposed rule implies, but is a Department of Labor tool to divide job classifications based on the experience and related factors needed to perform in the position.

Employers use the DOL's Occupational Employment and Wage Statistics (OEWS) system to determine prevailing wages. "The prevailing wage determinations are based on data collected by the Department of Labor's Bureau of Labor Statistics (BLS) in (1) the OEWS survey and (2) the National Compensation Survey (NCS). These data generate two wage averages. Then, the Office of Foreign Labor Certification (FLC) uses a formula created by Congress in 2004 to create four wage levels," explained an NFAP analysis.¹

"The Department of Labor's OEWS wage levels (I–IV) are designed as a job classification tool that reflects the amount of experience, supervision and responsibility required for a position, not an assessment of whether the worker is 'highly skilled' or 'less skilled,'" said attorney Vic Goel of Goel & Anderson. "A Level I role is simply an entry-level version of the occupation, while Level IV is a senior-level position requiring greater judgment and independence. USCIS, however, is recasting these categories for its own policy purposes. In the proposed rule, USCIS suggests that higher wage levels equate to higher skill and greater economic value, and it uses this framing

¹ Amy Nice, *Fixing Prevailing Wage Calculations for High-Skilled Immigrants*, NFAP Policy Brief, National Foundation for American Policy, June 2017. In 2017, the system was called OES.

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to justify weighting the lottery in favor of Level III and IV beneficiaries. Wage levels don't correspond to skill in the way USCIS suggests, and instead they correspond to how DOL has structured job progression for prevailing wage purposes."²

Goel explains that the two systems are not compatible. DOL wage levels are designed to ensure fair pay in relation to job requirements. "USCIS lottery weighting attempts to twist those same levels into a proxy for 'skill' and 'best and brightest,'" he said.³

Salary levels are typically determined by the amount of experience a position requires. Positions for individuals offered Level I salaries are usually for early-career professionals, such as recent international students. Level IV salaries are for positions generally filled by individuals with several years of experience, including managers.

For a 2021 NFAP report, the law firm Curran, Berger & Kludt provided NFAP with data on cases for 170 F-1 students with applications for H-1B cap selection from FY 2018 through FY 2021. According to the law firm's data, 53% of international students were paid at Level I and 37% were paid at Level II (i.e., 90% combined). Any system that reduces the likelihood USCIS will select individuals at Level I salaries will make it less likely that recent international students will gain H-1B status.

White House Deputy Chief of Staff Stephen Miller, the chief architect of the Trump administration's immigration policy, has long sought to end or significantly reduce the immigrant talent pipeline that starts with international students gaining Optional Practical Training and H-1B status, arguing it would benefit Americans. The administration has announced several measures, including a future rule to restrict OPT, that will make it more difficult for international students to enter, remain and work in the United States. The proposed rule to change the H-1B lottery selection should be viewed in this context.

HOW THE PROPOSED RULE WOULD OPERATE

For the past several years, USCIS has awarded petitions by lottery when employers filed enough applications to exceed the annual limit. Since 2019, employers have submitted electronic registrations with the names of individuals for whom they seek H-1B petitions. (Previously, employers submitted completed applications.) The Immigration Act of 1990 established an annual limit of 65,000 on new H-1B petitions. In 2004, Congress raised the H-1B annual limit to 85,000 by exempting 20,000 individuals a year who earned a master's degree or higher from a U.S. university. Despite that increase, the supply of new H-1B visas for companies has been exhausted for more than

² Interview with Vic Goel.

³ Ibid.

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two decades (since FY 2004).⁴ The 85,000 annual limit on new H-1B petitions for high-skilled foreign nationals is low, equaling 0.05% of the U.S. labor force, and remains the leading immigration problem for most technology companies.

In its proposed rule, USCIS stated, “If a random selection is necessary, each petition will be assigned the OEWS wage level selected in accordance with form instructions and will be entered into the selection pool in a weighted manner as follows: a petition assigned wage level IV will be entered into the selection pool four times, a petition assigned wage level III will be entered into the selection pool three times, a petition assigned wage level II will be entered into the selection pool two times, and a petition assigned wage level I will be entered into the selection pool one time.”⁵

As a policy, a significant shortcoming of the proposed rule is that it establishes, for H-1B selection purposes, that foreign nationals paid a Level IV wage are four times more valuable to the United States than people paid a Level 1 wage, or twice as beneficial as someone paid at a Level II wage, even though there is no evidence to support this contention. The four DOL wage levels primarily consider an individual's current level of experience in the labor market, not their talent or potential contributions.

On the labor condition application (LCA), most recent international students or other early-career professionals are paid at Level I (entry level) or Level II (qualified) under the DOL wage system due to their relative lack of experience. As a result, many fewer recent students would be selected for H-1B petitions under the new rule. Level III is “experienced” and Level IV is “fully competent,” according to the Department of Labor.

Level IV, for example, is described as employees who “generally have management and/or supervisory responsibilities,” according to DOL. H-1B petitions for individuals paid at Level III and Level IV would do well under the new rule, while others would not fare well.

THE SIGNIFICANT DIFFERENCE BETWEEN THE PROPOSED RULE AND THE CURRENT PROCESS

Comparing the current system to the proposed rule reveals a striking difference. Under the current system, individuals at all four salary levels have a 29.59% chance of being selected for an H-1B petition. Under the proposed rule, individuals at Level I would see their probability of being chosen for H-1B petitions decrease significantly, from 29.59% to 15.29% under the proposed rule, according to USCIS. At the same time, individuals at Level IV would

⁴ Congress exempted from the H-1B annual limit petitions by universities and nonprofit and government research institutes.

⁵ “Weighted Selection Process for Registrants and Petitioners Seeking to File Cap-Subject H-1B Petitions,” U.S. Citizenship and Immigration Services, DHS, RIN 1615-AD01, published September 24, 2025.

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see their probability of being selected rise to 61.16% under the proposed rule. The probability of USCIS selecting individuals at Level III would climb from 29.59% under the current system to 45.87% under the proposed rule, while for people at Level II, the selection opportunity would increase slightly to 30.58%.⁶

**Table 1
H-1B Lottery Selection Probability**

Salary Level	Probability of Being Selected in H-1B Lottery Under the Current System	Probability of Being Selected in H-1B Lottery Under Proposed Rule
Level I	29.59%	15.29%
Level II	29.59%	30.58%
Level III	29.59%	45.87%
Level IV	29.59%	61.16%

Source: USCIS.

The percentage shift in selection probability also illustrates the significant change produced by the proposed rule. (See Table 2.) Under the proposed rule, the probability of USCIS selecting an individual at Level IV for an H-1B petition would increase by 107% but plummet by 48% for individuals at Level I. The probability of USCIS selecting a person for an H-1B petition would rise by 55% at Level III and increase by 3% for individuals at Level II.⁷

**Table 2
Change in Probability of H-1B Lottery Selection**

Salary Level	Percentage Change in Probability of Selection Under the Proposed Rule
Level I	-48%
Level II	+3%
Level III	+55%
Level IV	+107%

Source: USCIS.

The National Foundation for American Policy discovered an error in calculations made by USCIS in Tables 13 and 14 of the proposed rule that leads the agency to understate the negative impact of the new system on individuals at Level I and the boost the proposed rule gives to individuals at Level III and Level IV.⁸ According to USCIS, people at Level I would receive 10,099 fewer H-1B selections, while individuals at Level IV would receive 3,230 more, Level III individuals would get 4,496 more selections and Level II would receive 2,373 additional selections.

⁶ Ibid.

⁷ Ibid.

⁸ In the proposed rule, Table 13, line F was incorrectly calculated, and this affected the calculation of total selections under the proposed new system in Table 14, line 5.

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However, after correcting for the USCIS error, NFAP found that people at Level I would receive 11,518 fewer H-1B selections and individuals at Level IV would receive 4,426 more. Level III would get 5,528 more selections and Level II would receive 1,564 more selections.

Table 3
Estimated Difference in H-1B Lottery Selection By Wage Level: Current vs. Proposed System
(With NFAP correction to USCIS simulation)

Salary Level	Estimated Share of H-1B Petitions Selected Under the Current System	Estimated Share of H-1B Petitions Selected Under the Proposed Rule	Difference in Estimated Number of H-1B Petitions Selected Under Proposed Rule
Level I	23,830 (28.0%)	12,312 (14.5%)	-11,518
Level II	46,968 (55.2%)	48,532 (57.1%)	+1,564
Level III	10,052 (11.8%)	15,580 (18.3%)	+5,528
Level IV	4,150 (4.9%)	8,576 (10.1%)	+4,426
Total	85,000	85,000	n/a

Source: USCIS, National Foundation for American Policy.

Under the proposed rule, after correcting for the USCIS error in their simulation, the share of H-1B petitions would more than double to 10.1% for individuals offered salaries at Level IV compared to 4.9% under the current system. Similarly, the share of H-1B petitions for individuals at Level III would rise from 11.8% under the current system to 18.3% under the proposed rule. However, the share of H-1B petitions selected for individuals at Level I would drop nearly in half, from 28.0% under the current system to 14.5% under the proposed rule. For Level II, the share of H-1B petitions would rise from 55.2% under the current system to 57.1% under the proposed rule.

WHAT IF SCENARIO

It is not easy for employers to change their employment or salary structure by shifting more positions from Level I to Level III or Level IV. That is because the position and levels correspond to experience levels. Despite these obstacles, it is possible to run a “what if” simulation to see the result of many more companies deciding to petition for more experienced individuals whose positions would correspond to Level III or Level IV minimum salaries. If the H-1B lottery saw a 50% increase in applications of individuals at Level III and Level IV salaries, NFAP found it would result in individuals at Level III and Level IV further dominating the H-1B selection process. The share of individuals with Level IV salaries selected by USCIS would rise to 13.3% compared to 10.1% under the proposed rule with no increase in Level III and IV applications, and 4.9% under the current system. The share of individuals selected at

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Level III would rise to 24.1% with a 50% increase in applications of individuals at Level III and Level IV salaries under the new system, compared to 18.3% under the proposed rule and 11.8% under the current system. Under the 50% scenario, the share of individuals at Level I salaries selected would drop to 12.7%, compared to 14.5% under the proposed rule without the Level III and Level IV increase and 28% under the current system.

Table 4
Estimated Difference in H-1B Lottery Selection By Wage Level: With Hypothetical 50% Increase in Level III and Level IV Applications

Salary Level	Estimated Share of H-1B Petitions Selected Under the Current System	Estimated Share of H-1B Petitions Selected Under the Proposed Rule and a 50% increase in Level III and Level IV applications	Difference in Estimated Number of H-1B Petitions Selected Under Proposed Rule
Level I	23,830 (28.0%)	10,780 (12.7%)	-13,050
Level II	46,968 (55.2%)	42,494 (50.0%)	-4,474
Level III	10,052 (11.8%)	20,463 (24.1%)	+10,411
Level IV	4,150 (4.9%)	11,263 (13.3%)	+7,113
Total	85,000	85,000	n/a

Source: USCIS, National Foundation for American Policy.

Under the proposed rule, an increase in the number of H-1B registrations would not change the distribution of H-1B petitions among levels unless the proportion of registrations increased or decreased among the different salary levels.

LEGAL AND POLICY ISSUES

The Trump administration published a similar rule to change the H-1B selection process during Donald Trump’s first term. DHS published the rule near the end of the term and Biden officials chose not to allow it take effect. It also would have heavily favored people filling positions that required years of experience over recent international students and other early-career professionals. That rule would have awarded H-1B petitions by highest to lower salary but used a different method, i.e., not a lottery but a priority for individuals at Level IV, then Level III, Level IV and Level I.

The final rule published in January 2021 faced two criticisms that also pertain to the 2025 proposed rule: 1) The rule was unlawful because the awarding H-1B petitions based on salary violates U.S. immigration law and 2) Largely eliminating international students and other young people from the ability to obtain H-1B status makes little sense for competitiveness reasons.

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“Congress spoke directly and clearly by stating that H-1B petitions were subject to a numerical limit and would be considered not by order of skill or wage levels, by relative value to the U.S. economy, or by any other prioritizing criterion other than filing order,” according to a comment signed by the American Immigration Lawyers Association and other organizations. “This is unambiguous in the statute where the INA establishes that consideration for an H-1B visa or status ‘shall’ be ‘in the order in which petitions are filed.’” The Compete America Coalition, FWD.us, NAFSA: Association of International Educators, National Immigration Forum, TechNet, the U.S. Chamber of Commerce and others also signed the comment.⁹

In January 2019, in the final rule establishing a system of submitting registrations rather than full H-1B applications, DHS stated that it did not have the legal authority to select petitions based on salary or other criteria without a change in the law. “DHS is reversing the cap selection order to prioritize beneficiaries with a master's or higher degree from a U.S. institution of higher education in accordance with congressional intent, as the numerically limited exemption from the cap for these beneficiaries was created by Congress and appears in the INA,” according to the preamble to the 2019 rule. “DHS believes, however, that prioritization of selection on other factors, such as salary, would require statutory changes.¹⁰

“The statute mandates visas be issued in the order in which they are received,” said immigration attorney Brad Banias about the 2021 rule. “While a lottery may be a fair interpretation of that mandate when 250,000 applications show up on the same day, the same cannot be said of prioritizing those applications based on wages. A regulation is an interpretation of an ambiguous statutory provision. This interpretation is wholly unmoored from the statute and likely *ultra vires* (beyond one’s legal authority).”¹¹

The second concern about the regulation is that it will make it more difficult for international students to work in America in H-1B status. Recent international students are new to the U.S. labor market and logically would be expected to have less experience, disadvantaging them in a rule that favors seniority.

Bo Cooper, a partner at the Fragomen law firm and a former general counsel at U.S. Citizenship and Immigration Services, has questioned the wisdom of establishing as U.S. government policy a priority for the recruitment of individuals who already are senior professionals, even though nearly all of America’s competitors for talent focus on attracting young talent, particularly recent university graduates.¹²

⁹ Stuart Anderson, “New Trump Immigration Policy: End The H-1B Lottery,” *Forbes*, June 21, 2025

¹⁰ <https://www.federalregister.gov/documents/2019/01/31/2019-00302/registration-requirement-for-petitioners-seeking-to-file-h-1b-petitions-on-behalf-of-cap-subject>.

¹¹ Stuart Anderson, “DHS Published Final Rule to End H-1B Lottery,” *Forbes*, January 8, 2021.

¹² Stuart Anderson, “International Student Enrollment Plummets: Biden Could Bring it Back,” *Forbes*, November 17, 2020.

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While there is much attention on larger companies, approximately half of H-1B petitions for initial employment in FY 2024 went to companies that had 20 or fewer approved H-1B petitions.¹³

NFAP found the proposed 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.

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

Focusing on salary alone will likely close the door to talented individuals in less highly compensated fields. Katalin Karikó, who earned the 2023 Nobel Prize in Physiology or Medicine for her groundbreaking research on messenger RNA, earned only \$17,000 in 1985 (initially on a J-1 visa), which would be equivalent to less than \$42,000 today.

H-1B visas are essential because they generally represent the only practical way for a high-skilled foreign national, including an international student, to work long term in the United States and have the opportunity to become an employment-based immigrant and a U.S. citizen. An [NFAP study](#) found that 55% of America's startup companies valued at \$1 billion or more have at least one immigrant founder, and almost 80% of America's unicorn companies (privately-held, billion-dollar companies) have an immigrant founder or an immigrant in a key leadership role, such as CEO or vice president of engineering. Immigrants have founded or cofounded nearly two-thirds (65% or 28 of 43) of the top AI companies in the United States, and 70% of full-time graduate students in fields related to artificial intelligence are international students.¹⁴

¹³ NFAP analysis of FY 2024 H-1B data.

¹⁴ Stuart Anderson, AI and Immigrants, NFAP Policy Brief, National Foundation for American Policy, June 2023.

ABOUT THE NATIONAL FOUNDATION FOR AMERICAN POLICY

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