# NISKANEN CENTER

## Regulatory Comment

*Comments submitted to the Department of Homeland Security, in the Matter of:*

# Modification of registration requirement for petitioners seeking to file cap-subject H-1B petitions; delay of effective date

CIS No. 2680-21; Docket No. USCIS 2020-0019

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## Key Takeaways

► Replacing the H-1B lottery with prioritization for higher prevailing wage levels would raise average H-1B earnings by more than $7,000.

► Delaying implementation of the modified requirements by just one year would cost national income more than $6 billion over ten years in net present value.

► Replacing the lottery is all the more urgent given the economic conditions brought about by COVID-19.

In both the notice of proposed rulemaking in 2020 and in the final rule published in January, DHS made reference to the economic benefits of transitioning to a wage-based allocation of H-1B visas. However, DHS did not attempt to quantify those economic benefits. This comment offers some quantitative estimates of the benefits of transitioning away from the visa lottery and the costs of delay. Even delay by a single year will cost the U.S. economy billions of dollars per year. The magnitude of the costs of delay imposed by maintaining the status quo dwarf the costs that would be imposed by even an imperfect and hasty transition.
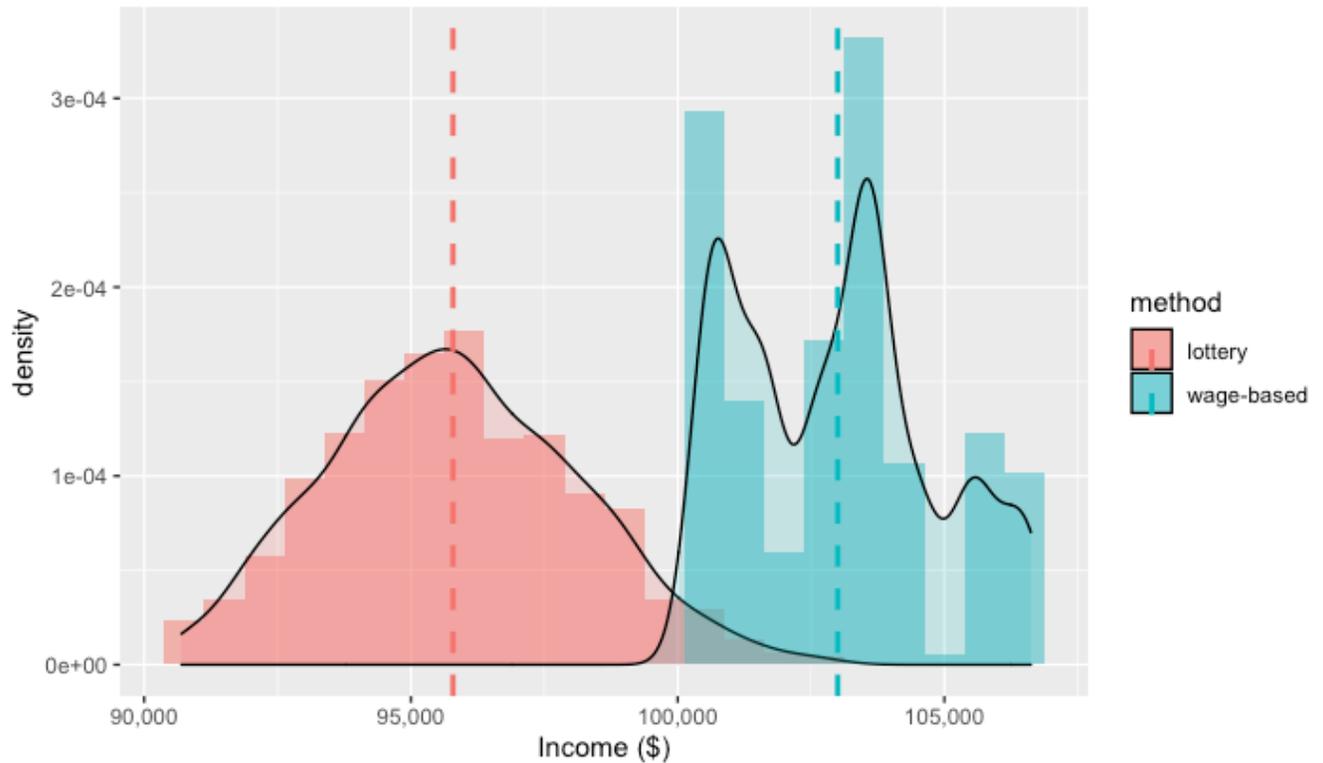
# The benefits of wage-based allocation

Because the demand for cap-subject H-1Bs consistently outpaces the 85,000 that are allowed each year, the H-1B lottery results in a zero-sum game in which one employer's approval is necessarily one fewer visa available to other employers. And the lottery-based allocation established under current rules dictates that virtually all employers are equally likely to win, regardless of their petitions' relative merit. Moving to allocation prioritizing higher prevailing wage levels results in a significantly more productive workforce, increasing annual income by billions of dollars. Conversely, delaying by a year will cost the economy billions of dollars.

**The cost of delay**

In order to quantify the benefits of the changes described in the final rule, I developed a simplified model of the lottery system and the new wage level allocation system. Then I simulated the visa allocation process and the resulting economic outcomes under both models 1,000 times. A detailed description of the methods used to simulate the economic effects can be found in the appendix below.

The results of the simulations can be seen in the table below. Over 99% of the time, the allocation under the new rule results in visas being awarded to more productive workers than under the visa lottery. On average, the wage-based allocation results in the average H-1B worker producing between $7,037 and $7,386 more than the average H-1B worker under the visa lottery, with the lottery selecting workers who earn about $96,000 on average and the wage level-based allocation selecting workers who earn about $103,000 on average. Notably, the far-right tail of earnings under the wage-based allocation is also much fatter than the tail under the lottery, indicating that the likelihood of selecting superstar H-1B workers is much higher under wage-based allocation.

**Simulated average H-1B earnings under wage-based allocation vs the lottery**
(distributions across 1,000 simulations)

These results translate into huge differences in the total contribution to the economy afforded by the H-1B program under each model: they indicate that delaying adoption of wage-based allocation by one year is likely to cost $598–$628 million to total output in the first year of work. Further, because H-1B workers are likely to stay in the U.S. labor market for many years, these costs are not limited to one year. In other words, delay by one year means a compounding blow each year for the indefinite future. I conservatively estimate that the net present value of the ten-year costs associated with delay in implementing wage-based allocation by only one year amounts to $6.4 billion to national income.

Difference in average earnings under each model
(distribution across 1,000 simulations)
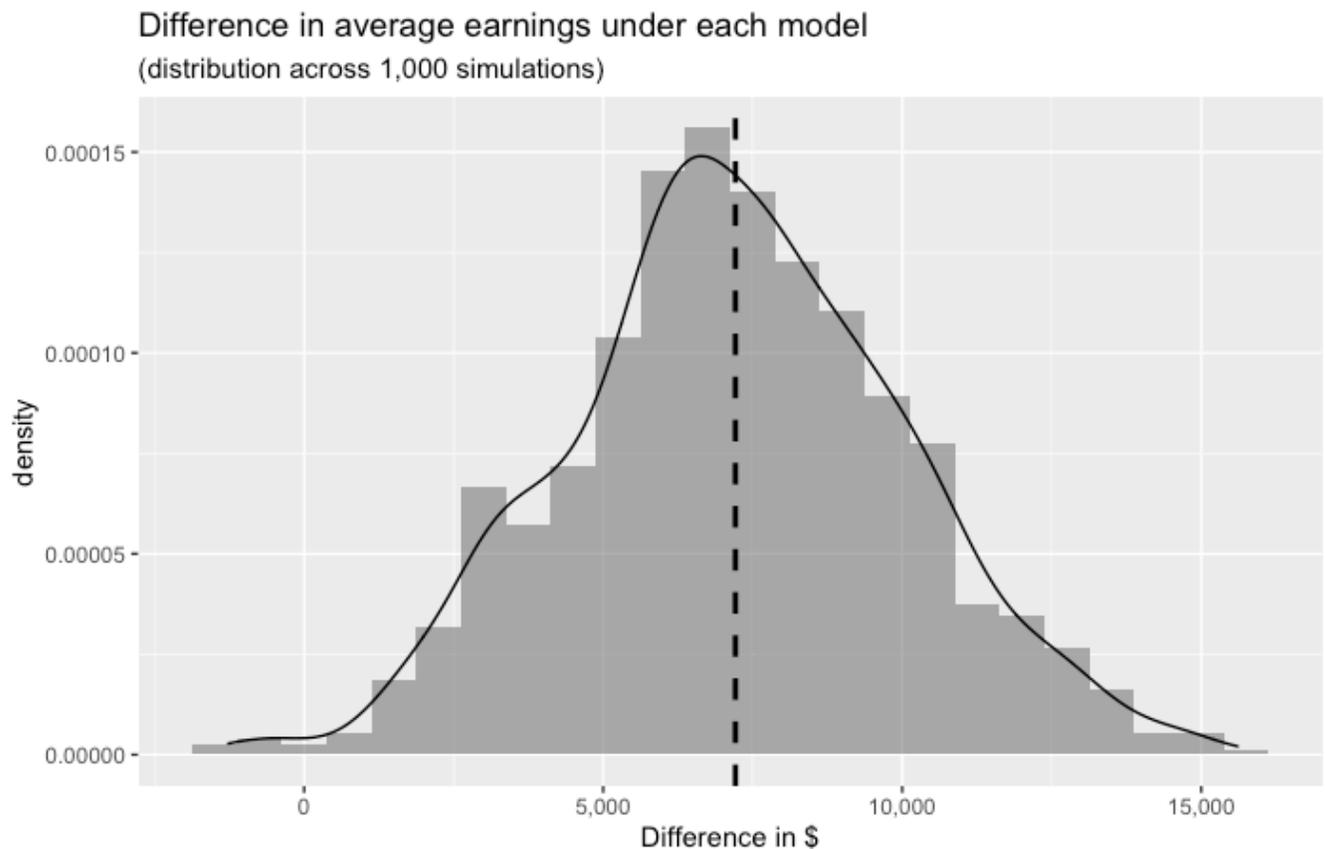


DHS is undoubtedly correct in its belief that there are costs associated with "confusion and disparate treatment of registrants that would result if a new rule took effect during the initial registration period, or a subsequent registration and selection period." However, those costs are unlikely to approach the enormous costs by preserving the status quo relative to the gains on the table from a more efficient allocation of visas.

## Additional benefits

In addition to allocating H-1Bs efficiently, prioritizing higher wage levels yields other significant benefits that I made no attempt to quantify. These benefits are all in addition to the benefits estimated above.

First, prioritizing higher wage levels protects native workers. However overblown stories of labor market competition between H-1B workers and natives are (it's worth noting that H-1B workers earn much more on average than natives of the same level of education), there are nevertheless disturbing cases where businesses use H-1B workers to replace or undercut natives. Adopting this rule would prevent such cases, especially important during the economic recovery from COVID.

Second, wage-based allocation is good for business and reduces a tremendous amount of waste. Under a lottery, businesses face costly uncertainty about whether all the money and time spent trying to secure a visa will pay off. If an employer wins the lottery, their new employee will make the process worth it, but if they lose, the resources are squandered. On top of the waste, the uncertainty and risk deters some businesses from participating at all. Wage-based allocation addresses these issues, giving high-paying employers security and reliability, while providing lower-paying employers the signal they need to know they won't win a visa if they petition for one.

Third, a wage-based allocation generates valuable information to lawmakers about the value of H-1Bs. Under the modified rule, the lowest salary that still secures a visa is much higher as it is almost guaranteed to be in a higher prevailing wage level. It therefore sends a  much stronger signal about the demand for H-1B labor than does the number of lottery applicants, which can obscure the underlying need for workers by only including employers who are willing to take on the risk inherent in entering the lottery. As demand for labor increases, it might not show up clearly in the number of H-1B applications because the value of an H-1B application decreases as the probability of winning the lottery decreases. Therefore, the number of H-1B applications is a mixed signal about the demand for workers and the risk-aversion of employers that is hard to disentangle. On the other hand, a more wage-based allocation does not send these mixed signals, transparently informing lawmakers how to set the cap and assure them that increasing it won't lead to low-wage labor.

Preserving the status quo for even a short time longer imposes severe costs on the economy that would be unnecessary in a strong economy—but in an economy recovering from a pandemic and recession, prioritizing higher wage levels is all the more urgent. We urge DHS not to delay implementation of the rule any longer than is absolutely necessary from a technical standpoint.

# Appendix: Methods

For data, I used 2019 data on Labor Condition Applications from the Department of Labor.[1] While COVID likely changes the dynamics to some degree, the strong recovery underway indicates that using 2019 data is still a good starting point, especially when we consider that H-1B workers are disproportionately likely to work in cutting-edge fields driving economic growth. The data includes H-1B1 and E-3 petitioners so I dropped those petitions from my data. Then, I restricted the sample only to certified applications. And, because I did not want to include petitioners with cap-exempt visas—as they would not be affected by this rule—I excluded petitioners with industry codes identifying them as institutions of higher education. That left over 221,000 remaining petitions, about 30,000 more than the number of actual H-1B petitioners in 2019. In each of the simulations, I randomly sampled 190,098 of the petitions to match the size of the H-1B pool in 2019. Because petitioners filing on behalf of more valuable employees have a greater incentive to receive an H-1B, this sampling is likely to bias the resulting economic estimates downward. In other words, this means my estimate is likely to be conservative.

In each of 1,000 simulations, after drawing a sample to represent the pool of H-1B petitioners, I modeled each of the two methods of allocating visas. For the wage-level based allocation, any petitioner with a prevailing wage level IV or III was identified as receiving a visa. Then, I drew a random sample from level II petitioners to hit however many visas are left of the 85,000 visa cap. For the lottery, I drew a random sample directly from the 190,098 petitioner sample. In both cases, I ignore the master's exemption and treat the allocation as a single block of 85,000 visas out of data limitations. Then, I compared the average wage offered by employers to the resulting pool of employees under both models. The range of estimates reported is given at the 95% confidence internal. For the present value estimate of 10 year costs, I use the average earnings under each model to model a representative worker with a 2% yearly raise and a 3% discount rate. The non-normal distribution of earnings under the wage-based model, with its fat right-hand tail, means that treating the average worker as representative will yield a conservative estimate.

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[1] U.S. Department of Labor, Employment and Training Administration, Performance Data, LCA Programs. Available at: https://www.dol.gov/agencies/eta/foreign-labor/performance#dis