HERE E-REGISTRATION
FOR THE 2020 H-1B FILING SEASON

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Y now, human resource professionals, legal counsel, and other corporate stakeholders in any business dependent on the H-1B visa program should be well aware that United States Citizenship and Immigration Services (USCIS) intends to implement a new system this year — indeed this quarter — for filing H-1B visa petitions subject to the annual H-1B visa cap. This ostensibly well-intentioned new system will replace the prior industry practice of preparing hundreds of thousands of complete H-1B visa petitions and submitting them to USCIS each April 1 — the official start of what has become known as the H-1B filing season.

As described in a Notice of Proposed Rulemaking (NPRM) by USCIS in the March 3, 2021 Federal Register, completing H-1B cases will require 24/7 regional processing centers by “multiple truckloads” and “were stacked on pallets on loading docks, in offices and in balconies” (76 FR 11606, 11609 (Mar. 3, 2011)). From this pool of submitted petitions, USCIS would then conduct a random lottery to select a sufficient number to process against the statutory cap for that federal Fiscal Year. Generally, the annual cap is 65,000 cases (or H-1B visa numbers), with 20,000 set aside for beneficiaries holding U.S.-issued advanced degrees (e.g., master’s, Ph.D., J.D., M.D., etc.). The remaining 65,000 are allocated for any beneficiary holding at least a four-year bachelor’s degree in the field, or its equivalent. H-1B petitions submitted, but not randomly selected, would be returned to the file.

In each Fiscal Year since 2007, the H-1B visa cap was reached. In all but five of those years, USCIS had to implement a lottery system to randomly select petitions because a sufficient number of H-1B visa petitions were received within the first week of that year’s filing season. In the nine H-1B seasons in which lotteries were conducted, any given H-1B petition had between a 30% and 69% chance of being randomly selected for adjudication. In the last three years, the odds of “winning” the H-1B lottery ranged between 43% and 45% with approximately 200,000 cases being submitted.

Given that Congress has been unable to pass legislation to correct this fundamental supply and demand problem, in March 2011 USCIS introduced the concept of an electronic H-1B registration system to replace the current process. Rather than having to prepare and file complete, full-throtted H-1B petitions, petitioners instead would participate in an electronic registration process from which the lottery would be conducted. While this makes sense on several levels, it does invite the potential for trouble. The lack of transparency with respect to the numbers of cap-subject visa numbers historically have been large consulting companies and companies in the Information Technology industry. The business models for a significant portion of these H-1B consumers involve outsourcing H-1B workers to their customers. Put simply, the more H-1B professionals they have available to outsource, the more revenue those resources generate for the petitioner. Thus, those companies have a clear incentive to get as many H-1B visa petitions approved as they can.

Under the prior H-1B filing system, there were de facto limitations on the number of cases a given petitioner could submit due to the cost, time, and legal resources required to draft, produce, and submit those petitions. However, by implementing an electronic registration system instead, what’s to prevent a voracious H-1B employer from stuffing the new system with unlimited numbers of e-registrations?

In a comment to the March 2011 NPRM, I asked USCIS how their electronic system would “be safeguarded from potential abuses such as stuffing the electronic registration system with huge numbers of speculative H-1B cases to hedge their bets for a number or other unfair gaming of the H-1B registration process system?” (See Thibeault, New Rules May Bring Fake H-1B Demons, COMPUTERWORLD, Jan. 1, 2011). And I wasn’t the only one. The American Immigration Lawyers Association warned that e-registrations could “generate fake H-1B demand” by “creating a flood of unnecessary or unspecified registrations, potentially numbering in the thousands, that will ultimately be abandoned or denied.” (American Immigration Lawyers Association letter to Chief, Regulatory Products Division USCIS (May 2, 2011) ALA Doc. No. 11050267). USCIS then shelved the e-registration concept, only to resurrect it again for implementation in 2020.

The new e-registration rule proposed in September 2019 states that USCIS will:
1) charge $10 for each e-registration, and
2) have a protocol in place to identify and disqualify any petitions filed by a single employer for the same beneficiary for more than one position. (84 Fed. Reg. 46609 (Sept. 4, 2019)).

The H-1B law and regulations are intended to prevent the use of the program for speculative employment (e.g., filing a petition on behalf of a worker for whom the employer does not have a specific opening), and more recently to prevent approval of H-1B status where the resources are outsourced and the petitioner cannot fully document the employer’s duties for the entirety of the requested H-1B approval period. (See Third-Party Workites and Employees Policy—Policy Memo. USCIS, PA-602-0157, Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Workites (Feb. 2018), ALA Doc. No. 18022362). But at ten bucks per e-registration, there appears little in the rule preventing speculative e-registrations from being submitted en masse.

As in 2011, commentary to the September 2019 proposed rule again raised this concern. USCIS’s response implied that the 2020 filing season will be somewhat out of this in this regard: “USCIS will monitor the system for potential fraud and abuse (e.g., monitoring the system to determine if employers are submitting many registrations but filing petitions based on selected registrations at a significantly lower rate, which could reflect gaming of the system to unfairly improve their odds of being selected)” (84 Fed. Reg. 60307, 60309 (Nov. 8, 2018)). First, this “monitoring” would not be complete until lottery winning cases have been filed and counted by USCIS. Next, there is nothing in the law to define or assess what “gaming of the system to unfairly improve their odds of being selected” means, or what the penalties for doing so would be. USCIS does indicate that it will require an attestation of e-registrants “intended to ensure that each registration is connected with a bona fide job offer and, if selected, will result in the filing of an H-1B petition.” (Id.). Presumably, this attestation might lay out the details, and the teeth, associated with this monitoring function.

Another comment similarly proposed “there were not enough safeguards in place to prevent unscrupulous petitioners from flooding the H-1B system” and suggested USCIS “conduct additional outreach... especially to small business entities, so that concerns about potential flooding of the registration system can be addressed prior to implementation.” (84 Fed. Reg. 60307, 60310). To this, USCIS responded that it “has already put several safeguards in place to prevent employers from flooding the H-1B registration system, and the details are not part of the registration process.”

What these safeguards may be and how they operate remain undisclosed at this point. The cases given on USCIS’s response to stakeholders’ concerns to date, it is fair for one to conclude that they may not fully appropriate the concerns for changes to the new e-registration system. Indeed, as of the writing of this piece, USCIS says it “believes it is too speculative to conclude that the H-1B registration system would result in large entities crowding out smaller entities for H-1B prospective employers.” (Id.) having reached this conclusion after considering this for nearly a decade.

With this backdrop in mind, USCIS has yet to define or explain how Goethal H-1B consumers will be sufficiently checked from devising H-1B visa numbers this year for themselves, and leaving companies requiring H-1B workers — though not in such large numbers — without key, highly educated personnel they need to remain competitive in their industries. We are left to wait and see whether USCIS vogue references to safeguards and abuse monitoring will, in practice, be effective. The first test will be to see how many e-registrations are submitted this year, and who submit them.

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