

Preparing for the FY2023 H-1B Lottery

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Webinar Overview

- H-1B Fundamentals
- Electronic lottery – what we have learned from previous years and what we know about the upcoming process
- Best practices in H-1B documentation
- Impact of COVID and remote work arrangements on the H-1B process
- Recent RFE trends and recommended responses
- Alternative options for H-1Bs not selected in the lottery
- Questions?

H-1B Requirements

- Employer-Employee relationship
 - Control
 - Third-party placement
- Specialty occupation
- Applicant must have a bachelor's degree or equivalent (foreign degree equivalent or experience equivalent or combination)
- Prevailing wage/actual wage

H-1B Requirements

- Identify H-1B candidates
 - International students working under CPT, OPT, or STEM OPT
 - International candidate working under a cap-exempt H-1B
 - Employees in other nonimmigrant work status such as TN, H-3, H-4, O-1, or J-1
 - New Hires from abroad

H-1B Cap – Defined

- 65,000 H-1Bs per fiscal year plus 20,000 for US master's degree holders
- H-1B Cap Subject Employers = Lottery
 - Prior to FY 2021 Lottery, all petitions filed at Service Center within first 5 days of April 1
 - Random lottery held within 30-45 days
 - Electronic lottery system implemented for FY2021 and FY2022

Electronic Lottery

- Electronic registration timeline
 - Registration period: March 1 through March 18, 2022
 - Registration period may be extended or reopened if USCIS did not receive enough number of registrations or petitions
 - If USCIS receives enough registrations by March 18, it will randomly select registrations.
 - Selections will be notified through users' myUSCIS online account by March 31
 - Multiple lotteries may be run within the same FY

Electronic Lottery

- Electronic registration:
 - Employer/authorized representative must register an online account with myUSCIS
 - Employer/representatives can set up new accounts on February 21, 2022
 - Can be set up before or during the registration period

Electronic Lottery

- Electronic registration, continued:
 - Information required
 - One registration per beneficiary per employer in one FY; beneficiary must be named
 - Duplicate registration will result in disqualification
 - \$10 fee per registration

Electronic Lottery

- Selected registrations proceed to file H-1B petition
 - Must be filed during a designated filing period: regulation provides at least 90 days
 - Actual filing period will be announced in the selection notices
 - Cannot substitute beneficiary for selected registration
 - Cannot transfer beneficiary of selected registration to another petitioner

Electronic Lottery

- Regulatory updates
 - DHS withdrew USCIS final rule titled *Modification of Registration Requirement for Petitioners Seeking To File Cap-Subject H-1B Petitions*, published on January 8, 2021
- USCIS training: February 24, 2022

Deadlines

- Case preparation deadlines:
 - Position and candidate assessment/evaluation
 - LCA
 - Petition preparation

Best Practices in H-1B

- Which roles qualify for H-1B status?
 - Specialty occupation
 - At least a Bachelor's degree or equivalent is required
 - Foreign national must possess required degree or equivalent

Best Practices in H-1B

- Must convince USCIS job=specialty occupation in filing
- Start with detailed job descriptions
 - Internal description used to build case should include detailed duties and educational and experience requirements

Best Practices in H-1B

- Establishing specialty occupation
 - Look to DOL to determine agency's take on role
 - If case is border line, find support for claim to degree requirement:
 - Prior hiring practices and internal documentation
 - Industry practice
 - Evidence of complex/specialized role
 - Expert opinions

Best Practices in H-1B

- Evidence to prove specialty occupation, to be filed with initial filing or upon RFE:
 - Detailed job descriptions demonstrating the complexity of job duties and skills/knowledge required to perform such duties
 - Product or service brochures, work products
 - Occupational Outlook Handbook and O*NET

Best Practices in H-1B

- Examples of evidence to prove specialty occupation:
 - Job postings of same or similar position by Petitioner and similar organizations
 - Organizational chart of Petitioner showing hierarchy and staffing level with corresponding educational and experience requirements for positions

Best Practices in H-1B

- Examples of evidence to prove specialty occupation:
 - Evidence from third-party sources such as industry-related professional association, trade publications or articles within the industry

Best Practices – Consulting

- H-1B employment involving 3rd party worksite requires additional documentation of employer-employee relationship:
 - Requirements have eased since 2020
 - Filings may still need to be more document heavy than non-consulting arrangements

Best Practices – Consulting

- Proof of employer-employee relationship when involving third-party worksite, cont.:
 - Employment agreement between EE and ER
 - Itineraries no longer required
 - Letter from end client probably not required
 - Contract/Statement(s) of Work not required, but may wise to include

Best Practices – Public Access Files

- LCA is mandatory prerequisite to filing
- What is the LCA and what's required?
 - Notification to employees of H-1B job
 - Employer assurances
 - Maintenance of public access file

Best Practices – Public Access Files

- Public access file must be created within 24 hours of LCA filing with DOL
- Subject to audit by immigration; subject to review by public
- Required contents – must be maintained 1 year from earlier of expiration of LCA or LCA withdrawal

Impact of COVID

- Remote work arrangements
 - LCA
 - Prevailing wage analysis
 - Amendment

RFE Trends and Responses

- RFE and denial rates appear to be dropping from previous very high rates
 - Most notably within IT → new administration, new approach
- Specialty occupation RFEs down; maintenance of status and alternative salary survey RFEs persist

What Happens if H-1B Not Selected

- Cap Gap and impact of the electronic lottery
- Plan B:
 - STEM OPT
 - Green card sponsorship
 - Reenrolling in school

Other Options To Consider

- Country-specific visa options
 - TN: Mexico & Canada
 - E-3: Australia
 - H-1B1: Chile & Singapore
- B-1 in lieu of H-1B or H-3
- E-1/E-2 Treaty Traders and Investors
- F-1 with Curricular/Optional Practical Training (CPT and OPT)
- J-1, Trainees & Interns

Other Options To Consider

- L-1, Intra-company Transferees
- O-1, Extraordinary Aliens in the Arts, Sciences and Business
- H-4 Employment Authorization
- Other Options for Spouses: L-2, E-2 Spouse & J-2
- Temporary global assignment

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