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New H-1B Cap Registration and Important Considerations

Legal Update

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By Immigration Group

As you may be aware, the process of preparing H-1B petitions is changing this year, for the Fiscal Year 2021 H-1B lottery. On December 6, 2019, USCIS announced that it is implementing an electronic registration requirement for petitioners seeking to submit H-1B cap-subject petitions. Employers seeking to file FY2021 H-1B cap-subject petitions, including those eligible for the advanced degree exemption, must first electronically register and pay an associated \$10 fee for each electronic registration they submit to USCIS.

Under this new process, employers seeking H-1B workers subject to the cap, or their authorized representatives, will complete a registration process that will require only basic information about their company and each requested worker. USCIS plans to open the initial registration period from March 1 through March 20, 2020. It will then run a random selection process on those electronic registrations. Only those with selected registrations will be eligible to file H-1B cap-subject petitions for Fiscal Year 2021.

USCIS has communicated that it will post step-by-step instructions on how to complete the registration process, along with key dates and timelines as the initial registration period nears. There are still many questions and uncertainties regarding the new process. We recommend that employers seeking to file FY 2021 H-1B petitions start preparing now.

H-1B Cap Process Background

Before discussing our recommendations on how to manage this year's cap-subject H-1B filings, it is important to understand the background. The H-1B is available to employers seeking to hire a foreign national worker with at least a bachelor's degree or equivalent in a relevant field for a position that requires a degree in the field (also known as a specialty occupation). The employee must also be paid the prevailing rate of pay for the occupation. Under the rules, 65,000 new H-1B's are issued each fiscal year, which begins on October 1, with an additional 20,000 for graduates of U.S. master's degree programs. USCIS has historically accepted applications for cap subject petitions beginning on April 1. In recent years the H-1B cap was reached

within a week, resulting in a lottery, which was a random selection process of the H-1B applications received to determine which applications were assigned an H-1B cap number and adjudicated. Some years as many as three times the applications were received as there were spots available.

This year, instead of requiring petitioners to fully prepare all H-1B applications only to see which are chosen in the lottery, USCIS is hopeful that through its new registration process it will randomly select a sufficient number of registrations to meet the cap. Employers or their representatives will then (after April 1) be eligible to file the full H-1B cap petitions with a start date of October 1, 2020. Registrants may only submit one registration per beneficiary in any fiscal year.

If the USCIS registration process works, it will save employers time and money, creating a far more reasonable and efficient H-1B cap filing system. Due to uncertainty about how the new system will work and to avoid the risk of missing the deadline, we recommend employers start initial preparation of H-1Bs as soon as possible - especially if paper copies are later required due to the failure of the electronic system .

How Should an Employer Prepare for the 2021 H-1B Season?

The decision on how much case preparation needs to be made before the registration process depends on an employer's risk and cost aversion. We will speak with all our clients to determine the best path for their situation and advise accordingly on the procedures to be followed. To assist with this decision we have identified some options for our employers to consider in light of uncertainties with the new registration system:

Option 1: Prepare H-1B petitions fully in advance of the registration period for submission by April 1.

Option 2: Prepare H-1B cases to include the preparation and filing of the Labor Condition Application (LCA). The reasoning behind this option is our concern that if the system fails, employers will have insufficient time to file their H-1B petitions by April 1. The LCA certification process takes about 10 days, including preparation time and certification by the Department of Labor. The remainder of the H-1B petition will be prepared after the registration lottery is conducted and if the case is chosen. If the registration process fails, we will prepare and file the full petitions for the traditional H-1B lottery as soon as we are able, but we cannot guarantee that they will all be filed by April 1.

Option 3: Prepare the registration form as soon as possible and prepare the entire H-1B petition after the lottery is conducted and if the case is chosen. If the registration lottery process fails, it likely will not be possible to timely file an H-1B petition by the filing date of April 1. Your Fredrikson & Byron attorney will discuss which option (along with pricing) works best for your company before the initiation of H-1B preparation.

Identifying Candidates Who Need H-1B Sponsorship

The H-1B cap applies in most situations to new H-1B petitions for foreign workers who have not had H-1B status before. To avoid missing out on filing an H-1B petition under the fiscal year 2021, it is important to identify candidates who need sponsorship and are in professional positions. Some of the candidates may already be currently employed and are working under temporary work authorization. Below are examples of cases where an employee or job candidate may need H-1B sponsorship:

- Students who are working under Optional Practical Training (OPT) or Curricular Practical Training (CPT) and will need H-1B sponsorship to be eligible to be employed in the U.S. once their OPT or CPT expires.
- Candidates currently in H-1B status with an H-1B cap exempt employer (institutions of higher education or a related or affiliated non-profit entity, nonprofit research organizations, or governmental research organizations) and are seeking employment opportunities with cap subject employers.
- Candidates who are in other nonimmigrant work status such as TN, H-3, H-2, O-1 and J-1 but need to change their status to H-1B.

Please contact us soon if you would like our assistance in registering, preparing, and filing a cap-subject H-1B petition. We strongly recommend starting the H-1B application process as soon as possible, and no later than February 1, 2020.

For further information on the FY2021 H-1B cap season, register for the Preparing for the 2021 H1B Lottery webinar on January 14, from 12-1 p.m. CDT.