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H-1B Visa FY2022 Cap Season Primer: What Do Employers Need to Know?

The H-1B nonimmigrant visa program, which allows businesses to bring in foreign professionals to work in “specialty occupations,” has been an important tool of employers for many years. As winter thaws, our thoughts turn to our spring gardens, but many companies know that spring also means H-1B cap season is around the corner. U.S. Citizenship and Immigration Services (“USCIS”) rolled out its new H-1B registration system last year, and for the most part it has been regarded as a positive change, reducing costs for employers not selected in the lottery. With a year of experience under the new registration system, and after a year where many changes were proposed to the H-1B visa program, what can employers expect for the fiscal year 2022 (“FY2022”) H-1B cap season?

The Basics

The cost of each H-1B registration remains \$10. The registration period will open at noon (EST) on March 9, 2021, and remain open until noon (EST) on March 25, 2021 (note: this is a change from last year when the registration period ran from March 1st until March 20th). Employers seeking to create new myUSCIS accounts for registration purposes can do so beginning on March 2, 2021, at noon (EST). If your organization has more than one legal entity (meaning, a company with a different employer identification number) that desires to sponsor an H-1B employee, each entity will need to set up a myUSCIS employer account. If you previously set up an employer account for the FY2021 registration period, you may use that existing account again this year. However, if your H-1B “point person” has changed (*i.e.*, the authorized representative who typically signs your work visa petitions), then the new representative will need to set up their own myUSCIS account, since USCIS does not allow sharing of individual’s registration accounts.

USCIS intends to run the lottery after the registration period has closed and then notify selected registrants by March 31, 2021. The first phase of the lottery will pick from a pool containing all registrations, while the second will be limited to only individuals that qualify for the advance degree cap. April 1, 2021, is the first date on which selected registrants can file their Petition for Nonimmigrant Worker, Form I-129, with USCIS. Selected employers will have at least 90 days to submit the H-1B petition to USCIS. It is unclear, at this time, whether USCIS will allow Premium Processing for cap-subject FY2022 petitions.

The information needed to complete each registration remains the same:

- The employee’s full name, as it appears on their passport, and gender;
- The employee’s passport number and country of citizenship;
- The employee’s date/country of birth; and
- Confirmation regarding whether the beneficiary is eligible for the U.S. advanced degree cap (note: a beneficiary is eligible for the advanced degree cap if she will obtain the degree by the time her H-1B petition is filed with USCIS).

The sponsoring employer may only submit one registration for the same beneficiary. Duplicate registrations will be cancelled by USCIS and cannot be re-filed. Multiple related entities can each submit a single registration for a specific beneficiary, but only if each entity can show a legitimate business need. These potential duplicates will be closely scrutinized by USCIS before the cap lottery is run.

Is the lottery still random?

Yes. On January 8, 2021, the Department of Homeland Security (“DHS”) published a final rule seeking to replace the current system, which randomly selects H-1B registrations for the lottery, with a prioritization system that would favor petitioners offering higher wages to their employee based on the Occupational Employment Statistics (“OEC”) four-level wage system. This was slated to go into effect on March 9, 2021, just in time for the FY2022 cap season. However, on February 4, 2021, DHS posted the final rule for public inspection, delaying its effective date for cap-subject H-1B petitions until December 31, 2021. The practical effect is that FY2022’s cap season will be unaffected, and the lottery will be chosen through random selection.

Will prevailing wages be significantly higher than last year?

No. On October 8, 2020, the Department of Labor (“DOL”) issued an interim final regulation that significantly raised the prevailing wage minimums for foreign professional workers, including H-1B employees. On December 14, 2020, the U.S. District Court for the District of Columbia struck down the rule because, among other reasons, the DOL bypassed the mandated public notice and comment period. On January 14, 2021, a new version of this rule was published, which still contains significant increases to the prevailing wage levels, but nothing close to what was attempted in late 2020. This new rule, however, is not slated to go into effect until July 1, 2021, so it should not affect cap-subject FY2022 petitions filed within the initial 90-day window.

Has the definition of a specialty occupation changed?

No. On October 8, 2020, DHS published a rule in the Federal Register seeking to tighten certain H-1B definitions and regulations. For instance, employers would no longer be permitted to argue that a bachelor’s degree was common to the industry and would have, instead, had to show it was a minimum requirement for entry into parallel positions at similar organizations. Critical for staffing companies, the proposed rule sought to add definitions to distinguish the “worksite” from a “third-party worksite,” the latter being a place “other than the beneficiary’s residence in the United States” that is not owned, leased or operated by the petitioning employer. The rule also sought to define whether an employer-employee relationship exists between the petitioner and a beneficiary working at a third-party worksite, and to limit H-1B employment at third-party worksites to a maximum of one year. This rule was struck down by the U.S. District Court for the Northern District of California on December 1, 2020, along with the prior version of the increased prevailing wage rule. These new definitions and requirements will, therefore, not affect the FY2022 H-1B cap season.



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In Conclusion

The H-1B registration period will be open from March 9th until March 25th of 2021. As H-1B visas registered are expected to greatly exceed the allotted 85,000 available, employers seeking to bring in foreign workers for the FY2022 cycle will need to have their H-1Bs registered within that window. Late registrations will not be allowed. Employers should be in contact with immigration counsel as soon as possible to make sure all accounts are set up and that a plan is in place for the registration period.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.

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