# FY2021 H-1B Lottery

An In Depth Look at the Major Changes on the Horizon

Michael Schewe, Esq.
Peckar & Abramson, P.C.
+1 201.343.3434
mschewe@pecklaw.com

Peckar & Abramson, PC

# FY2021 H-1B Lottery: Major Changes on the Horizon

Employers familiar with traditional H-1B filings must prepare for a completely new process for the fiscal year 2021 ("FY2021") filing season which, this year, begins on March 1, 2020. The old lottery process – where petitions were prepared in full before filing on April 1 – has been totally overhauled in favor of a registration process that, in theory, should save employers time and money. These changes, however, will disrupt the normal workflow both internally, and with immigration outside counsel. Employers and their attorneys should work together to develop a comprehensive strategy that takes into account the already-in-place changes to the filing process as well as possible regulatory changes that the Trump administration is considering for 2020.

**Background**

The H-1B visa allows employers to bring professionals working in a "specialty occupation" to the United States for a period of temporary need. The visa is capped at 85,000 per fiscal year, with 20,000 reserved for the U.S. Master's Cap (i.e., petitions set off for individuals who hold a United States master's degree or higher). Since FY2013, U.S. Citizenship and Immigration Services ("USCIS") has received well over the allotted number of H-1B visas within the first five days of filing, forcing USCIS to utilize a "lottery" system to determine which visas will be adjudicated. Recent years have seen heavy demand for H-1B visas, with the following filings in the first five days:

- 201,011 (FY2020)
- 190,098 (FY2019)
- 199,000 (FY2018)
- 236,000 (FY2017)
- 233,000 (FY2016)

In each of the last seven years when a lottery was needed, employers were required to prepare the entire H-1B petition for filing within the initial five-day filing window in the first week of April. With a roughly 1/3 or 1/5 chance (depending on whether the employee qualified for the Master's Cap) of making the lottery, this means many employers prepared full H-1B petitions with supporting documentation that was never even considered by USCIS.

**The New Registration System**

In an effort to cut down on the waste inherent in this system, USCIS formally announced a switch to the H-1B registration system for FY2021 on December 6, 2019. Under this new registration system, employers will submit a skeletal amount of detail regarding their desire to petition an H-1B worker during the "registration period," which USCIS has set as March 1-20, 2020. Each registration will be made through the myUSCIS website and will require a nominal payment of $10. Duplicate registrations are prohibited, and offending employers may be banned from the program if foul play is discovered. If more than 85,000 registrations are

entered, which is expected, a lottery will be run, and successful registrations will be identified before March 31, 2020. Prospective petitioners with selected registrations will then be eligible to file a FY2021 cap-subject petition only for the individual named in the registration; no substitutions will be allowed. It is unclear, at press time, how long selected employers will have to file the full H-1B petition, but USCIS has indicated it will not be shorter than 90 days.

Based on screenshots and information regarding the registration system released by USCIS in November 2019, at least the following information will be required to register an H-1B petition for the lottery:

- The legal name of the prospective petitioning employer;
- The dba ("Doing Business As") names of the prospective petitioning employer, if applicable;
- The Employer Identification Number ("EIN") of the prospective petitioning employer;
- The primary U.S. office address of the prospective petitioning employer;
- Legal name, title and contact information for the authorized employer's signatory representative, who will need to attest to the fact that the employer intends to file an H-1B for the beneficiary;
- Beneficiary's legal name, gender, date of birth, country of birth/citizenship, and passport number; and
- Whether the beneficiary qualifies for the U.S. Master's Cap.

At this time, it does not appear USCIS will require any information regarding the offered position, such as the job title or minimum requirements. Additionally, there is no indication yet that a Labor Condition Application [ETA-Form 9035] ("LCA"), a prerequisite to obtaining H-1B approval, will be required to register an H-1B petition in the lottery.

**Is this a good thing?**

While many welcome this change as a cost-saving measure, the true costs are not entirely clear. An employer who simply registers an H-1B with little due diligence and fails to make the lottery will certainly have a lower cost than if it would have prepared the full H-1B petition. However, as discussed in further detail below, risk-adverse employers may spend the same or more. Proper analysis, initial petition preparation and other due diligence pre-registration could equal or exceed the cost of an H-1B petition prepared in full in one fluid effort.

There's also the legitimate fear that the technology will fail. Government agencies have a spotty track record when it comes to unveiling new technology. One needs only to look back to January 2019, when the H-2B registration process debuted. The website crashed on its first day of use due to an influx of almost 100,000 applications. Will the new H-1B registration system suffer similar technological issues? USCIS is not ruling it out. In fact, in announcing the H-1B registration tool in the Federal Register, the agency said that it reserves the right to suspend the registration process and revert to the old system if technical difficulties arise. Therefore, risk averse employers may want to prepare H-1B petitions in the traditional way while complying with the registration system to cover both contingencies.

**How will the new registration system affect students?**

One crucial challenge with the new registration system involves students in danger of losing "cap-gap" protections. "Cap-gap" protection is available to students on optional practical training ("OPT") that runs out at some point after an H-1B petition is filed until the start date of an approved H-1B (usually October 1, the beginning of the fiscal year). Essentially, by availing themselves of "cap-gap," students are allowed to continue working through their OPT expiration until their H-1B begins, thus avoiding a gap in their employment. However, "cap-gap" protection is only triggered after the H-1B petition is filed, not when an H-1B petition is registered. Therefore, employers filing for students with expiring OPT need to be particularly careful about timing and may want to file their LCAs and prepare their H-1B petitions before April 1 so that they are ready to file immediately upon learning they were selected in the lottery.

Another potential stumbling block involves the U.S. Master's Cap. As indicated above, USCIS will require an employer to indicate whether "the beneficiary ha[s] a master's or higher degree from a U.S. institution of higher education such that the beneficiary is eligible for the advanced degree exemption under INA 214(g)(5)(C) and [is] requesting consideration under the advanced degree exemption?" This question is stated in the present tense; however, USCIS has also said that establishing eligibility is not a requirement for registration. Given that a selected H-1B petition will likely not need to be filed until 90 days after selection, could a master's degree candidate in May 2020 avail herself of the U.S. Master's Cap with the knowledge that she will have the degree in hand by the time of filing? USCIS has, to date, not provided clarification of this apparent discrepancy, but it merits close monitoring as we approach the registration period.

This is of particular importance given the restructuring of the lottery that was put in place last year (FY2020). In the past, all H-1B employees were included in the first 65,000 "drawing" of the lottery, then the remaining entrants who qualified for the U.S. Master's Cap were re-run in a second 20,000 visa lottery. Last year, the 20,000 U.S. Master's Cap was run first, then the remaining U.S. Master's Cap entrants were given a second chance in the 65,000 visa lottery. This resulted in an increase of 11% of visas going to candidates with a U.S. master's degree or higher, which was the intended result. With this significantly higher chance of success, employers with graduating employees may want to declare for the U.S. Master's Cap with the knowledge that their employees will be eligible by the time of filing. However, without further guidance from USCIS clarifying this loophole, it's unclear whether those petitions will be ultimately accepted or denied for claiming U.S. Master's Cap status during registration when they didn't, in fact, qualify at that time.

The Trump administration's proposed 2020 regulatory agenda signals more problems for students in 2020, even though international student enrollment fell by more than 10% between the 2015-2016 and 2018-2019 academic years. Proposals include setting drop-dead dates for Optional Practical Training students, who currently are given an indefinite timeframe called "D/S," or duration of status. The administration would also like to find ways to strengthen its May 10, 2018 unlawful presence memorandum, which is currently the subject of litigation. That memorandum defined the penalties for failing to maintain continuous student status severely. Both of these proposals could further discourage international student enrollment, weakening the talent pool for U.S. employers.

**How will the registration system affect the attorney-client relationship?**

As discussed above, in prior years, H-1B petitions were prepared in full before being submitted to USCIS, even if there was no guarantee that they would be considered due to the lottery system. Therefore, attorneys filing H-1Bs had fully considered whether the position was truly a "specialty occupation" eligible for H-1B status — and whether the beneficiary was qualified to fill that position — before submitting the application to USCIS. While employers may welcome the cost-saving benefits of the registration system, what duties does an attorney have to analyze whether the registered H-1B petition will ultimately be successful? Will USCIS punish employers or attorneys for filing frivolous, or at least not fully analyzed, H-1B petitions before registration? There are no easy answers here, and employers will need to discuss with their attorneys the scope of the pre-registration engagement, including the level of analysis and cost the employer is willing to tolerate. Unlike in past years where the due diligence requirement was clear, this year, attorneys and clients will need to engage in frank discussions about to what extent the H-1B petitions will be prepared pre- and post-registration.

H-1B denials have been increasing at an alarming rate, more than tripling since FY2015 (4.3% in FY2015 to 15.2% in FY2019), and challenges to H-1B petitions, so-called "Requests for Evidence" have nearly doubled in the same time period (22.3% in FY2015 to 40.2% in FY2019). With USCIS seeking to deny more H-1B petitions, it is crucial that initial filings be as strong as possible. If USCIS ultimately decides to give selected employers only 90 days to prepare petitions, this may leave employers and attorneys who did little pre-registration preparation scrambling to draft persuasive job descriptions and collect the remaining supporting documentation required to complete the petition post-registration. Therefore, employers and attorneys will want to plan out a careful roadmap of evidence to be gathered and questions to be answered even before the results of the lottery have been announced.

**Will we see more or less petitions submitted to the lottery?**

Employers and immigration attorneys are certainly curious as to how the registration system will impact the total volume of petitions filed. USCIS had been receiving fewer H-1B visa requests per year (FY2017-FY2019) until a bump of approximately 11,000 petitions last year (FY2020). The decrease may have been attributable to the increased rate of H-1B denials and challenges, as discussed above, thereby discouraging employers from the cost and effort inherent in filing H-1Bs. Whether employers are being discouraged from the administration's high rate of denial or suffering from confusion regarding the new system, there remains a chance that H-1B filings could decrease this cycle.

However, many believe that the simplicity of the new registration system will cause a sharp increase in filings, especially from large staffing companies that already make up a sizable percentage of the total H-1B filing base (and which, ironically, are the companies the Trump administration is trying to discourage the most with its draconian policies regarding third-party worksites). Small businesses with critical needs may be the most severely impacted by the registration system. They typically file a small number of petitions for employees they truly need to grow their businesses, and a flood of registrations from staffing companies could substantially decrease their chances of success in the lottery.

In sum, while it's unclear how the registration system will impact volume, many believe the low cost and ease of registering will lead to a sharp influx of petitions being submitted to the lottery. This could benefit staffing companies whose businesses will not fail with fewer candidates, but could significantly hurt small businesses facing the expiring OPT of prized employees or looking to fill critical positions in order to stay competitive in the market.

**What other changes are on the horizon for H-1B employers in 2020?**

It is clear that USCIS increased H-1B denial and challenge rates in an effort to frustrate H-1B petitioners and fulfill the Trump administration's "Buy American, Hire American" executive order. In 2020, the administration wants to do even more, and is setting its sights on changing the very foundation of the H-1B. As legislative action is unlikely, the administration believes it can undermine the H-1B program through its executive powers.

As part of its regulatory agenda, the Trump administration has identified three terms of art relating to the H-1B that it intends to redefine in 2020: (1) "specialty occupation," (2) "employment," and (3) "employer-employee relationship." While we aren't sure exactly how "specialty occupation" will change, it is clear from recent litigation that the administration will want an employee to hold a "specialized degree" in order to qualify for an H-1B position. This will make it significantly harder for prospective employees with liberal arts degrees or degrees in popular majors such as business or economics. The focus on college degrees instead of relevant skills or experience, which employers generally value more than a candidate's course of study, will shrink the potential H-1B pool considerably. For instance, a candidate with high-level computer programming skills who pursued a degree in digital marketing while in college may not have a "specialized degree" that USCIS will accept, even if her programming skills are excellent after ten years of employment in the field. This restrictive approach may also negatively affect candidates whose colleges use non-traditional degree monikers.

The latter two definition tweaks will likely target staffing companies and other businesses that place their employees at third-party worksites, such as consultancies. In recent years, USCIS has issued memoranda designed to make it extremely difficult for these companies to obtain H-1B visas, or that at least limit the amount of time an H-1B visa can be valid for employees who work project-to-project (as opposed to traditional direct employment). If the administration continues down this path, it may make H-1B visas no longer cost effective for these types of companies.

The spouses of H-1B employees are allowed H-4 status. In limited situations where the H-1B worker is being delayed in applying for lawful permanent residency due to visa retrogression, these H-4 visa holders can apply for a work authorization. The Trump administration has been threatening to eliminate H-4 work authorizations for years, and has identified abolishment of the H-4 work permit program as a key target in its 2020 regulatory agenda. Employers with H-4 workers on their payroll should be planning alternatives for these employees in the event these threats become reality, which could be as early as March 2020. If H-4 employees could qualify for their own H-1B visa, employers may want to submit them to the lottery for FY2021 to avoid any gaps in employment if they lose their right to work at some point later in 2020.

This change could also have a ripple effect on whether H-1B employees will endure the excessively long wait times for their green card, as removing their spouses' ability to work will make many households one-income dependent. H-1B workers who are hit hardest by visa retrogression – especially Chinese and Indian employees – may have to give up working in the U.S. under the H-1B program if this change goes through.

Finally, with the sharp increase in H-1B denials, employers are increasing litigation against USCIS. Especially where denials are completely unwarranted, litigation can help overturn an improper H-1B denial. No longer a measure of last resort, litigation is becoming more common to hold USCIS to the language of the statute and regulations. For companies with complicated issues or third-party worksites, litigation is rapidly becoming a realistic probability that needs to be factored into the H-1B budget.