

In The News

H-1B Lottery Proposal Gives Attys Hope For Efficiencies

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By: Nicole Narea

Attorneys are cautiously optimistic that a recent U.S. Citizenship and Immigration Services proposal to revamp how the agency processes H-1B visa petitions and applicants with advanced U.S. educational degrees could promote efficiency in adjudications.

The agency published a notice of proposed rulemaking earlier this month that would have H-1B petitioners complete a simple registration form electronically; only those selected by lottery would have to go ahead and provide full applications. The agency is also proposing to change how USCIS counts the visa registrations by including all types of beneficiaries in that lottery, including those with advanced degrees from U.S. schools, and then moving on to just those with the advanced-degree exemption not chosen in the first round, rather than doing it other way around.

Changing the order in which the registrations are selected may lead to picking more applicants with advanced degrees for further processing than the current system, the notice said. And the new process would also be easier on petitioners because they would only need to file detailed applications if their registration is picked for further processing after the first-round lottery.

Attorneys were concerned, however, about the agency's ability to implement the rule as proposed, taking into consideration technological challenges and potential conflicts with immigration laws. They said more could go wrong if the rule goes into effect this upcoming filing season with little advance notice to attorneys.

But the proposed system could streamline the application process if it works, they said.

"If employers had the large part of year to plan around the proposed changes, it might allow for a more efficient use of resources and could save time and money, depending on the nature of the pre-registration form," said Andrew Greenfield, a partner at Fragomen, Del Rey, Bernsen & Loewy LLP.

Strategy for the Upcoming Filing Season

The H-1B program, which allows skilled foreign workers to work in specialty occupations, is popular with information technology and tech companies. The number of new visas granted through the program is capped at 65,000 a year, with an extra 20,000 slots allotted for those with master's degrees or higher from U.S. institutions. Nonprofit and government research workers and petitions by higher education institutions are also exempt from the cap.

Demand has consistently outstripped supply, however, so USCIS conducts an annual lottery to allocate the visas.

Most attorneys are planning to proceed with business as usual in preparing comprehensive H-1B applications ahead of the April 1 filing deadline. While USCIS may implement the new registration process in the meantime, it is simply too risky to forgo preparing H-1B applications in full, which can take several months, attorneys said.

Greenfield said his firm is not changing its filing strategy for H-1B cases.

"This way, if USCIS suspends registration, which the proposed rule explicitly says the agency might do if it experiences technical challenges, our clients are not at risk of failing to file cases at the opening of the filing window," he said.

Irina Plumlee, a shareholder at Munsch Hardt Kopf & Harr PC, said her firm will be monitoring the progression of the proposal carefully and that unless it is clear by mid-January that it will go into effect this filing season, she will prepare full packages as she has in years before.

Robert Cohen, a partner at Porter Wright Morris & Arthur LLP, said that if the proposal goes into effect for the upcoming season, attorneys will have to scramble to file the abbreviated registration forms at the last minute.

"I don't see this saving anyone any time or money this season," he said. "We're going to have to do everything we do normally anyway, and we're going to charge our clients for that legal work."

Potential Benefits

Laura Reiff, co-chair of Greenberg Traurig LLP's immigration practice, said that if the rule is implemented as proposed it could make for a "much more efficient process of determining who is eligible to apply for H-1B status."

Plumlee said the proposed regulation seems like an improvement on the current lottery system by potentially approving more applications with advance degrees.

She said it bodes well that USCIS is trying to make the system more efficient and to give higher priority to those with graduate degrees from American schools. She said it would likely benefit many of her firm's clients, who fall in that category.

Greenfield said that the effects of the proposal may vary across his clients. Those who recruit H-1B candidates from U.S. graduate programs will have better odds, but others who tend to sponsor H-1B candidates who are already employed by foreign affiliates and are less likely to hold a U.S. advanced degree may have somewhat diminished odds.

Concerns About Implementation

Cohen noted that the regulation would require USCIS to maintain a functional electronic database of H-1B registrations, and most attorneys do not have high confidence in USCIS' technological capabilities.

"They really can't manage IT systems," he said. "This is intensive IT. If they're going to roll it out, they need to put in place systems to do it and beta test it to make sure they know what they're doing."

Cohen said that many of his colleagues believe the proposal gets crosswise with immigration statutes by allowing those with U.S. graduate degrees to be considered twice. The law already provides an exemption for up to 20,000 visas for their category, so allowing them to participate in the overall lottery "turns on its head the fact that they have an exemption," he said.

Greenfield echoed the statutory concerns over the proposal.

"I'm not at all sure it is appropriate for USCIS to run a lottery before selecting the 20,000 exempt foreign nationals," he said. "By throwing all U.S. advanced degree holders into the initial lottery mix, the government would effectively be subjecting potentially exempt workers to the quota. This may be subject to judicial challenge."

The statutory question aside, Cohen said he also uncertain the proposal will achieve its goal of selecting more holders of advance degrees to ensure employers are hiring the best and the brightest. He cited the example of a individual with a Ph.D. from Cambridge in the U.K. who would be at a disadvantage because they did not receive a master's degree in the U.S.

The policy would also put many physicians at a disadvantage, despite an urgent shortage of doctors in the U.S., Cohen said. Many of his clients graduated from foreign medical schools and went on to residency programs in the U.S., which do not qualify as "advanced degrees" for H-1B exemption purposes.

Even if the regulation is effective in delivering what it promises, Reiff said the H-1B program still sorely needs more improvements.

"There needs to be more visa capacity," she said. "Congress really should address reform of the entire visa program, and it should be based on the needs of the business community and not just arbitrary numbers."

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