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FILING UNDER THE FY 2021 H-1B CAP; HOW WILL H-1B REGISTRATION WORK?

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It's the year 2020! We celebrate the start of a new decade and are hopeful for good things to come. Will the upcoming H-1B cap season be one of those good things? All we know for sure is that it will be different. Preparing for the cap season can be stressful but we recognize the stressors and, through trial and error, we have developed various coping strategies and mechanisms. But this year, we are not sure what to expect.

As background, the H-1B program allows U.S. companies to temporarily employ foreign workers in occupations that require the application of a body of highly specialized knowledge and a bachelor's degree or higher in the specific specialty, or its equivalent. Congress has set a cap of 65,000 H-1B visas per fiscal year. An advanced degree exemption from the H-1B cap is available for 20,000 beneficiaries who have earned a U.S. master's degree or higher from a U.S. institution of higher education. Each year, USCIS monitors the number of petitions received during the designated filing period and notifies the public when the H-1B numerical allocations have been met.

It was over a year ago, in December 2018, that USCIS first issued a Notice of Proposed Rulemaking announcing a rule that would revolutionize the H-1B cap process. The rule was made final on January 31, 2019 and amended the regulations governing cap-subject H-1B petitions, including those that may be eligible for the advanced degree exemption and setting forth an H-1B registration process. Ever since then, business immigration practitioners have been anticipating (or dreading?) the change. USCIS was unable to implement the registration process during the FY 2020 H-1B cap season but they previously announced that the process would definitely be implemented for the FY 2021 H-1B cap season and on January 9, 2020, USCIS published

"Registration Requirement for Petitioners Seeking To File H–1B Petitions on Behalf of Cap-Subject Aliens" announcing that the agency had completed all requisite user testing and is implementing the registration process in advance of the H–1B cap season for FY 2021. Based all USCIS has released thus far, here is what we know about the registration process:

- Employers seeking to file cap-subject H-1B petitions, or their authorized representatives, must complete a registration process that requires basic information about the H-1B employer and each requested H-1B worker. USCIS will open an initial registration period from March 1 through March 20, 2020.
- There will be a non-refundable registration fee of $10 per for each H-1B registration submitted by petitioning employers.
- If a specific employer submits more than one registration per beneficiary in the same fiscal year, all registrations filed by that employer relating to that beneficiary for that fiscal year will be considered invalid.
- There is still no prohibition on a prospective H-1B beneficiary considering job opportunities with multiple employers which may seek to extend a job offer.
- USCIS will provide step-by-step instructions on its website regarding how to register and employers and authorized representatives will be able to start setting up their registration accounts in advance of the registration period opening.
- USCIS will post the date that employers and authorized representatives may start setting up accounts on its website.
- Employers will be able to edit a registration up until the registration is submitted. An employer may delete a registration and resubmit it prior to the close of the registration period.
- If a sufficient number of registrations are received, USCIS will use a computer-generated random registration selection process (lottery) to select enough registrations to meet the congressionally-mandated regular cap and the U.S. advanced degree exemption for fiscal year (FY) 2021.
- The lottery will be conducted no later than March 31, 2020.
- Employers with selected registrations will be eligible to file a cap-subject petition only for the beneficiary named in the registration. An employer may not substitute the beneficiary named in the original registration or transfer the registration to another employer.

- USCIS will send notices electronically to all registrants with selected registrations. The notifications will be added to registration accounts. The account holder who submitted the selected registration will receive notification via email or text message stating that an action has been added to their account, and they will have to log in to see the full notice.
- USCIS intends to notify registrants with selected registrations from the initial registration period no later than March 31, 2020.
- After such selection, employers will be notified by USCIS of the exact amount of time allowed for filing the H-1B petition, which will in all cases be at least 90 days, but may be longer at the discretion of USCIS. Employers will have the ability to file their petitions as soon as eligible (i.e. by April 1) to allow the beneficiary to obtain cap-gap, if required.
- USCIS may determine it is necessary to continue accepting registrations, or open an additional registration period, if it does not receive enough registrations and subsequent petitions projected to reach the numerical allocations.

According to the "H-1B Registration Workflow with Payment" that USCIS released in association with the proposed registration fee requirement, it appears that USCIS will require payment of the $10 registration fee through the Pay.gov portal. Employers may submit one combined registration fee payment for multiple prospective H-1B workers at the same time and the registration fee payment can be paid with either a debit or credit card, or with a withdrawal from a checking or savings account. It appears that USCIS will only require information such as employer and beneficiary names, addresses, employer identification number, and beneficiary date of birth and passport information. USCIS has stated that they will not evaluate the "quality" of the registration other than to eliminate duplicate submissions. USCIS recognizes that some employers may be more willing to submit a registration than they are willing to submit a complete H-1B cap-petition with filing fees under the old process. However, USCIS will not have any means to determine whether a registration is meritorious until after it is selected and a petition resulting from such registration is properly filed. Because some registrations will not lead to approved H-1B cap-petitions, USCIS plans to hold unselected registrations in reserve and will conduct additional selections if necessary.

There are still many details yet to be divulged about the registration process but USCIS has promised to conduct outreach and training prior to the initial

implementation of the registration system to allow the public the opportunity to familiarize themselves with the electronic registration process. In the meantime, this author believes that it makes the most sense to conduct a complete evaluation of any potential H-1B petition even prior to submitting the registration. For example, there ought to be preliminary discussions on education credentials, education evaluations, occupational classifications, wage levels, job descriptions, proving specialty occupation, etc. all before submitting a registration. It would be a terrible thing for an employer to be notified of a selection only to be later advised that their H-1B petition would likely be denied due to a degree or specialty occupation issue!

While one should anticipate that the new registration system will be up and running, there is still an outside chance that the system might not be ready, or may crash, and employers may at the last minute be asked to file full H-1B petitions in the first five business days of April 2020. Filers must be prepared for all eventualities, and this further underscores the need to ensure that the prospective employees for whom employers will file H-1B petitions must be properly screened for H-1B eligibility and that all available information and documentation is available to file meritorious cases.