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CAN THE H-1B VISA BE SAVED THROUGH EXECUTIVE ACTION?

Posted on April 4, 2016 by Cyrus Mehta

The annual H-1B VISA cap forces employers to scramble way before the start of the new fiscal year, which is October 1, to file for H-1B visas, only to face the very likely project of being rejected by a randomized lottery. This is no way to treat US employers who pay thousands of dollars in legal and filing fees, along with all the steps they need to take in being in compliance. The whole concept of a nonsensical quota reminds us of Soviet era central planning, and then to inject a casino style of lottery into the process, makes the process even more unfair. Under the lottery, unsuccessful H-1B petitions may be every year with no guarantee of being selected. In fact, notwithstanding recent criticisms, the H-1B visa program has a positive impact on jobs, wages and the economy. Unfortunately, this time too, it is predicted that there will be far more H-1B visa petitions received when compared to the 65,000 H-1B visa cap plus the additional 20,000 H-1B cap for those who have graduated with advanced degrees from US universities. To have only less than a 30% chance to secure an H-1B visa number under the 65,000 cap renders the program totally unviable for employers and H-1B visa applicants.

I was thus heartened to read a blog by esteemed colleague Brent Renison for suggesting that the H-1B lottery may be illegal. He points to INA § 214(g)(3), which states that "Aliens who are subject to the numerical limitations of paragraph (1) shall be issued visas (or otherwise provided nonimmigrant status) in the order in which petitions are filed for such visas or status." According to Renison, this suggests that the USCIS should be accepting all H-1B visas and putting them in a queue rather than rejecting them through a randomized H-1B lottery. Renison also points to a parallel provision, INA § 203(e)(1), which reads, "Immigrant visas made available under subsection (a) or (b) shall be issued to eligible immigrants in the order in which a petition in

behalf of each such immigrant is filed…" Although the wording of those two sections are virtually identical, the government rejects H-1B petitions that do not get chosen in the lottery, but accepts all immigrant visa petitions and assigns a "priority date" based on the order they are filed, which in some cases is based on the underlying labor certification. Unlike the H-1B visa, the immigrant visa petition is not rejected. Instead, they wait in a line until there are sufficient visa numbers available prior to receiving an immigrant visa or being able to apply for adjustment of status in the United States.

Renison is contemplating filing a class action to challenge the H-1B visa lottery under 8 CFR 214.2(h)(8). I commend him for this initiative, and now take the liberty to propose an even more audacious idea, building upon his brilliant idea. If he is successful in getting USCIS to cease the H-1B lottery process, and accepting all H-1B petitions and placing them in a queue, then the USCIS should approve such petitions prior to placing them in a queue, but only allowing either the grant of an H-1B visa or a change of status to H-1B when a visa number becomes available. However, beneficiaries of approved H-1B petitions on the wait list should also on a case by case basis be given the opportunity to apply for interim immigration benefits such as deferred action or parole.

The U visa serves as a case in point for my idea. Congress only granted the issuance of 10,000 U visas annually to principal aliens under INA 214(p)(2). However, once the numerical limitation is reached, the USCIS does not reject the additional U visa petition like it does with the H-1B visa under the lottery. U-1 visa grantees are put on a waiting list and granted either deferred action if in the US or parole if they are overseas pursuant to 8 CFR 214.14(d)(2). The Adjudicators Field Manual at 39.1(d) explains how the waitlist works for U visa applicants:

> *2) Waiting list .*
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> *All eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status must be placed on a waiting list and receive written notice of such placement. Priority on the waiting list will be determined by the date the petition was filed with the oldest petitions receiving the highest priority. In the next fiscal year, USCIS will issue a number to each petition on the waiting list, in the order of highest priority, providing the petitioner remains admissible and eligible for U nonimmigrant status. After U-1 nonimmigrant status has been issued to qualifying petitioners*

> *on the waiting list, any remaining U-1 nonimmigrant numbers for that fiscal year will be issued to new qualifying petitioners in the order that the petitions were properly filed. USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list. USCIS, in its discretion, may authorize employment for such petitioners and qualifying family members.*

Why can't the USCIS do the same with H-1B petitions by granting beneficiaries of H-1B petitions deferred action if they are within the United States or paroling them if they are overseas, along with discretionary work authorization? The grant of deferred action or parole of H-1B beneficiaries would be strictly conditioned on the basis that the employer would comply with the terms and conditions of the H-1B petition and the attestations made in the underlying Labor Condition application. Critics of the H-1B petition, and there are obviously many, will howl and shriek that this is an end run around the annual H-1B limitation imposed by Congress. But such criticism could be equally applicable to U visa applicants in queue, who are nevertheless allowed to remain in the United States. Of course, a compelling argument can be made for placing U visa beneficiaries on a waiting list through executive action, who are the unfortunate victims of serious crimes, as Congress likely intended that they be in the United States to aid criminal investigations and prosecutions. While H-1B wait listed applicants may not be in the same compelling situation as U visa applicants, a forceful argument can be made that many H-1B visa recipients contribute to the economic growth of the United States in order to justify being wait listed and receiving an interim benefit.

If the administration feels nervous about being further sued, after being forced to dismantle the H-1B lottery, perhaps it can limit the grant of deferred action or parole to those H-1B wait listed beneficiaries who can demonstrate that their inability to be in the United States and work for their employers will not be in the public interest. Or perhaps, those who are already in the United States, such as STEM (Science, Technology, Engineering and Math) students who have received Optional Practical Training, and are making significant contributions, be granted deferred action as wait listed H-1B beneficiaries. Such deferred action should only be granted if they are well within the three year term of the approved H-1B petition. If the administration wishes to narrow the criteria further, it could give preference to those H-1B beneficiaries for whom the

employer has started the green card process on their behalf.

While this proposal will likely not get a standing ovation on first brush, and the best solution is for Congress to either expand the H-1B cap or get rid of it altogether, it is important to take comfort in Victor Hugo's famous words – "Nothing is more powerful than an idea whose time has come." Who would have imagined a few years ago that those who had come to the United States prior to the age of 16 and were not in status would receive deferred action and be flaming successes today? Or who would have imagined that H-4 spouses could seek work authorization or that beneficiaries of I-140 petitions who are caught in the green card employment-based backlogs are likely to be able to apply for work authorization, even if the circumstances are less than perfect, under a proposed rule? Of course, it goes without saying that executive action is no substitute for action by Congress. Any skilled worker immigration reform proposal must not just increase the number of H-1B visas but must also eliminate the horrendous green card backlogs in the employment-based preferences for those born in India and China. But until Congress acts, it is important to press the administration with good ideas, and to build upon brilliant ideas proposed by others. Good ideas never disappear, and have the uncanny knack of resurfacing again and again, until they come into fruition to benefit deserving immigrants who contribute to America.