CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

# WILL THE DISRUPTION OF THE H-1B LOTTERY FORCE CHANGE FOR THE BETTER?

*Posted on September 30, 2016 by Cyrus Mehta*

A class action lawsuit, *Tenrec, Inc. v. USCIS*, challenging the annual H-1B lottery recently overcame a motion to dismiss, and will move forward. There is a decent chance that the plaintiffs may prevail and employers will no longer be subject to the H-1B lottery. 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 prospect of being rejected by an opaque randomized lottery.

The lawsuit asserts that the H-1B lottery contravenes the law, and 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." 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. The parallel provision, INA § 203(e)(1), for immigrant visas 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 nonimmigrant visa 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.

The government in *Tenrec, Inc. v. USCIS* filed a motion to dismiss for lack of

subject matter jurisdiction. In its motion, the government argued that the individual plaintiffs did not have standing because only employers have standing to challenge the H-1B program. The employers too, according to the government, did not show sufficient injury and thus did not have standing. In a September 22, 2016 decision, Judge Michael Simon rejected the government's lack of standing claims on both counts. Judge Simon referenced other recent federal court decisions that have ruled that foreign workers who are beneficiaries of immigrant visa petitions have been allowed to challenge their denials, and be given notice of them. This trend has been discussed in my recent blog, Who Should Get Notice When the I-140 Petition Is Revoked? It's The Worker, Stupid! What is interesting in Judge Simon's decision is the notion that standing can also extend to nonimmigrant workers. As the recipient of an H-1B visa can become a permanent resident through subsequently filed applications following the grant of H-1B status, there is no distinction between the beneficiary of a nonimmigrant visa petition with an immigrant visa petition. Even if the individual H-1B visa plaintiffs cannot become permanent residents, Judge Simon noted that they are still "more than just a mere onlooker" because their status would be in jeopardy and would lose an opportunity to live and work in the United States, as well as enjoy life here. Judge Simon also held that the employers had standing notwithstanding that the H-1B lottery already occurred since it was likely that the employer could lose in next year's lottery. This holding in itself is invaluable for providing standing to nonimmigrant visa holders in future challenges even if the plaintiffs are not victorious here.

Even if the plaintiffs succeeding in knocking out the H-1B lottery, they will not be able to readily access the H-1B program. The annual H-1B cap will still be limited to 65,000 per year for applicants with bachelor's degree, and an additional 20,000 for those with master's degrees. It will be somewhat similar to the priority date system for immigrant visas that face years of backlogs, and the EB-2 and EB-3 India backlogs is currently several decades long. Although the underlying labor condition application of an H-1B petition is valid for only three years, under a redesigned filing system devoid of the lottery, an LCA could potentially be submitted and activated once the priority date for that H-1B petition becomes current.

While the H-1B lottery benefits employers who file many petitions each year (as they can then at least hope to win some in the lottery), there is already a wait list for most, especially smaller employers who file for one employee. If the

employer loses two or three lotteries before getting a number for that prospective employee, this in any event becomes a de facto waiting list. The fact that some lucky ones get in the first time does not mean that most will not be subject to a wait list. While a wait list system for all will be fairer than a randomized lottery for a lucky few, it will create pressure for the administration to tweak the system or for Congress to create more access to H-1B visas. Regarding tweaking the system, I have previously argued that beneficiaries of approved H-1B petitions on the wait list should 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 .*

*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.*

While U visa recipients already in the United States on a wait list can seek deferred action, the USCIS has also recently agreed to grant parole to U visa petitioners and family members based overseas when the 10,000 annual

limitation has been reached.

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 certain narrow criteria. Critics of the H-1B program, and there are 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 by anti-H-1B interest groups, 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 students who have received Optional Practical Training, be granted deferred action as wait listed H-1B beneficiaries. 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. One could also throw in a requirement that the employer register under E-Verify in order to qualify, and this would expand E-Verify to many more employers, which is one of the government's goals as part of broader immigration reform.

Of course, people have gotten comfortable with the status quo, but the H-1B lottery is problematic and thus not worthy of preservation. By turning the lottery on its head, it is hoped that there will be real change for the better. Ideally, Congress should bring about change by creating more H-1B visa numbers, although given that the H-1B visa program has already been poisoned due to the misconception that H-1B workers take away US jobs, other

restrictions in exchange for more H-1B numbers will become inevitable, such as forcing employers to recruit before filing for an H-1B visa or by creating more restrictions on dependent H-1B employers. Still, disruption is the order of the day, and if we have witnessed seismic disruption in the taxi industry through Uber or the hotel industry through Airbnb, why not also disrupt the H-1B lottery through a lawsuit in hope for positive change? As Victor Hugo famously said – "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 contributing to the United States today through their careers and tax dollars? 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? Moreover, the new proposed parole entrepreneur parole rule is also worthy of emulation in place of a disrupted H-1B lottery program. If deserving entrepreneurs can receive parole, so can deserving H-1B beneficiaries who are waiting in a queue that may be more fair than the lottery. 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 this administration and the next with good ideas. The lawsuit to end the H-1B lottery is one such good idea. It should be embraced rather than feared in the hope that it will first dismantle and then resurrect a broken H-1B visa program.