END THE ARBITRARY H-1B LOTTERY AND VISA QUOTAS – AND OTHER PRACTICAL CONSIDERATIONS FOR THE WINNERS!

Posted on April 2, 2021 by Cyrus Mehta

By Cyrus D. Mehta and Kaitlyn Box*

On March 30, 2021, USCIS announced that it had received sufficient H-1B registrations during the initial period to reach the Fiscal Year 2022 cap, including Master's Cap registrations. All prospective petitioners whose registrations were selected should now have been notified. These petitioners may file H-1B petitions for the selected beneficiaries beginning on April 1, 2021. At this time, many petitioners are seeing that less than 1/3 of their registrations have been selected, a remarkably low selection rate. The selections for a total of 85,000 H-1B slots were made out of a record number of what is believed to be over 300,000 total registrations.

This lottery system is an unfair barrier to U.S. employers who rely on the H-1B visa program to employ highly-skilled workers. Subjecting employers to the game of chance that is the H-1B lottery renders the process of planning for the future and meeting staffing needs unnecessarily complex for U.S. employers, particularly when the selection rates are as low as this year's selection numbers. In fields like the tech industry, where the need for highly-skilled workers exceeds the number of qualified U.S. workers, the unduly restrictive cap numbers hinder companies from being able to meet demand and remain competitive in the global market. It is also highly unfair for both employers and the foreign workers they wish to hire to first be fortunate enough to be selected in a lottery, and then have to wait until October 1 to commence employment.

The only way to ensure that the United States continues to attract the best and

brightest talent worldwide is to eliminate quotas and lotteries from the H-1B program. As discusses by Stuart Anderson in a recent Forbes article, highly-skilled noncitizen workers promote innovation and economic growth in U.S. markets. Even the oft-maligned IT consulting companies, which employ high numbers of H-1B workers, serve a critical role in the U.S. economy by providing reliable and inventive IT solutions to U.S. companies. Employing H-1B workers allows consulting companies flexibility, as well as the ability to provide top talent at affordable rates and respond to changes in the market. Though sometimes pejoratively referred to as "job shops", IT consulting companies, in truth, promote ingenuity by providing a source of technical expertise that can quickly respond to the evolving needs of the U.S. market.

Some have suggested that the solution is to allocate H-1B visas to the highest wage earners but this system, articulated in the Trump administration's H-1B lottery final rule entitled "Modification of Registration Requirement for Petitioners Seeking to File Cap-Subject H-1B Petitions", worsens the problems with the H-1B visa program rather than solving them. As we have discussed in a prior blog, a wage based preference system would practically foreclose numerous categories of noncitizens workers who are highly skilled but do not earn overly high salaries from pursuing the H-1B visa as an option. Entry level workers, for example, including talented graduates of U.S. universities, have the potential to greatly contribute to the U.S. economy over the course of their career, but are not likely to be paid extremely high wages. Entrepreneurs who start their own companies bring innovative businesses to the United States and create jobs if they are successful, but their startups may not be able to afford to pay them an overly high wage. Similarly, employees of non-profit organizations tend to command modest salaries, but perform meaningful and significant work in the United States. Allocating H-1B workers to the highest earners will, in the long run, deter highly-skilled noncitizens from pursuing employment in the United States, which will be detrimental to the United States' economy and competitive advantage in the global market. And even if the lottery is skewed towards those offered the highest wages in the occupation, it still continues to remain a game of chance.

Although some affiliated with respectable think tanks like the Economic Policy Institute attack the H-1B as a source of cheap labor, they are wrong. Daniel Costa and Ron Hiro of the Economic Policy Institute, for example, suggest that H-1B employers "use the program to pay migrant workers well below market

wages", but a recent Center of Growth and Opportunity paper suggests that skilled immigrants holding temporary work visas have a wage premium of 29.5 percent compared to similar natives. H-1B lotteries, whether quota or wage based, limit the United States' ability to attract the most skilled foreign workers. Those who are truly concerned for the wellbeing of the U.S. economy understand the key role that highly skilled foreign workers play and would want to encourage top talent from all over the world to come to the United States. One obstacle to H-1B workers was already removed when Proclamation 10052, which suspended the entry into the U.S. of many H-1B and other nonimmigrants, was allowed to lapse on March 31, 2021. This Trump-era ban further obstructed the flow of skills into the United States. Ironically, it also impeded the ability of last year's lottery winners to come to the United States but this year's winners with approved H-1B petitions will not be impacted by the Proclamation and last year's winners may also seek visa appointments. Even with the expiration of the Proclamation, however, it is unlikely that H-1B visa applications will immediately begin being processed, as many U.S. consulates are still not fully operational due to the pandemic. DOS will prioritize the applications of applicants who have not yet been interviewed or scheduled for an interview, and invites individuals who were refused a visa due to the Proclamation to reapply.

Abolishing the H-1B lottery is the surest way to ensure free entry of talented and skilled workers into the United States. The reason for the lottery is because there is an arbitrary limit of 65,000 visa and an additional 20,000 for master's degree holders that have no bearing on economic reality. Similarly, these same H-1B workers who get sponsored for green cards are subject to unrealistic quotas in the India EB-2 and EB-3s resulting in decade long backlogs, thus depriving them of obtaining permanent residency. There is no basis for quotas on H-1B visas or immigrant visas. As pointed out in a Forbes article, unemployment rates in H-1B occupations like computer and mathematical fields were only 2.4% at the beginning of 2021, illustrating that H-1B employees are not pushing U.S. workers out of the labor market. Lotteries and quotas have no place in a modern immigration system. There should be a free flow of skills and talent into the US.

It remains to be seen whether another H-1B lottery will be conducted in August, as was the case last year. If the case was selected under the lottery, the online account will indicate "Selected." If the case shows "Submitted," it means that it is

still eligible for selection in a subsequent lottery during this fiscal year. If it shows "Denied" it means that multiple registrations were submitted for the same registrant. If the payment was declined it will show "Invalidated-Failed Payment." In the meantime, petitioners who were selected can begin filing Form I-129 from April 1 to June 30, 2021. They will only be eligible to start employment in H-1B status on October 1, 2021, and if the foreign national is in the US they must ensure that they are maintaining status. Those who are on F-1 Optional Practical Training, and if their OPT will expire prior to June 30, 2021, should file the I-129 prior to expiration so that they can take advantage of the Cap Gap till September 30, 2021. USCIS will begin accepting exclusively the new (3/10/2021) version of Form 1-129 on July 1, 2021. Until then, older versions of the form may still be submitted. Also note that Question 5 in Supplement H on page 13 of Form I-129 must be completed for H-1B Cap-subject petitions.

(This blog is for informational purposes and should not be considered as a substitute for legal advice)

* Kaitlyn Box graduated with a JD from Penn State Law in 2020, and works as a Law Clerk at Cyrus D. Mehta & Partners PLLC.