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USCIS'S OCTOBER 20 CLARIFICATION WILL NOT MAKE THE $100,000 H-1B FEE DISAPPEAR

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By Cyrus D. Mehta and Kaitlyn Box*

In a prior blog, we detailed Presidential Proclamation implementing a new $100,000 fee that applies to certain H-1B workers. The initial Proclamation created concern and confusion for H-1B beneficiaries and U.S. employers alike, as it left unclear which types of H-1B petitions would be impacted. On October 20, 2025, USCIS issued guidance stating that "for H-1B petitions subject to the Proclamation, petitioners must submit a copy of the proof of the payment from pay.gov or evidence of an exception from the fee from the Secretary of Homeland Security at the time of filing the H-1B petition. Petitions subject to the $100,000 payment that are filed without evidence of payment or the grant of an exception will be denied."

USCIS guidance also clarifies that the Proclamation does not apply to "any previously issued and currently valid H-1B visas", "any petitions submitted prior to 12:01 a.m. eastern daylight time on September 21, 2025", and "does not prevent any holder of a current H-1B visa, or any alien beneficiary following petition approval, from traveling in and out of the United States." Moreover, "he Proclamation also does not apply to a petition filed at or after 12:01 a.m. eastern daylight time on September 21, 2025, that is requesting an amendment, change of status, or extension of stay for an alien inside the United States where the alien is granted such amendment, change, or extension, and a beneficiary of an approved petition "will not be considered to be subject to the payment if he or she subsequently departs the United States and applies for a visa based on the approved petition and/or seeks to reenter the United States on a current H-1B visa."

Ambiguity remains, however, in which categories of H-1B beneficiaries will be

subject to the new fee. For example, even the updated guidance does not address whether the fee would apply if an H-1B amendment or extension petition was filed on behalf of a noncitizen who was on a brief trip outside the U.S. To ensure that they are exempt from the Proclamation, however, beneficiaries caught in this situation who have valid visas could simply travel back to the United States before the H-1B petition is filed, a scenario in which the fee is clearly inapplicable. However, individuals who were counted against the H-1B cap because they were terminated by their H-1B employer or have reached the six year maximum in H-1B status and are awaiting I-140 approval may no longer have valid H-1B visas. If new H-1B petitions are filed on behalf of these individuals, it is unclear whether the employer would be required to pay the $100,000 fee.

The updated guidance also clarifies that if a petition filed at or after 12:01 a.m. eastern daylight time on September 21, 2025, requests a change of status or amendment or extension of stay and USCIS determines that the alien is ineligible for a change of status or an amendment or extension of stay (e.g., is not in a valid nonimmigrant visa status or if the alien departs the United States prior to adjudication of a change of status request), the Proclamation will apply and the payment must be paid according to the instructions provided by USCIS. This could impact one whose H-1B extension or amendment has been denied. If the employer files a new petition for consular processing so that the beneficiary could travel overseas and apply for an H-1B visa stamp at the US Consulate, this petition would unfortunately be subject to the $100,000 fee. On the other hand, if a motion to reopen or reconsideration is filed and the case gets successfully reopened, the employer can avoid the $100,000 fee. Of course, there is a lot of uncertainty with a motion to reopen and reconsider with respect to the time it will take and the outcome. If the motion to reopen or reconsider fails, the H-1B worker might also have accrued more than 6 months of unlawful presence and would face the 3 or 10 year bar to reentry.

USCIS' updated guidance also does not indicate whether the fee applies to H-1B1 visas for Chilean and Singaporean nationals, although the U.S. Embassy of Singapore stated in a Facebook post on October 29, 2025 that the Proclamation "does not apply to the H-1B1 visa for Singaporean citizens. There is no change to the H-1B1 process at this time."

Even if the scope of the Proclamation has been clarified since its promulgation apply to a narrower set of H-1B beneficiaries than initially appeared to be

impacted, the new fee will nonetheless have a devastating impact on U.S. companies who rely on H-1B workers. It is clear that the fee will apply to new H-1B petitions filed on behalf of candidates selected in next year's H-1B cap. However, if such candidates are in the US in a status such as F-1, and get selected under the H-1B lottery, they should not be subject to the $100,000 fee. On the other hand, if such prospective candidates enter the US in a nonimmigrant status to try their luck at changing status to H-1B in the next March 2026 lottery to avoid the $100,00 fee, the USCIS could potentially still use its discretion in denying the change of status. Worse still, the prospective candidate would be subject to expeditious removal at the port of entry.

Given how unaffordable this fee will be for many, it is anticipated that a number of U.S. employers will be forced to stop filing new H-1B petitions altogether. Companies like Cognizant, Tata Consultancy Services, and Walmart, which traditionally employed large numbers of H-1B workers have already signaled that they will limit the number of H-1B petitions that they file going forward. Even cap exempt employers such as universities and non-profits affiliated to universities or non-profit research organizations will be subject to the $100,000 fee if the candidate cannot fall under any of the exceptions set forth in the October 2, 2025 clarification.

After the October 20, 2025 clarification, many in the immigration community expressed relief that this guidance had blunted the impact of the Proclamation, but the clarification does not really address the fact that the Proclamation will continue to apply to many H-1B cases with a few exceptions. As we have stated in our prior blog, this Proclamation has been issued in violation of the INA, and there are two court challenges already to the Proclamation, and we hope that the courts will strike it down very soon.

*Kaitlyn Box is a Partner at Cyrus D. Mehta & Partners PLLC.