

March 1? H-1B Season Will Be A Little Different This Year

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Employers who seek highly skilled foreign professionals must use a variety of visas for their employees. One of those most frequently used is an H-1B visa, a temporary non-immigrant visa category that allows employers to petition the U.S. Citizenship and Immigration Services (USCIS) for highly educated foreign professionals to work in “specialty occupations” that require at least a bachelor’s degree or the equivalent.

Although the H-1B visa is popular, Congress limits its annual availability. The current yearly statutory cap is 65,000, with an additional 20,000 available for foreign professionals who have graduated with a master’s or a doctoral degree from a U.S. university. In almost every year since 2007, within days of the filing period the USCIS has received more H-1B visa petitions than there were visas available. To determine which of those petitions would be adjudicated, the USCIS held a lottery.

The annual cap does not meet the U.S. workforce’s demand for highly skilled workers, however, and the race to file H-1B petitions by April 1 for inclusion into the H-1B visa lottery has been an annual rite of passage.

But this year, there’s a whole new ballgame. Employers seeking to file an H-1B cap-subject petition must first electronically register and pay a \$10 H-1B registration fee for each submission to the USCIS. The USCIS will then run the lottery on the registrations. Only if the registration is selected by the lottery will an H-1B visa petition need to be prepared and filed.

The USCIS has only now begun to release the details, which are scant but will definitely make for an interesting year. According to the latest information provided on Jan. 9:

1. The initial registration period opens on March 1, and is scheduled to close on March 20. The USCIS indicated it will announce the actual end date on its website based on the number of registrations it gets, but said that all registrations received during the initial period will be included in the lottery regardless of whether they were received on March 1 or March 19.

2. Employers must register using an online account. USCIS said it “will provide step-by-step instructions on its website at uscis.gov,” but has not yet done so. I expect the process will require the company to register at the myUSCIS online portal (<https://myaccount.uscis.gov/>), but the Federal Register notice did not affirmatively state that it will be using that platform. This could change, but it probably won't.
3. The information required will likely be: legal name of petitioning company; Doing Business Name, if applicable; Employer Identification Number; primary office address; name, title and contact information of the authorized signatory; and the foreign worker's name, gender, date of birth, country of birth and/or citizenship, passport number and whether they had earned a master's or higher degree.
4. Duplicate registrations for the same employer/beneficiary combination are prohibited. If a company submits more than one registration for the same foreign national in the same fiscal year, the USCIS will consider all registrations filed by that company for that foreign national to be invalid.
5. If USCIS receives more than enough registrations to meet the cap, all registrations that were not selected will remain on reserve for the rest of the fiscal year. It is unknown how reserved registrations will be selected, including whether master's cap cases will be prioritized.
6. It appears that selected cases will have at least 90 days from the date of a registration selection to submit a complete H-1B petition to the USCIS. No one knows whether premium processing will be available.

Key takeaways:

H-1B season should be considered as opening on March 1 this year, not April 1 as it has been in the past.

While registration requires only a little information compared to a full H-1B visa petition preparation, if the registration is selected it does not mean the visa has been approved. A full H-1B visa petition must be prepared and adjudicated successfully for approval.

Based on initial rollouts of other electronic processes by the USCIS and the U.S. Department of Labor, I anticipate that there may be issues involved with the electronic registration process. The USCIS has reserved the ability to suspend that process – which could conceivably mean that a full H-1B visa petition may need to be prepared and filed on paper on April 1 if the system goes down completely. As a result, the prudent company should be prepared for anything to happen this year.

If you have questions about this or other immigration or H-1B visa compliance matters, contact the Nexsen Pruet Employment and Labor Law team.

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