Proskauer

The Pre-Registration System For H-1 Cap Filings – A Losing Race to April 1, 2019?

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Will thousands of H-1 cap petitions be received by USCIS Service Centers on Monday, April 1, 2019, or will online pre-registrations during the month of March make Monday, April 1 a quiet day at USCIS?

It was anybody's guess last week when USCIS filed a proposed regulation introducing a pre-registration system for H-1 cap filings (with written comments to be received on or before January 2, 2019). But soon thereafter USCIS tweeted "It is likely that the FY 2021 cap season would be the first time that electronic registration is required, if the rule is finalized as proposed," indicating that the agency is not optimistic that it can get everything in place for the 2020 cap filing season which begins on April 1, 2019.

As stated in the proposed regulation: "The proposed amendments would require petitioners seeking to file H-1 Petitions subject to the regular cap, including those eligible for the advance degree exemption to first electronically register with U.S. Citizenship and Immigration Services ("USCIS") during a designated registration period. USCIS would select from among the registrations timely received a sufficient number projected as needed to meet the applicable H-1B allocations. DHS also proposes to change the process by which USCIS counts H-1B registrations by first selecting registrations submitted on behalf of all beneficiaries, including those eligible for the advance degree exemption. USCIS would then select from the remaining registrations a sufficient number projected as needed to reach the advance degree exemption."

Pre-Registration Rather Than Preparing Unnecessary Petitions

All would agree that a pre-registration system has the great advantage of precluding the need to prepare and file H-1B petitions that may never be looked at and never used. The proposed system anticipates registration for the lottery by submitting a short form that provides basic information about the company, the job offer and the foreign employee. A separate registration form would be submitted for each applicant, and a petitioner could file only one registration for any individual applicant.

It is proposed that the registration period would be for a mere 2 weeks prior to the April 1 start date of the cap season. After April 1, but before October 1, 2019, the effective authorization date of employment, a 60-day period would be established to actually file the petitions.

USCIS would preserve non-selected registrations on a waiting list in case the algorithm used by USCIS to calculate how many registrations must be selected in order to fill the quotas, turns out to be inadequate.

The proposed regulation outlines in precise detail how USCIS computes its algorithm for determining how many registrations to select based upon and analyzing prior cap lottery selections.

The Two Lotteries – Favoring U.S. Masters' Degree Graduates

USCIS, by proposing that the general cap lottery be run first including all U.S. Masters' degree candidates, anticipates that as many as an additional 5,000 more such candidates would be selected as would otherwise be the case if the current system were in place, which provides that the Masters' degree lottery is run first and those not selected, a smaller group, are then dropped into the general lottery pool.

USCIS seems to believe that this is more consistent with the "Buy American Hire American" initiative because it is thought to potentially result in a higher number of American trained applicants being selected. Of course, this may result in less highly trained foreign Masters and Ph.D. applicants being considered for an H-1.

Will They Be On Time and Will It Work

The proposed regulation anticipates that there might be challenges in implementing the system on time, both from a technical perspective and a legal perspective and, in fact, the proposed regulation specifically references the possibility that there might be litigation that they would have to deal with. Thus, it provides for suspension or delay of the registration period, although the proposal is not too clear on exactly how that would be implemented and if it anticipates that some form of the current process may still need to be used for the 2020 cap season, which begins on April 1, 2019. [Fiscal Year 2020 begins on October 1, 2019.]

What Does This Mean for Employers

Given the uncertainty as to implementation and timeline, employers really do not have a choice and must prepare for the H-1 cap season as always, especially after the USCIS tweet. Employers must anticipate that it will likely be necessary to put together actual petitions with supporting documents as they always have done and, even if at the last moment it will turn out that printing out and assembling those forms becomes unnecessary. The groundwork to assure that each registration filed, which is potentially an actual petition, must be done to assure that each applicant does, in fact, qualify for a specialty occupation position and that the potential documentation needed is identified and ready should the registration be selected for actual filing of a petition.

In an environment where H-1 petitions are challenged; Requests for Evidence are issued *en masse*; and a significant number of petitions are denied, no registration can be wasted and it must be the product of a robust preparation process so that a compelling and convincing petition can readily be prepared should this registration be selected.