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H-1B Cap Filings: March 20 Is the Real Deadline, After Which It Is Too Late, Not the Week of April 1

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Burnt into the psyche of all who have participated in the H-1 cap process was the April 1 deadline to file petitions. However, if the new USCIS protocol is implemented (and it seems that it is happening) April 1 will no longer be the real deadline. March 20 will be the last day to participate in the H-1B Cap program for the coming year, Fiscal Year 2021.

USCIS is introducing a new protocol for H-1B Cap filings this year. A petitioner must first open up an online account with USCIS and between March 1 and March 20 of 2020, individually register each H-1B Cap petition the employer wishes to enter into the anticipated lottery for available visas.

Simply put, if you fail to register by March 20, you are out of the H-1B Cap program for this fiscal year. There is nothing you can do for the individual who calls you on March 25 and wants to rush a new petition in by the beginning of April.

Only after the lottery selection process is done, based upon this electronic registration, will an employer be obligated to actually prepare and file a full H-1B petition with approved labor condition application in a 90-day period designated by USCIS and, who knows, the 90-day filing period could even start on April 1!

When To Prepare?

Employers who wish to participate in the H-1B Cap application process now must decide how much preparation and work (with the associated legal costs), they should do in the "registration" phase and how much to defer until actual selection.

There is an argument to be made that employers should conduct themselves, business as usual, and complete all of the preparation, obtaining necessary degree evaluations, translations, professional opinions, preparation and filing of the labor condition application, and actual preparation of the petition, in advance, to avoid the crunch and stress of completing all these necessary processes and drawing on the resources of vendors and the Department of Labor website, all within the 90-day window that will be designated by USCIS. During that limited period, most other petitioners will be accessing the same resources with no reasonable likelihood of actually being able to file the petitions within the first part of the 90-day designated period, if they have not prepared in advance.

The argument is particularly compelling for those who are seeking to apply under the U.S. Master's degree cap allocation as historically, a very high percentage of those filings were selected for the lottery, making pre-preparation of such petitions much more likely to be worthwhile, and cost effective.

It is reasonable to expect that pre-prepared petitions will be filed at the beginning of the 90-day period and enter the adjudication pipeline that much more in advance of others, to some advantage.

Alternatively, an employer might decide not to engage in all the effort to put together a full petition, and decide further to save some cost by deferring this activity until such time as the selection process has been completed, prepared to assume the burden of full preparation, only when necessary, once the 90-day period is designated.

There are variations on this theme. Some might not be ready to prepare full petitions before knowing whether they have actually been selected, but decide to at least file the labor condition applications in advance in anticipation to the possibility that the Department of Labor system might be challenged by an onslaught of filings right after the registration lottery is completed. On the other hand, in total, fewer labor condition application filings may take place if more employers are holding up filing until the lottery actually is completed.

When To Input Data And When To Register?

USCIS has announced that employers will have a chance to set up the necessary online accounts in advance of the new electronic pre-registration process being implemented, and once accounts are created, employers will be able to prepare and upload so that data will be in place for review and vetting, perhaps before the actual filing process will take place, beginning on March 1.

Once you are in fact ready to register a case, the question might be should you be proceeding on the first possible day or days on the theory that if there are glitches in your particular cases, you will have more time to resolve them, or quite the opposite – wait for the first rush to pass, and let other petitioners be the beta testers of the system, and enter the process later in the 20-day period.

Attorneys And Employers Working Together

In fact, I think it is fair to say that we are all beta testers of this new system, as USCIS in its prior online adventures has not really had much experience in working with the attorneys and petitioners interacting. It is currently possible for an individual to file certain applications online, which are in fact individual based, such as the AR-11; Form G-639; Form I-90; Form I-539; Form N-336; Form N-400; Form N-565; Form N-600; and Form N-600K, all individual personal applications. The only form involving the petitioner, which can currently be submitted online, is Form I-130. The interface to coordinate with these individual applicants and their attorneys is clumsy, at best.

What will the interface for attorneys and employers filing multiple applications look like?

> "Two road diverged in a yellow wood
> And sorry I could not travel both
> And be one traveler, long I stood
> And looked down one as far as I could
> To where it bent in the undergrowth"

I say to the poet Robert Frost, we are now indeed traveling down "The Road Not Taken". Exactly where it will lead us, we do not know.

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[1] Technically, it is not April 1, but the first five business days in April.