

H-1B Rule Rollout Leaves Time To Work Out Kinks

By **Nicole Narea**

Law360 (January 30, 2019, 11:06 PM EST) -- Immigration attorneys said U.S. Citizenship and Immigration Services' reforms to the H-1B skilled worker application process unveiled Wednesday largely take into account stakeholder concerns and will provide more flexibility to corporate clients overall when fully implemented next year, giving attorneys and the government alike time to revise filing strategies and implement the new online system.

Attorneys are breathing a sigh of relief now that the government can work out technical issues in the new online registration system outside the stresses of filing season and they can spend the next year determining whether to pursue low-cost registrations for clients. The reforms have been long-awaited given that the H-1B program, which allows skilled foreign workers to work in specialty occupations, has long been overburdened. Demand for the visas has outstripped the 65,000 statutory cap, forcing USCIS to conduct an annual lottery to allocate the visas.

Paul Virtue, a partner at Mayer Brown LLP, praised the agency's efforts to adequately prepare the registration system for eventual implementation.

"As we learned from changing one or two lines on Labor Condition Applications at the Department of Labor, it's not easy to implement a new form in a short period of time," he said. "It was prudent on [USCIS'] part to test the system."

An Unhurried Rollout

Beginning in April 2020, the regulation will require H-1B petitioners who are subject to the 65,000 visa cap mandated by Congress, as well as those with advanced degrees from U.S. schools who are exempt from the cap, to complete a simple online registration form with USCIS. Of those registered, only those selected by lottery will proceed to provide full visa applications.

Effective this coming filing season beginning April 1, the regulation also changes how USCIS counts the visa registrations by including all types of beneficiaries in that first lottery and then conducting a second lottery just for those with the advanced degree cap exemption. Those changes will likely result in an increase of H-1B holders with master's or higher degrees from U.S. institutions, according to the regulation.

Attorneys had previously dreaded the prospect of scrambling to submit registrations at the last minute

for H-1B petitions this upcoming filing season.

Becki Young, a partner at Grossman Young & Hammond LLC, said news that the agency would not implement the new registration system this season was a "big relief for everybody." She noted that USCIS does not have a reputation for seamless technological advancement — its Electronic Immigration System was originally intended to fully digitize immigration paperwork by 2013, but it is still unreliable, she said.

"A lot of people are still skeptical that they will be able to implement the new registration system for next filing season," she said. "But it's good that they tried not to rush it."

Who Benefits — And Who Doesn't

Andrew Greenfield, a partner at Fragomen, Del Rey, Bernsen & Loewy LLP, said that once USCIS implements the rule, it will benefit employers who will no longer need to spend time and money filing as many full petitions, only for them to be rejected in the lottery. They can instead register online with USCIS at no fee and only invest further if and when their petitioner is selected in the lottery to move forward with a full application.

Young said that USCIS showed "good intention to improve a really bad situation" involving a cumbersome, expensive and unreliable paper filing process. But other attorneys have been resistant to the changes, she said.

"Many people feel like any change is a bad change," she said.

The rule, however, may have disparate effects on different employers. Greenfield said that employers who rely on professionals with U.S. advanced degrees, who will have an advantage under the new lottery system, may have the ability to further supplement their workforces.

But with the nationwide unemployment rate so low, industries are struggling to fill even positions that do not require advanced degrees, Greenfield said. For example, the information technology field often requires just specialized bachelor's degrees. Virtue said that the policy could also have an adverse effect on companies that are trying to fill positions at the entry level.

Young said that the changes could entice her clients, which are small-to-medium-sized businesses, to file more petitions because there is no monetary risk associated with registering for H-1B petitions. But the ease of registering might be so attractive as to encourage larger companies to "stuff the ballot box" in their favor, registering thousands more petitions than they could feasibly need to increase their odds in the lottery.

She noted that the agency had responded to such concerns in public comments by including a provision in the final regulation that could impose monetary fines or criminal penalties if companies show a pattern of submitting frivolous registrations.

Possible Legal Challenge

Five attorneys said that the rule could invite a legal challenge under the H-1B provisions of the Immigration and Nationality Act.

The act specifically provides a cap exemption for up to 20,000 noncitizens who have earned a master's degree or higher from a U.S. institution. After the 20,000-cap is met, such noncitizens will be subject to the 65,000 cap for all H-1Bs.

Greenfield said that the statute does not permit the government to include cap-exempt U.S. advanced degree holders in the initial lottery with all other beneficiaries.

"By just throwing them into the mix with everybody else, it's contrary to the exemption," he said.

Virtue said it is a "close question" as to whether the statute gives the government flexibility to include cap-exempt petitioners in the initial lottery. He said it is possible that plaintiffs in any such litigation would request at least a temporary restraining order forestalling the full implementation of the rule before April 1, 2020.

"I would hate to see the rule end up in litigation, causing further delays in the adjudication process than we already have," he said.

Young said that calls for litigation, however, might be a symptom of the immigration bar's recent challenges to extrajudicial rulemaking under the Trump administration.

"Everyone has an appetite for litigation right now," she said. "People are looking for reasons to sue the government. It's not black and white, but from what I understand there is a viable argument on the part of the government and from a policy perspective."

--Editing by Emily Kokoll and Michael Watanabe.