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# U.S. Department of Homeland Security Launches Fraud Investigations into Dozens of Companies for H-1B Lottery Abuse

Morgan Bailey, Maximillian L. Del Rey, and Kelly B. Kramer\*

*In this article, the authors discuss a recent initiative by the U.S. Department of Homeland Security to determine whether employers are inappropriately gaming the H-1B lottery system.*

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To retain the best global talent, many employers leverage the annual H-1B visa lottery to secure work authorization for new employees. The nature of a lottery, however, leads some employers to search for ways to improve their chances of securing that “winning ticket”—and a pathway to retaining key talent in the United States.

Recently, the Department of Homeland Security (DHS) noted that some employers had developed schemes with other entities to submit multiple submissions on behalf of the same prospective employee. These types of arrangements have risen sharply in recent years: DHS announced<sup>1</sup> that more than 52% of total submissions were for beneficiaries with multiple registrations.<sup>2</sup> According to the agency, this practice raises questions about whether employers are inappropriately gaming the H-1B lottery system.

The federal government has announced a tripartite response to combat abuse:

1. DHS will undertake administrative fraud investigations into organizations suspected of colluding to improve prospective employees’ chances in the recent H-1B lottery selection process;
2. DHS will begin making law enforcement referrals for criminal prosecution to suspected violator companies; and

3. DHS intends to amend relevant regulations governing H-1B lottery registrations, as initially announced<sup>3</sup> in the 2021 Unified Regulatory Agenda and Regulatory Plan.

These announcements came as DHS reported a record-high number of submissions for the fiscal year (FY) 2024 H-1B lottery.<sup>4</sup>

## **Background: The H-1B Lottery**

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The H-1B nonimmigrant visa category allows U.S. organizations temporarily to employ foreign workers in “specialty occupations”; that is, positions requiring a bachelor’s degree or higher in a specific specialty (or its equivalent). Congress statutorily limited the number of new H-1B visas that may be approved each fiscal year to 85,000 (with some exceptions for certain universities, nonprofits, and government entities). Of these 85,000, Congress reserved 20,000 for individuals with U.S. graduate degrees. Historically, demand for H-1B visas has exceeded the available quota, making it a coveted category.

In 2020, DHS moved to an electronic registration system that allows employers to register candidates for the H-1B lottery with relative ease. An employer submits basic data about itself and the prospective employee, including the prospective employee’s name, date of birth, gender, and passport number, along with a \$10 fee. The electronic system then selects registrations at random, and only selected registrants are invited to submit a fully prepared H-1B petition that is reviewed and adjudicated by the agency.

In determining the number of registrations to select each year, DHS takes into account historical data related to approvals, denials, revocations, and other factors. For FY 2024, DHS selected approximately 110,000 of the submissions and expects to approve 85,000 new H-1B petitions from this pool. The result was a historically low rate of selections—only 14.6% of registrations (less than one in six) were selected through the lottery.

## **Multiple Registrations for Prospective Employees**

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Some have speculated that the relative ease with which beneficiaries can be entered into the H-1B lottery has led employers to work together in order to capture at least one H-1B selection

for a given employee.<sup>5</sup> This is because the registration system is drastically simpler than preparing a full H-1B petition, which used to be required for all lottery entries but is now only necessary for selected registrants. Even so, the new electronic registration process has enabled DHS to more quickly identify the number of prospective employees who are the subject of multiple submissions. It has also enhanced the agency's ability to identify trends and areas of potential fraud. While the government's announcement regarding its fraud investigations has raised awareness, the issue is not new. DHS recognized the potential for employers to exploit the selection process and has previously issued regulations in 2008 and agency guidance in 2018 to combat potential abuse.<sup>6</sup>

The regulations penalize "related entities" for submitting multiple registrations on behalf of the same prospective employee unless there is a "legitimate business need" for multiple submissions. As part of the registration process, employers are required to attest under penalty of perjury that they have not colluded with any other entity to increase the chances of selection for the prospective employee. Attempts to gain an unfair advantage through coordinated efforts to submit multiple registrations may be considered fraud and subject to legal penalties, including employers' potential debarment from the H-1B program.

The government's policy guidance<sup>7</sup> defines "related entities" broadly. Under the policy, the term "related entities" includes companies "*whether or not related through corporate ownership and control*" that submit registrations for the same individual "for substantially the same job."<sup>8</sup> Thus, companies that submit multiple registrations may be considered related entities even if they function at arm's length. Such companies may be found to be in violation of the law if, for example,

- Both organizations submit registrations for the same beneficiary, and agree that one will subcontract the prospective employee to the other (or another third party) if selected; or
- The company that is selected and approved quickly terminates the selected employee, enabling the employee to transfer to the other employer without going through the registration process again.

According to DHS, it would be unlikely that two unwitting employers would have the requisite similitude to trigger the bar

but the more similarities in the records, the more likely the agency will determine that the entities were acting in concert to undermine the purpose of the random lottery process.<sup>9</sup>

Withdrawal of a duplicate registration by one of the entities does not cure the issue. Under the regulations, once DHS determines that a violation has occurred, all submissions filed on behalf of the prospective employee must be denied or revoked.

## **Rise in Multiple Registrations Increases Agency Concern**

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The federal government's investigations of dozens of companies suspected of attempting to secure an unfair advantage in the H-1B process may result in a shortfall of approved H-1B petitions, either because the government may identify additional tainted petitions among the selections or because of penalties against employers found to be in violation of the registration rules. The agency may ultimately deem it necessary to conduct a second round of selections in order to reach the statutory cap. Based on trends in prior years, this announcement may not come until July 2023 or later. (See Table 1.)

DHS previously reported<sup>10</sup> it was furthering its efforts to combat fraud by enhancing and increasing site visits, interviews, and investigations of employers who use the H-1B program. The agency also created a tip form<sup>11</sup> for reporting suspected fraud and abuse.

## **Guidance for Employers Amid Additional H-1B Scrutiny**

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The investigations announced by the government are specific to employers suspected of gaming the H-1B registration system, but all employers should be prepared to document and explain their practices for H-1B registration, including any safeguards they have in place to ensure that the same prospective employee is not inappropriately registered twice by different entities—whether or not those entities are under common ownership or control.

In the event a prospective employee has been registered more than once, employers should be prepared to show a legitimate business need for multiple registrations.<sup>12</sup> The agency may consider such

Table 1. Registration and Selection Numbers for FY 2021-2024

Cap FY	Total Registrations	Eligible Registration <sup>1</sup>	Beneficiaries with No Other Eligible Registrations	Beneficiaries with Multiple Eligible Registrations	Registrations Selected	Percentage of Eligible Registrations Selected
2021	274,237	269,424	241,299	28,125	124,415	46.1%
2022	308,613	301,447	211,304	90,143	131,924	43.7%
2023	483,927	474,421	309,241	165,180	127,600	26.9%
2024	780,884	758,994	350,103	408,891	110,791	14.6%

<sup>1</sup> The count of eligible registrations excludes duplicate registrations, those deleted by the prospective employer prior to the close of the registration period, and those with failed payments.



factors as familial ties, proximity of locations, leadership structure, employment history, similar work assignments, and substantially similar supporting documentation.<sup>13</sup>

More broadly, the increased scrutiny being applied to registrations is a reminder to all H-1B employers to ensure ongoing compliance with H-1B regulations. It is important to plan ahead for possible site visits, interviews, and investigations relating to the H-1B program.

Best practices for H-1B employers include the following:

- *Prepare for a site visit.* U.S. Citizenship and Immigration Services officials may collect and verify information through site visits. These may be unannounced or preceded by a request to meet. This process may include reviewing the H-1B petition and supporting documents, researching information in public records, and interviewing the employer, the beneficiary, and others. Participation is voluntary. If the employer or beneficiary expresses an unwillingness to participate, the federal officers will end the site visit and instead complete the review based on the information available.
- *Create a reception plan.* Because federal authorities may make unannounced site visits, employers should prepare a set of standard operating procedures (SOPs) for receiving government officials if and when they arrive. The SOP should include guidance for employees (e.g., receptionist, human resources [HR] staff, in-house counsel, petition signatory, the beneficiary), instructions for verifying the identity of the federal officers, designated space for audit activities, location of files to be pulled, and specific lists of the documents the company is prepared to share. The SOP should anticipate government visits at sites outside of the corporate headquarters or major worksites and plan accordingly.
- *Prepare a call sheet.* Employers should know beforehand exactly who they will notify if a government visit is taking place. This includes HR officials, in-house counsel, and other senior executives, as well as outside immigration counsel. Specific contacts should be identified for issue escalation. The goal is to ensure all decision-makers are apprised and ready according to established communication

channels—not to create a panic that could impede the employer’s plan for resolution of an investigation or audit.

- *Know where your PAFs are.* Employers are obliged to maintain a Public Access File (PAF) for sponsored H-1B, H-1B1, and E-3 positions. PAFs provide additional detail on the Labor Condition Applications (LCAs) submitted with these nonimmigrant petitions, and members of the public are entitled to request these records. An electronic database of PAFs, segregated from other HR systems to protect confidential employee data, is a straightforward way to ensure ready compliance.

Employers should plan accordingly and review their employment and HR policies and practices across worksite locations.

## Notes

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\* The authors, attorneys with Mayer Brown, may be contacted at [morganbailey@mayerbrown.com](mailto:morganbailey@mayerbrown.com), [mdelrey@mayerbrown.com](mailto:mdelrey@mayerbrown.com), and [kkramer@mayerbrown.com](mailto:kkramer@mayerbrown.com), respectively.

1. <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-electronic-registration-process>.

2. Of the more than 780,000 total registrations, approximately 408,000 were for beneficiaries with multiple registrations.

3. <https://www.reginfo.gov/public/Forward?SearchTarget=Agenda&txfield=1615-AC70&Image61.x=0&Image61.y=0>.

4. <https://www.uscis.gov/newsroom/alerts/fy-2024-h-1b-cap-season-updates>.

5. At least one district court has found that there is no authority preventing prospective employees from increasing their own chances of being selected, such as by seeking out as many sponsoring employers as possible. *Fontenoy Eng’g Inc. v. Baran* (N.D. Cal. Jan. 13, 2020).

6. 8 C.F.R. § 214.2(h)(2)(i)(G); *Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt from the Annual Numerical Limitation*, 73 Fed. Reg. 15389-95, 15391-93 (Mar. 24, 2008); *Matter of S- Inc.*, Adopted Decision 2018-02 (AAO Mar. 23, 2018).

7. <https://www.uscis.gov/sites/default/files/document/memos/2018-3-23-PM-602-0159-Matter-of-S-Inc-Adopted-Decision-Package.pdf>.

8. *Matter of S- Inc.*, Adopted Decision 2018-02 (AAO Mar. 23, 2018) (emphasis added).

9. *Id.*



10. <https://www.uscis.gov/scams-fraud-and-misconduct/report-fraud/combating-fraud-and-abuse-in-the-h-1b-visa-program>.
11. <https://www.uscis.gov/report-fraud/uscis-tip-form>.
12. Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt from the Annual Numerical Limitation, 73 Fed. Reg. 15389-95, 15392 (Mar. 24, 2008).
13. Matter of S-Inc., Adopted Decision 2018-02 (AAO Mar. 23, 2018).