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### **2017 H-1B CAP FILING ADVISORY**

This advisory is being issued as a result of continued uncertainty surrounding the upcoming H-1B Cap Season for April 2017, relating to the 2018 Fiscal Year (FY-2018) H-1B numbers which come available on October 1, 2017, the first day of FY2018.

#### **Current Rules**

Under current regulations, USCIS will only accept H-1B cap filings for FY2018 numbers during the first 5 business days of April 2017 for October 1, 2017 start dates. There is no doubt that filings will exceed the 65,000 regular cap and 20,000 U.S. master's cap numbers by many times over and that in such circumstance USCIS holds a random computer based lottery to determine which petitions will be approved and which will be rejected. The chance of a petition being selected in the lottery ranges from 20% to 30%. This estimate is based on last year's 236,000 filings for only 85,000 slots, and the trend toward more filings each year.

#### **Possible Changes Due to the Class Action Lawsuit**

A national class action lawsuit, *Tenrec, Inc. v USCIS*, 3:16-cv-00995 (D. Or., filed June 2, 2016) is currently pending decision in federal court which could change the way FY2018 H-1B numbers are allocated. I am lead counsel in that lawsuit. Plaintiffs, on behalf of themselves and others similarly situated, claim that USCIS is required by law to accept all petitions filed for H-1B status and issue available visas in the order in which petitions are filed (in date order), and not distribute them randomly based on a computerized lottery. The Office of Immigration Litigation in Washington D.C. has opposed the lawsuit in legal briefs on behalf of their client USCIS, and the Court is poised to make a decision at any time. The case has been taken under advisement by the Judge as of January 6, 2017.

If the USCIS prevails in the litigation, the current regulations will govern and there will be a random lottery system. Filings will be required to be filed within the 5 business day window beginning in April 2017 (April 3 – 7, 2017). All petitions filed will be randomly selected no

matter how many times previously a person has tried and failed to be selected, with an estimated 20% to 30% selection rate and 70% to 80% rejection rate.

If the class plaintiffs prevail in the litigation, USCIS will be required to accept petitions filed at any time, not just in the first 5 business days of April. Further, petitions will be assigned a priority date which corresponds to the date they filed the petition, and future visa numbers which become available in FY2018 (which runs October 1, 2017 to September 30, 2018) will be accorded in date order to those with the earliest priority dates.

As part of the class action, plaintiffs have requested that those who suffered a rejection in the lottery in past years (from 2013 to 2016) be provided a filing date in accordance with their earlier attempted filing. Therefore, those who have filed previously and were not selected in a past lottery will have priority over those who are filing for the first time, for future H-1B numbers beginning with the FY2018 numbers.

Those with rejected petitions in a past lottery will likely be provided a place in line in accordance with their earlier filing, provided the petition is re-filed to capture the older attempted filing date.

Those who have not ever filed previously will need to establish a priority date by filing a petition. Each day earlier that a petition is filed is a day ahead in line of others who file later. Therefore, if plaintiffs prevail in the lawsuit, first-time H-1B filers may need to act quickly to establish an early priority date.

In addition, if there are more class members who file to recapture old 2013-2016 priority dates than there are available visa numbers (for the 85,000 combined total), USCIS may be required to establish a waiting list and issue visa numbers according to petition date filing order.

It is very important to remember, however, that the above predictions are based only upon the requests made by plaintiffs in the lawsuit, and could be substantially different as ordered by the Court when the decision is made. Be aware that no action should be undertaken as a result of the lawsuit until the decision has been made, and only after competent immigration counsel has reviewed the decision carefully and advised in an individual case.

### **Things to Consider for H-1B Petitioners and Beneficiaries**

Immigration attorneys, petitioners and beneficiaries may wish to consider the following factors, with the assistance of competent immigration counsel, when determining how to proceed in this time of uncertainty:

#### **Past Lottery Rejection**

If an H-1B petition was previously filed on your behalf, and was not selected in the lottery, then one of two circumstances will likely occur if you intend to re-file this year. First, if the lottery is

still in place, you will not be given any priority and will have a 20% to 30% approximate chance for an H-1B starting October 1, 2017 if you file in the first 5 business days of April. Second, if the lawsuit prevails, the Court will likely provide a mechanism for petitioners to re-file and gain a place in line based on their previously filed H-1B petition. Based on the place in line, visas will be made available starting October 1, 2017 according to the earliest filing date first. This will remove the random nature of visa assignment, and result in issuance of visas according to one's place in line.

### **First Time H-1B Petition**

If an H-1B petition was never previously filed on your behalf, one of two circumstances will occur if you intend to file this year. First, if the lottery is still in place, you will have equal chances, 20% to 30% approximately, as anyone else who filed, understanding that there are differences between regular and U.S. master's cap cases, even if others filed for multiple years ahead of you and were not selected in the past. You will also have equal chances of rejection, estimated between 70% to 80%. Second, if the lawsuit prevails, you will need to consider that the earlier you file, the earlier your priority date for a future H-1B number will be. There will no longer be a chance of not receiving a number in the future, but the wait for a number will potentially be longer into a future fiscal year. It may be necessary to look to other options to extend status or seek another immigration option.

### **Conclusion**

Currently, the regulations are in force, and the Court has not ruled on the H-1B lottery yet. When the Court rules, the decision will be posted on our law firm's website:

<http://www.entrylaw.com/h1b-lottery-lawsuit>

Until the Court rules, petitioners and beneficiaries should consult with competent immigration counsel to determine the best course of action.

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