

Our Immigration Policy Shouldn't be Left to Chance

Summer is here, and most business immigration practitioners are breathing a sigh of relief that the H-1B season is over. At the same time, however, many are scrambling to find a visa alternative for employers whose H-1B petitions were not chosen.

Every year, United States Citizenship & Immigration Services (“USCIS”) issues H-1B visas to foreign workers serving in “specialty occupations at a professional level.” A specialty occupation requires theoretical and practical application of a body of highly specialized knowledge to be performed by a worker with at least the equivalent of a bachelor’s degree in the field. Both the position to be filled and the foreign worker’s qualifications must meet the criteria for a specialty occupation.

Federal law provides for an annual quota of 65,000 new H-1B visas that can be issued in any given fiscal year, which runs from October 1 to September 30. There is also a separate quota of 20,000 H-1B visas per fiscal year for graduates of U.S. advanced degree programs, for a total of 85,000 H-1B visas. If USCIS determines at any time during the first five business days of the filing period that it has received more than enough petitions to meet the numerical limits, the agency uses a computer-generated random selection process—i.e., a “lottery”—to select a sufficient number of H-1B petitions that may proceed to adjudication. Petitions that are not selected are returned to the petitioning employer. This year, USCIS received over 236,000 H-1B petitions within the first week of filing.

Interestingly, USCIS’s lottery system remains a mystery because the agency has been very reticent to describe its selection process. There appears to be very little accountability in how the lottery system works, whether it’s operating fairly, and whether all the available H-1B visas allotted in any given fiscal year are being used. In light of this lack of transparency, the American Immigration Council and the American Immigration Lawyers Association have sued the U.S. Department of Homeland Security and USCIS under the Freedom of Information Act on the grounds that USCIS failed to properly respond to a FOIA request seeking records describing how USCIS tracks and counts unused H-1B visas for each fiscal year and how the electronic selection process actually works. Until that lawsuit is resolved, the H-1B visa lottery will remain a mystery to us all, but in particular to employers.

Because the demand for highly skilled workers far exceeds the H-1B visas available in a given fiscal year, it is important that we have a system in place that fairly selects the petitions submitted and completely allocates the H-1B visas. Leaving the selection of our highly skilled workforce to chance can’t be the long term solution. Employers shouldn’t be forced to gamble, and there must be more certainty in the process. We must take steps to modernize our antiquated immigration system by implementing much needed reform.