

Race for H visas likely to continue into H-1B season

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Last night, I received a questioning text message from my brother-in-law, a conscientious and well-informed high school social studies teacher, with a link to a news article about the recent rush to apply for H-2B visas. He—and many others in the general public—was wondering why employers fueled up on coffee, stayed up past midnight and waited with bated breath for the clock to turn to midnight on January 1, 2019 to file for these visas. Why the rush? What's the big deal with H visas? And even more poignantly, why aren't more people being allowed in through a legal process, if demand is so high?

The answer stems from a combination of a need for foreign workers, balanced against limitations on the number of foreign workers granted U.S. work authorization because of political posturing; a game of legal “hot potato;” and pandering to public perception that allowing foreign workers in the U.S. = fewer jobs for U.S. workers. Never mind that nearly half the companies in the Fortune 500 were founded by first or second-generation immigrants—many of whom, no doubt, held work visas at some point.

Firstly, what's going on with the H-2B visas: similar to the commonly written about and more broadly publicized H-1B visa program, the H-2B visa program allows U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States—in the case of H-2Bs, to fill temporary nonagricultural jobs. To even qualify for an H-2B visa, the employer must show that (1) there are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work; (2) employing H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers.; and (3) the employer's need for the prospective worker's services or labor is temporary, regardless of whether the underlying job can be described as temporary.

These are not easy hoops to jump through. And yet, Congress limits the number of available new H-2B visas to a mere 66,000 during any fiscal year—33,000 for the first half of the fiscal year (October 1st to March 31st) and 33,000 for the second half of the fiscal year (April 1st to September 30th). As a first step in the process, employers must apply for labor certification for these workers. Employers wishing to apply for H-2B visas for workers with a start date of April 1st were permitted to apply online starting on January 1st—leading to a tidal wave of applications being submitted at midnight or immediately thereafter, crashing the U.S. Department of Labor's (DOL) iCERT website. According to the DOL, within five minutes, the system had received an unprecedented demand for H-2B labor certifications—more than 33 times the user demand on the system compared to January 1, 2018. In essence, employers requested labor certification for 97,800 H-2B workers even though only 33,000 visas are available. As of today, the system is still down, with the DOL currently estimating that application processing through its iCERT system will (tentatively) resume at 2:00pm EST on Monday, January 7th.

This trend portends similar disruption to U.S. government systems and available resources once the upcoming H-1B visa filing window opens on April 1, 2019. For those of us in the immigration industry, it's a bit like the movie Groundhog Day...we help clients to file requests for labor certification with the Department of Labor, prepare all the necessary paperwork, cut checks in the correct amounts, gather signatures greedily on forms and letters, pile up the evidence—and then, come the end of March, send these petitions off to the USCIS with a wish and a prayer that they might be one of the 85,000 selected by the U.S. government for processing. And yet, year after year, we see the demand for H-1B visas far outpace available visa numbers. For example, for visas in each of the past two fiscal years (starting October 1st and running to September 30th of each year), the USCIS has received nearly 200,000 new H-1B visa petitions within the first week of the filing period (after which they stop accepting new petitions). Of the 85,000 available visas, the USCIS allocates 65,000 for beneficiaries whose job requires a minimum of a bachelor's degree or the equivalent, and an additional 20,000 for those whose jobs require a master's degree or higher and who have graduated from an accredited public or non-profit U.S. college or university. To determine who gets these potential golden tickets, the USCIS holds a lottery to choose which candidates it will consider.

LMWF anticipates that we will see a similar trend this year, for FY2020 (starting October 1, 2019), with demand undoubtedly outpacing availability. The USCIS has certainly made strong efforts to dissuade employers from hiring foreign workers under the H-1B program, of late—including raising the minimum wages required for jobs, unannounced policy shifts in what the government requires for approval and how they define terms under the law, and asking for seemingly endless additional evidence of the foreign national's qualifications to delay or derail the process for the employer. But it remains to be seen whether these efforts will have any impact on the number of petitions filed. The process is certainly more cumbersome than ever before; but demand for U.S. work authorization remains high, and options for work visas remain fixed in place. The need for high-skilled foreign workers is likely to remain, resulting in employers being willing and even eager to jump through whatever hoops they must to get visas for their most competent employees or potential employees.

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