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Lawsuits to Clarify or Eliminate H-1B Lottery System (Random Selection Process)

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CLASS-ACTION LAWSUITS ON H-1B LOTTERY SYSTEM

Several parties have sought class-action lawsuits against the U.S. Citizenship and Immigration Services (USCIS) regarding H-1B Lottery System (Random Selection Process) for H-1B Cap Petitions. H-1B Cap Petitions are being filed by U.S. employers on April 1 each year for hiring skilled foreign nationals with at least a bachelor's or higher degree, or the equivalent for professional occupations. H-1B Cap Petitions must undergo lottery system given the overwhelming numbers of such petitions being filed on April 1 each year, especially in the last few years.

On June 2, 2016, two H-1B Petitioners and two Beneficiaries that have had their H-1B Cap-Petitions rejected in the H-1B Lottery System have filed a class-action lawsuit against USCIS in a case named, ***Tenrec, Inc. et al v. USCIS***. The H-1B Petitioners in this suit are Tenrec, Inc. and Walker Macy LLC. This class action is **contending that USCIS regulation providing for H-1B Cap Petitions to undergo lottery or random selection, and only be filed within a 5-day window each year are arbitrary, capricious, an abuse of discretion or not in accordance with federal law. This class action is requesting, among other things, that H-1B Cap Petitions must be accepted in the date filing order, and not randomly.**

Other parties are teaming up on another class-action lawsuit separate from the above, as announced on May 23, 2016. The parties are the **American Immigration Council (Council)**, and the **American Immigration Lawyers Association (AILA)**. **This class action's position is that USCIS has never been forthcoming in describing and disclosing the selection process. This class action is seeking to ascertain how the H-1B Lottery System works from the beginning to the end, whether the H-1B Lottery System is operating fairly, and if all the H-1B visa numbers are being used up as government mandated.**

RISING DEMAND FOR H-1B VISA NUMBERS

The demand for visas numbers for H-1B Cap-Subject Petitions is showing a pattern of increase over the years. The **H-1B Cap-Subject Petitions received** by U.S. Citizenship and Immigration Services (USCIS) were around **236,000 in 2016; 233,000 in 2015; 172,500 in 2014; and 124,000 in 2013.**

In 2012, H-1B visa quota was not met until June 2012 (i.e. visa numbers used up only in June 2012). However, **in 2013 and for the first time since 2008, USCIS met its H-1B visa quota within the first few days of April 1, 2013.** April 1 is the first day USCIS begins accepting H-1B Cap-Subject Petitions.

H-1B ANNUAL WORK VISA CAP OR VISA QUOTA

Each year on April 1, USCIS begins accepting H-1B Cap Petitions for the upcoming fiscal year (FY) with an October 1 employment start-date for the annual 65,000 government-mandated cap, and the 20,000 exemption for H-1B under the U.S. advanced degree.

Those under U.S. advanced degree not selected within the 20,000 visa numbers will be processed under random selection or lottery for the 65,000 limit. All H-1B Cap Petitions not selected in the lottery system will be returned with their filing fees. The filing fees for any H-1B Cap Petitions with duplicate filings will not be returned.

WHAT IS AN H-1B?

H-1B petitions are temporary work visas for specialty occupations. They are for positions requiring theoretical or technical expertise in specialized fields for qualified foreign nationals to live and work in the U.S. Many H-1B foreign nationals have successfully gone on to apply for and obtain lawful permanent residence status (also known as, green card).

Foreign nationals with at least a bachelor's degree or the equivalent (equivalent degree and/or work experience) may be sponsored for H-1B petitions. A broad range of positions may fall under H-1B specialty occupations. Each case depends on the position's overall circumstances, necessitating complex legal analysis.

SOME H-1BS ARE NOT SUBJECT TO H-1B CAP OR QUOTA

Not all H-1B petitions are subject to the annual visa cap or quota. It depends on the types of H-1B petition being filed, or the types of entity-sponsor. For examples,

foreign nationals who already have approved H-1B petitions or H-1B status may still have H-1B petitions filed for them to extend their H-1B status, or to change or add H-1B employers. Certain employers are cap exempt.

DURATION OF H-1B

In general, H-1B petitions/work visas are approved for three years each time (up to a total of 6 years). Under certain circumstances, H-1B work visas can be extended beyond the 6-year maximum time limitation.

H-1BS NOT SELECTED OR FILED WHEN ALL H-1B VISA NUMBERS ARE USED UP

Potential H-1B candidates who do not make it to the Fiscal Year 2017 H-1B visa quota (October 1, 2016 employment start-date) have the options to have their H-1B cap petitions submitted or resubmitted to reach USCIS on April 1, 2017 (with an October 1, 2017 employment start-date) for the 2018 Fiscal Year H-1B visa cap/quota. They can also consider other immigration options such as other nonimmigrant status, work permit, and self-petition green card filings, if eligible.

This article is intended for informational purposes only, and should not be relied on as legal advice or attorney-client relationship. By **Aik Wan Kok, Lawyer USA Immigration Services, at Tiya**; Tel: 703-772-8224 & koka at tiyalaw dot com; Direct dial from abroad: 001-703-772-8224; <http://www.tiyaimmigration.com> ; <http://tiyalaw.blogspot.com> ; <http://immigrationresource.net>

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