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Lisa Nagele-Piazza

Welcome to The FP5: Five Things for Your 9-to-5, where we help employers make sense of the fast moving world of workplace law and compliance by breaking topics down into five parts. I'm Lisa Nagele-Piazza from the FP content team.

Today I'll be chatting with Jocelyn Campanaro, who is a partner in our Denver office and co-chair of our immigration practice group. Welcome Jocelyn.

Jocelyn Campanaro

Thanks for having me today.

Lisa Nagele-Piazza

So today our topic is the H-1B visa lottery, and it's H-1B season right now. I know it's a stressful time for employers and candidates alike, especially since there's been some big changes this year and we'll get to those changes in a bit.

But our first topic for today is for those unfamiliar, we want to talk about the bigger picture a little bit. So can you tell us about the general H-1B selection process and kind of what employers have been used to over the years?

Jocelyn Campanaro

Sure. So there are 85,000 H-1B visas issued each year for new applicants. So if you haven't had an H1B before, you have to go through a lottery and there are 85,000 each year, 20,000 of which are for master's degrees, US master's degree holders, and then the rest are for everybody with a bachelor's or higher.

And it used to be that we had to file all of the H-1Bs the first week of March, and you had to have the full filing together. But in 2020, they revised the system to create a registration process that allowed for a lottery system, which was really fantastic because you can just register people in the lottery and then they get randomly selected and then you prepare the whole filing. So it's made it a lot more humane. So it is stressful, but it's also very predictable and it's manageable because you know it's coming and you're not spending the first three months of the year putting together hundreds of filings. You're spending the first three months, you know, coming up with a registration list.

So the registration process is in March of every year. It's about two and a half weeks. This year it starts on March 4th and runs through March 19th. And companies can register candidates who have bachelor's degrees or higher for specialized positions. And I mentioned that there are 85,000 available each year. The USCIS gets about 400,000 registrants. So that's the stressful part of it. Yeah, it's about one in three, we were seeing about 30 % selection rate last year.

So when lottery opens, when the registration period opens like it did last week, employers register the people they want to have selected, and at the end of the month USCIS does a random selection and will let you know if you've been selected for the lottery or not.

And so this year, there are a number of changes, and we'll talk about that in just a minute, but that can change that from last year's. But this has been going on for about five years. So it's predictable. It actually is a lot more humane than it used to be. But it's still stressful in that it's hard to get selected.

Lisa Nagele-Piazza

Yeah, absolutely, with the big difference in number between how many applicants there are and registrants there are and the amount of visas.

Jocelyn Campanaro

I'll say one more thing. Interestingly enough, one year there were about 700,000, and what was happening is employers were filing for the same person with all these different subsidiaries or multiple companies. So now they changed, I think it was last year, where you can only register one person one time.

Lisa Nagele-Piazza

Oh so they were like duplicates?

Jocelyn Campanaro

Yes. Yeah.

Lisa Nagele-Piazza

OK, gotcha.

Jocelyn Campanaro

So they did a whole review. They reduced the 700,000 down to about 400,000 again. So that's about between 350 and 400 is where it sits. And that's what we would expect based on prior years. And you can only register once.

Lisa Nagele-Piazza

Gotcha, yeah. So then, after the lottery process happens, what happens generally after that?

Jocelyn Campanaro

So once someone is selected, you have 90 days to file an H-1B. So employers will put together their petitions, file an H-1B with USCIS. Usually it has to be done by June 30th. And then they'll process anywhere from three to six months. And the start date will be October 1st. So in years past, sometimes there will be a second lottery. So they go through the first batch, and then they do a calculation.

They'll accept more than 85,000 with the idea that some are rejected, some are denied, some are just duplicated, and then, so they'll go through the first batch. If they've used the allotted number, they close it and it's done. In

some years, they have extras. And so they're like, we haven't gotten to the allotted 85,000. We'll do a second lottery. And so they'll do a second lottery, I believe, in August. And then you get a second chance. But based on last year and what I think will happen this year, I don't know that we'll have a second lottery. But it's possible. So after they're selected, you file the H-1B petition, and USCIS will hopefully approve it by October 1st. That's the first possible date that the person can start working on H-1B status. If they have, if they're students and they have OPT, which is a status given to students upon graduation where they're allowed to work in the US, and if that expires over the summer, they get what's called a cap gap extension. So they'll get by filing an H-1B before they expire and their student work authorization period, they get extended through September 30th. So they'll have a little bit of extra time. And then October 1st, the H-1B would go into effect.

Lisa Nagele-Piazza

Our second topic for today is that the H-1B process is changing in several big ways. Let's talk about those changes.

Jocelyn Campanaro

There have been a lot of changes in the last year in immigration overall, several that have impacted H-1Bs. So the first one is a wage system. When someone registers, so in the past we registered someone with their biographic information, so their name, their passport, the employer, and that was it. They got put into it, they were in random selection. This year we also have to include their wage and the wage requirement for where they're sitting and working based on the Department of Labor's wage system.

So the Department of Labor has a four-tiered wage system for H-1Bs. And depending upon experience and requirements of the position, it might be level one, level two, three, or four. Those four wage levels will have different levels of pay. And so the higher the level, the more someone is required to pay, and employers have to pay the minimum of that assigned wage at that level.

So this year, based on experience required for the position, any other requirements, they could fall under level one, two, three, or four, and they would have a different wage requirement. And for each level that you are registered under, you get one chance in the lottery. So if somebody falls under level three, because maybe the position requires a bachelor's plus three or four years of experience, they may get a level three assignment, they would get three chances in the lottery.

So it doesn't impact the number of registrants selected, but it will give more chances to people who have higher level wages based on the requirements of the position. That's one of the biggest changes.

Lisa Nagele-Piazza

Okay, so if you're level one, you get one chance, two, two, and so on up to four.

Jocelyn Campanaro

Correct.

Lisa Nagele-Piazza

Gotcha.

Jocelyn Campanaro

So we'll talk about how that impacts employers in a minute because it has shifted the process dramatically at this point in the registration. The other big change is that there is \$100,000 fee for some H-1B visas and approvals. So when that first came out, it looked like it was going to apply on a much larger scale than it is right now. But the \$100,000 fee impacts those folks who are approved for processing from outside the US.

So before they can come into the US on a new H-1B, their employer has to, or someone has to pay \$100,000 fee. It was upheld by the courts and it is an extremely high amount. So it will impact employers to some degree. So how it will impact them, I believe it will have an impact on some of the companies that hire mostly from outside the US. So that might be, for example, tech companies who are hiring from their data centers or their locations outside the USA. A good example is the data companies that are hiring from India. Those folks are doing specialized jobs. They're working. It's harder to bring them in on L-1s. So in the past, companies would use the H-1B program. Anyone who's getting an H-1B approved for processing initially from outside the US would have to pay the \$100,000 fee. So it will have a dramatic impact on employers who have used it in that manner. And that will dramatically decrease, could dramatically decrease the registration numbers. It won't impact someone who's in the US already and you're doing a change of status. So those students who haven't had an H-1B before and are here on F-1 OPT and working, they won't be impacted because they're a change of status.

So I think it will have less of an impact on most employers than initially thought, but there is a possibility that could hit some segment sectors more greatly, and that could impact the numbers. Now, will the numbers be shifted again because of some of the other changes like the waiting system? In terms of who has chances of getting selected, it could be that it balances out. We really don't know. So this is the first year these two changes are coming into play, and we'll see what happens.

Lisa Nagele-Piazza

Yeah, I'm curious to see how the new rules play out. Also, I'm sure that there are a lot of employers that are happy to hear that the new \$100,000 fee is not going to apply to them.

Jocelyn Campanaro

Yes, it is nice that it won't impact the majority of employers, but there are certain segments, certain types of employers that it could have an impact and it will really dramatically impact their hiring decisions under the H-1B program.

Lisa Nagele-Piazza

Yeah, absolutely, could be have a huge impact on those who have to pay it for sure.

Jocelyn Campanaro

It's interesting to see too, we haven't had any clients, I haven't heard of anyone who will pay it. I don't even know how they pay it, right? I mean, there's a mechanism, but just the functionality or the practicality of how that's all done will be interesting to see if employers opt to pay it for those candidates that are deemed essential.

Lisa Nagele-Piazza

Absolutely.

Jocelyn Campanaro

This fee will also impact individuals if they travel before it's been approved. So if you're in the US and the filing is for a change of status, so from F-1 to H-1, for example, if you leave before it's approved, the case then is no longer a change of status and it goes towards what's called consular processing. So the person still gets approved for H-1B status, but they have to get a visa and come in and activate the H-1B then. So it will have a big impact on employees as well who won't be able to travel until they have an approval, so either they have to remain in the US until they have that, or they're going to have to premium process their H-1B. And this is a fee employees can pay. And that fee is \$2,965. So it's a big, \$3,000 is a lot for individuals to pay. And that may be something that we see over the summer really impacting travel options for candidates who are waiting for their H-1B to be approved.

Lisa Nagele-Piazza

That brings me to our third topic today, which is how are these changes impacting employers? You talked a little bit about how it would impact employees or petitioners. And that's a big deal. What are some of the other ways that it's going to impact the workforce?

Jocelyn Campanaro

One of the biggest impacts we're seeing right now is the benefit of having weighted selection based on the level that's assigned for the H-1B. So when someone has a level three wage and that's what's being used for their H-1B filing, they get three chances. So employees are very incentivized to push for the higher levels. And sometimes employers may consider, we want to give this candidate as many chances, let's increase their wage and give them more options.

That will dramatically impact or could dramatically impact the company in ways of pay equity issues, discrimination issues, right? Because if you're paying one person more and not the rest, it could increase their obligation to pay other candidates in the same position. Our recommendation is you need to pay based on what the requirements of the position are, not in a way to get a higher weighted chance of success because it will have that impact on your other hiring decisions, your pay equity, other employment considerations across the board. It's going to impact similar to what we talked about earlier, "Who can you sponsor and who is worth sponsoring? If you have \$100,000 fee, is that candidate really absolutely essential and can you even afford that?" Most employers are saying no. And when the H-1B, the \$100,000 fee came out, the announcement for it came out, employers were really starting to get hesitant about using the H-1B program and they are really considering, you know, do we have other options around this?

Now, for the most part, people don't use the H-1B program if they have other options. So it's really put employers in a tough situation where, you know, going forward with this program and some of the burdens that it may have, but they don't have hiring options otherwise. So they're really having to look internally at recruiting in different ways and are there other ways... That was initially they were rethinking the H-1B program and it, you I think people are seeing the limited impact so they're proceeding with it and we have, you know, probably more candidates than we have had in past years. So we're seeing numbers increase despite all these changes.

But it definitely impacts hiring strategies, budgets perhaps, and then long-term planning in terms of how are we going to staff our employment needs? Are we looking at foreign nationals? Are we going to change? And do we even have the option to change? Like I said, most people wouldn't use the H-1B program if they had other options. It's way too burdensome and costly, but they may not have options. So really kind of trying to figure out what options do we have, if any, and how can we shift some of our internal practices that we've been doing for years.

Lisa Nagele-Piazza

Our fourth topic to discuss is the mistakes that you see employers making during the H-1B visa process and how they can avoid making those mistakes.

Jocelyn Campanaro

The biggest mistake is waiting too long and not being proactive and really in immigration, that's what it's all about, being proactive, planning ahead of time, looking at obstacles, figuring out solutions ahead of time. Because particularly right now, if you file an H-1B for someone and it turns out that maybe they don't have the requirements or they're not maintaining status and you're going to have to consular process them instead, you are now subject to the \$100,000 fee and you've probably lost a candidate in the hiring option that you had been planning for. So it's really about being proactive, planning and reviewing ahead of time so you have a better assessment and not at a last-minute change where it could impact everything and you may not be able to proceed.

Another mistake is if employers are going to increase wages solely for the purpose of additional selection options. We talked about the impact it could have on pay equity or your organization as a whole. We want to make sure that you have a defensible argument that the position requires this wage level and then you should be matching that wage across the board because that's what the position would require anyway.

So really just making sure they're looking ahead, they're being proactive and they're reviewing the requirements and that the candidates meet the requirements of the filing.

Lisa Nagele-Piazza

Okay, our fifth topic today, let's talk about what employers can do now, both in the H-1B visa process and perhaps if they're not selected, what are some other alternatives for them?

Jocelyn Campanaro

So right now the lottery process, the selection process is open. So they should be looking at who to register, getting registration packets ready, working with counsel to do that if they're not doing it internally. And that really

requires a lot more review than what we've had to do in the past because you have to look at the position, the requirements, and the forms are changing too, so we have to disclose those requirements upfront in a different way than we had to before. Making sure that your wages match and that you address any issues if you aren't currently paying the required wage based on the requirements of the position. They should be doing selections now. The lottery, it is two and a half weeks, which is great, but that time goes quickly.

Making sure you have time in advance because sometimes the system gets backed up. know there were a couple of issues in the first few days of glitches and payment problems. We typically don't do a lot of filing on the first day. We stagger them out to make sure that we are able to have enough time if there is a system glitch. And so it's really about being proactive and working ahead of time and giving yourself lots of lots of time.

So they should be doing that now because in a week or so it will close. And then once the lottery closes, that's it for new H-1B candidates until next year. So it could impact someone that you don't have a candidate for a year and a half because the start date isn't until October. So it's really about being ahead of the game and being proactive and looking at the whole case thoroughly.

In terms of other options, and we'll be doing a webinar, I believe in April, on alternatives if somebody wasn't selected in the cap. Typical alternatives are looking to see if someone could meet the qualifications for an O-1 visa. That's if you have an exceptional ability. So the O-1, which is available for exceptional ability foreign nationals, the O-1 visa is an option. There are three out of 10 criteria that someone has to meet with overwhelming evidence. And so if you meet that, you might be able to get an O-1 instead.

These are hard for a lot of industries because a lot of professional positions don't give things like national awards, people don't write articles themselves or have articles written about them. So the standard is tough. It's easier in some industries than others. And so sometimes someone may be an exceptional employee or exceptional worker, but they don't have the documentation throughout the industry to verify that. So O-1s are a good option. If someone's a multi, if the company is multinational, so they have offices in other countries, you could look at an L-1. So an L-1 is an inter-company transfer. These are people who are managers, executive positions, or have specialized knowledge based on the work that they've done for the foreign affiliate.

They work for a year or more in the last three years, and then you can transfer them in an L-1 status based on the experience they had with their company. The idea is most people wouldn't be able to do the job because they haven't worked for the company before, and it would take a lot to get them up to speed. So you want to take your global workforce and utilize it in different locations. So L-1s are great options, but you do have to be a company that has offices and companies outside the US, and the person has to go overseas and work for at least a year.

So some people are great with that. They want to go wherever for a year, and then they'll come back in on L-1 status. There are some other difficulties with it. Ls are really hard to get approved, particularly for certain nationals of different specific countries. You've got to go through the consulates and get visa stamping. And so there can be issues with that, particularly right now where there are some travel bans and there's halts on certain visa types. So

some people from certain countries really can't leave the US with an assurance or some level of assurance of being able to come back in.

Lisa Nagele-Piazza

Jocelyn, are there some countries where it's easier to get an alternative type of visa?

Jocelyn Campanaro

Yep, there are some countries that have visa options based on treaties that we have with those countries, like E-3s for Australians. They're very much like the H-1Bs. They're specialty occupations. And if you are from Australia and you fill a specialty occupation and you have a bachelor's degree or higher in a specialized field, you can come in on an E-3. Those are good for two years and renewable, you know, pretty much indefinitely.

If you are from Canada or Mexico, there's an option, it's called a TN visa. This is based on the US-Mexico-Canada agreement, which was formerly NAFTA. And these are professional positions. There's a whole appendix that lists a number of occupations and if you fill one of those occupations and have the requirements as listed, then someone could get a TN visa to come into the US. So sometimes you can get other alternatives based on your extraordinary ability or exceptional ability. You can get other options based on working outside the US for a year or more, or on these treaties based on your nationality.

Lisa Nagele-Piazza

And are these visa alternatives more cost effective for employers or does it really just depend?

Jocelyn Campanaro

It depends. Sometimes yes, sometimes no. The H-1B is an expensive program, but immigration overall is fairly expensive. But TNs tend to have less filing fees if you're processing outside the US and so sometimes they're a little cost-effective. They do have limitations though. Some of these are temporary intent. And so someone can't stay long term and pursue residency like you can on an H-1B, which is why for some nationals, like people from India or China who have very long waits to get green cards, the H-1B is so really critical to their ability to stay here. If you have a green card in place, you can have a green card in place while you're on an H-1B, which is a temporary visa, but it allows what's called dual intent. Things like TNs and E-3s don't allow that. So it's very short-term without long-term strategy planning.

Lisa Nagele-Piazza

Okay, that makes sense. So if you're on one of those visas, you're saying I'm not intending to stay in the United States indefinitely.

Jocelyn Campanaro

Correct. Yeah. And so if you were to be on that temporary visa that says, I'm here for this temporary period and I'm going home afterwards, to have a green card that says, I want to stay here permanently, there's a contradiction to those intentions and they are not permitted. So, which is why the H-1B is so desirable.

Lisa Nagele-Piazza

Absolutely. Great. Well, this has been very informative. Thank you, Jocelyn. Is there anything else that you want to say that you think is an important takeaway for employers about this whole process?

Jocelyn Campanaro

Biggest thing I can recommend to all employers and employees is to be proactive, plan ahead, and yes, there are challenges right now in immigration, but it's not impossible. We are seeing outcomes very similar to prior years in terms of success rate. People are getting approved. They're coming into the US without issues. Immigration is still working. It's still an option. So while it feels really scary and stressful right now, if you have good planning and good help, with good knowledge backed behind that of understanding the process and the practical applications right now, then it's definitely not something to be afraid of or too worried about. Business is proceeding, and so while it feels scary, it doesn't have to be. If you do it the right way, you do it with the right team, you'll still be able to hire people in immigration status, and people will still continue to remain here and work here legally.

Lisa Nagele-Piazza

Now I want to turn to something a little more fun. Let's do a speed round of five questions about you just off the top of your head. Are you ready?

Jocelyn Campanaro

Mm-hmm. Let's do it.

Lisa Nagele-Piazza

Number one, beach or mountains?

Jocelyn Campanaro

Mountains!

Lisa Nagele-Piazza

I was figuring you were gonna say that being from Colorado.

Jocelyn Campanaro

Although it is hard to not have water having grown up on the East Coast, but I'll take the mountains right now.

Lisa Nagele-Piazza

Number two, text or calling?

Jocelyn Campanaro

Texting and my kids tell me I'm a dry texter so people may not like texting with me, but definitely texting.

Lisa Nagele-Piazza

Yeah, does anybody call anymore?

Jocelyn Campanaro
Not any of my friends.

Lisa Nagele-Piazza
Number three, coffee or tea?

Jocelyn Campanaro
Coffee. It's the very last vice I have in life and I'm just not letting it go.

Lisa Nagele-Piazza
I love it too. Number four, early bird or night owl?

Jocelyn Campanaro
Early bird, if it's after eight o'clock, I'm useless.

Lisa Nagele-Piazza
And number five, tell us one hidden talent people don't know about you.

Jocelyn Campanaro
I got into road biking about a year and a half ago and liked it so much, I signed up for the Triple Bypass last summer and it's a 118 mile bike ride through the mountains of Colorado. You go over three peaks and about 10,000 feet incline. And I signed up, I did it and I finished. I survived. I finished at the very end of the pack, but I got over that line and then I did it. Yeah.

Lisa Nagele-Piazza
Bonus question, would you do it again?

Jocelyn Campanaro
I'm signed up for this year, so yes.

Lisa Nagele-Piazza
Excellent! That's awesome, very Colorado. Yeah, exactly. I went to the University of Colorado so I remember all my friends were very into mountain biking and climbing and snowboarding and all of that.

Jocelyn Campanaro
Yeah, there's a lot of pressure to be outside and doing things. So when it is a cloudy, wet day, it's like, I can have an excuse to stay inside. They don't come often, but they're nice.

Lisa Nagele-Piazza
Great, well thanks so much for joining us, Jocelyn. I learned a lot today and I'm sure our listeners did too.

Jocelyn Campanaro

Well, thank you for having me. It was a lot of fun and I really appreciate all that you're doing to get this podcast going.

Lisa Nagele-Piazza

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