

Fear of USCIS scrutiny deters many Indians from Filing H-1B petition

Ishani Duttagupta / TNN / May 22, 2023



For many Indian professionals and students, the excitement over being lucky to be selected in the annual US H-1B visa lottery, is fizzling out. When the US Citizenship and Immigration Services released the figures of H-1B visa registrations for the financial year 2024 last month, the organization that manages the immigration system of the US, also flagged the issue of a large number of multiple registrations for eligible beneficiaries.

Serious concerns were raised about many applicants trying to gain unfair advantage in the H-1B lottery process by working together with unscrupulous companies and consultancies with multiple registrations submitted on behalf of the same beneficiary. “We remain committed to deterring and preventing abuse of the registration process, and to ensuring only those who follow the law are eligible to file an H-1B cap petition,” the USCIS announcement had said.

With the USCIS warning H-1B applicants that at the time of registration each prospective petitioner is required to sign an attestation, under penalty of perjury, that all of the information contained in the registration submission is complete, true, and correct and the registration(s) reflect a legitimate job offer; there are fears among several Indians who have been successful in getting H-1B visas allotted through the lottery. There is likely to be greater scrutiny by USCIS of the petitions being filed for H-1B by candidates who had done multiple registrations through different consultatns and companies.

The USCIS has warned that if it finds that an attestation was not true and correct, and the registration not properly submitted and the prospective petitioner not eligible to file a petition based on that registration; the petition may be denied or revoked. Further, USCIS may also refer the individual or entity who submitted a false attestation to appropriate federal law enforcement agencies for investigation and further action.

Such a strong public stand by the USCIS, based on the perception that a large number of individuals are gaming the system, and the announcement that the agency will exercise the full extent of its investigatory powers to bring these people to justice, is, perhaps, unprecedented.

“Quantifying the level of scrutiny to be applied by USCIS in reviewing multiple registrations for the same foreign national worker through different companies is virtually an impossible task, but seeing how much publicity this news is receiving in mainstream media, it would be ignorant to speculate that no additional scrutiny would apply. In most things, Homeland Security and USCIS, in particular, are painfully slow to move and act, but when public perception is this widespread and that regardless of whether one leans left or right in terms of politics, the majority consensus believes the current H-1B cap lottery system is utterly broken, USCIS is going to act because the agency cares how they are

ultimately viewed in the public limelight,” Min Kim, partner and attorney at the Edison, New Jersey, office of law firm Chugh, LLP, told the Times of India.

All indications are that USCIS will compare every filed case against the H-1B registration database this year, to check if there are multiple registrations for the same beneficiary.

“USCIS will likely come down hard, especially where they find evidence of collusion and multiple coordinated registrations. Previously, we have seen USCIS rejecting the filed petition and in some cases issuing a notice of intent to revoke after approval, when evidence of multiple coordinated registrations came to their attention,” says Manjunath Gokare, an immigration lawyer based in Atlanta, Georgia.

Experts and immigration lawyers feel that if the USCIS finds that an H-1B applicant has filed their petition through a company which is not a genuine employer and the filing is regarded as speculative employment, questions are likely to be raised through a request for evidence (RFE) whether specialty occupation work, that qualifies for H-1B, is indeed available with the petitioner. USCIS is likely to deny the petition if it believes that the H-1B employment is not bonafide.

“Those candidates who were selected after multiple companies submitted registrations on their behalf should consult with an attorney prior to proceeding with an H-1B filing based on those selections. It may be in their best interest to not file,” Emily Neumann, attorney at Houston-based business immigration law firm Reddy & Neumann, told the Times of India. She added that there have been several cases of notices of intent to revoke for petitions approved last year.

“Under these circumstances, USCIS typically alleges fraud, which can lead to a finding that the candidate was not counted toward the H-1B cap and a permanent bar to returning to the United States. With USCIS raising this issue early in the filing window this year, the agency is likely to scrutinize petitions before approving and issue notices of intent to deny rather than approving and later revoking,” she said. Her advice for applicants who fear that the company that registered for the H-1B for them is not a genuine employer is that they should not proceed with filing the petition.

The potential range of consequences of fraudulent activity by H-1B applicants, detected by the USCIS, could be very far reaching. “Even if USCIS does not detect such perceived misbehaviour at that moment in time, and thus an H-1B cap petition is filed and perhaps even approved for that foreign national worker, later if USCIS comes to the conclusion that certain unscrupulous conduct was done for it to now suspect that the beneficiary and/or petitioning employers gamed the lottery system, an earlier approved H-1B cap petition can be revoked, thereby leaving the beneficiary without any lawful status in the US and at risk of being forcibly removed from the country,” warns Kim.

Further, the agency is on record of saying that it will potentially refer both the foreign national worker being sponsored as well as all petitioning companies in the US that submitted registrations to appropriate federal law enforcement agencies for investigation and potentially criminal prosecution. “In terms of what a potential H-1B cap beneficiary worker should be on the lookout for is primarily to be on alert if the sponsoring H-1B employer has ownership ties to some other affiliated companies. For example, if you know the person who owns the company that submitted your H-1B cap registration for you, which was selected in the lottery, also has some ownership interest in other companies in the same industry, then a red flag should be raised,” Kim says.

With several employers of professionals on H-1B visas and potential employees planning not to file their visa petitions so that they do not come on the USCIS radar, there are indications that there will be many unused H-1B numbers. In fact, a second round of lottery is also likely this year. “The USCIS received a whopping 781,000 registrations against the H-1B cap of 85,000 this year. What happened was sheer madness and the USCIS is looking to make changes to the registration process next year. Hopefully, there will be greater order with the changes being implemented,” says Gokare.

While it is likely that in view of the warning from the USCIS, the number of registrations against the H-1B cap for financial year 2025 will be reduced; it is not yet clear how big the impact will be.

“There are many variables in play that will influence that outcome including how serious is USCIS in seeking to refer the alleged transgressors to law enforcement for prosecution. If the agency wants to draw a line in the sand and make it clear to both US employers and foreign workers around the world that such conduct will not be tolerated, then it might

seek to prosecute such parties to the full extent of the law to endorse this zero-tolerance policy,” says Kim. He also feels that an increase in the fee involved in filing an H-1B cap registration might make a difference.

“Currently, there is a rule change proposal in the pipeline that might raise the USCIS registration fee from \$10 to \$215 per registration. That’s more than 20 times the current amount, so a company would probably not agree to file multiple registrations for the same beneficiary if the fee is hiked,” he says. However, without a change in the rules of how the H-1B lottery system works and the plugging of loopholes, there may not be a significant drop in the number of registrations. “The system continues to be open to these activities and new companies will pop up to take advantage again next year,” feels Neumann.

Worst hit by the H-1B lottery system are Indian students in the US on F-1 student visas who are working after they finish their studies on the optional practical training period.

“I feel strongly that USCIS must prioritise allocation of H-1B numbers to F-1 students with US advanced degrees before extending the same to people not in US. The 20,000 additional H-1B visas for US advanced degree holders are grossly inadequate,” says Gokare. Overall, the IT industry and consultancy sector is being impacted the most by the unscrupulous practices.

“It’s unfair and unfortunate that unscrupulous employers willing to bend the rules in their favour take advantage of and prey on unsuspecting foreign workers, largely from India, by promising them a guarantee that their H-1B registrations are selected in the lottery. The lottery system was not intended to work in such fashion and there are no such guarantees,” says Kim. The fiasco around the H-1B lottery this year, and the USCIS warning, will be a wake-up call for everyone, including young professionals from India, it is hoped