

Impact of H-1B visa changes for Canadian workers, U.S. employers

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Any employer who has been through the H-1B visa filing process over the last several years is likely to agree that the petitioning process has become a bit of a nightmare. The process is plagued by long delays in adjudication — or even, in knowing whether their petition was selected for adjudication in the annual lottery for H-1B visas held by the U.S. government.

This lottery is a response to an oversubscription by employers wishing to capture one of the 65,000 regular “cap” visas or 20,000 additional “master’s cap” visas available for approval annually starting in April (for a work start date of Oct. 1 each year).

As the process has devolved into total chaos and frustration over the past several years, 2019 presented a ray of hope: long-awaited changes to the H-1B system, to make it more “efficient and effective.” These changes present certain advantages to employers filing for H-1B visas for their employees in 2019 and certain advantages that kick in next year.

In 2019, Canadian beneficiaries (and other foreign nationals) with a master’s degree or higher from a U.S. institution of higher education are estimated to have an approximately 16 per cent higher chance of being selected in the annual lottery due to a change in the order of petition selection. The change basically gives those with advanced degrees from U.S. institutions two bites at the apple — if they are not first selected from among the 65,000 “regular cap” visas available, they will be tossed back into the pool of remaining applicants with master’s degrees (or higher) and given a second chance at selection.

In 2020, there will be an electronic registration requirement. This will decrease the burden on all employers wishing to employ H-1B workers, by only requiring them to register their intent to apply for an H-1B worker/workers, during a designated registration period. Only those registrations which are selected in the lottery for adjudication will be permitted to petition for H-1B visas. This will save employers the cost of hiring lawyers or paying other workers to complete the necessary information for a full petition — which can be lengthy and onerous — before they know whether their petition will be selected in the lottery and reviewed for approval or denial.

But will any of this impact Canadian workers seeking to obtain H-1B visas? Possibly.

The number of H-1B petitions filed for Canadian beneficiaries each year has been on a steady decline since 2007,

according to U.S. Citizenship and Immigration Services trend tables. In 2007, 8,562 Canadians were beneficiaries of H-1B petitions filed on their behalf; by 2017, this number had dropped to 3,551. This is likely a reflection of the increasing difficulty in obtaining H-1B visas, including the H-1B visa lottery that has left many U.S. employers out of pocket for thousands of dollars worth of U.S. government-required filing fees while they await word on whether their petition will even be adjudicated, and their cheques cashed.

This doesn't even count the (typically) thousands of dollars spent paying lawyers to prepare the H-1B petitions to try to avoid a dreaded request for additional evidence (RFE) — an increasingly common response by the government to even the most slam-dunk H-1B petitions. RFEs create delays, increase stress and may include extra-regulatory interpretations of the law that make meeting the standard applied to cases nearly impossible to achieve.

While only time will tell, the new registration process may make U.S. employers more willing to take a chance on hiring a Canadian worker who doesn't qualify for any other type of U.S. visa. If they don't need to outlay copious amounts of money that they might not see for months — all while passing up other potential candidates as they await word on whether they are permitted to employ their preferred (Canadian) worker — they may be more willing to take a chance on a Canadian candidate.

Employers will certainly benefit. In addition to having better access to the cash that might otherwise have been tied up in the H-1B lottery process, employers will know sooner rather than later whether they may be able to employ the candidate they desire. If their chosen (Canadian) registration is not selected for H-1B processing, they will be able to better plan for any shortage in workers and find an alternative resource to fill their need.

Another potential winner? Graduate programs at U.S. institutions of higher education. With an increase in the chance that graduate students will be eligible for H-1B visas, interest in international student programs at U.S. institutions could see a resurgence. This would be welcome news, after international student applications and enrolments fell for the second straight year in a row — the only two years where this has happened since 2003, according to a February 2019 study by the Chronicle of Higher Education.

The slight advantage being given to international graduate students in the H-1B selection process could very well be a nod to this downward trend, and an invitation to Canadian and other international students to once again consider U.S. higher education a pathway to U.S. work visas, green cards and — ultimately — citizenship.

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