**Nicholas J Watkins**
Gray Robinson, Miami
nicolas.watkins@gray-robinson.com

# H-1B season will be short again this year: but will there even be an H-IB season next year?

This April, it is anticipated that pent-up demand for H-1B visas will mimic recent years and US Citizenship and Immigration Services ('USCIS') will announce that, for the fifth year in a row, the agency has received more than enough H-1B visa petitions within the first week of the filing period to fill the annual quota of H-1B visas available for USCIS financial year ('FY') 2018 (1 October 2017 to 30 September 2018). If so, then USCIS will once again initiate the visa lottery system to randomly select from those received for adjudication sufficient petitions to satisfy the annual quota.

Absent more visas, employers filing petitions for all other H-1B employees whose petitions are not selected through the lottery process will, unfortunately, have to wait until 1 April 2018, to roll the dice again for the FY 2019 H-1B season. The H-1B season will have lasted exactly one week and the unlucky employers and foreign workers alike will be scrambling to find alternatives.

Since the H-1B visa programme was revamped in 1990, it has been criticised by many for its apparent failure to protect American jobs. Now that President Trump is in the White House, the programme is already under additional scrutiny. It might be a short H-1B season this year, but what does the future hold for the H-1B visa programme next year? Will there even be an H-1B season next year?

This article describes briefly the H-1B programme and its requirements. It then explains why the H-1B season is so short and it describes some of the reasons why the programme has been criticised. The author then states why the H-1B visa should not be eliminated. If anything, the author argues, the H-1B programme merely needs to be reformed from within and enforced under existing laws.

## What are the H-1B Visa Requirements?

Employers use the H-1B visa to employ foreign nationals in 'specialty occupations', that is, in jobs in fields such as science, engineering and computer programming, that involve the theoretical and practical application of a body of highly specialised knowledge and require a baccalaureate or higher degree (or the equivalent) as a minimum to qualify for the position offered. H-1B positions come in a wide range of fields from engineering and mathematics, to both physical and social sciences, to education, business and the arts.

In order to sponsor a foreign worker for H-1B employment, a United States employer must first file a petition with USCIS showing that: (1) the prospective position being offered to the US worker is one that, at a minimum, requires at least a bachelor's or higher degree; (2) the prospective foreign worker has the required degree, or a combination of training, education and/or experience equivalent to the required degree; (3) the employer has obtained a certified labor condition application from the US Department of Labor, attesting that, among other things, the employment of the foreign worker will not adversely affect the working conditions of similarly employed American workers; and (4) there will be an employer-employee relationship.

Contrary to popular belief, there is no need for the H-1B employer to test the job market for available American workers.

Once an employer's H-1B visa petition has been approved, the prospective H-1B worker may change his/her status to H-1B if already in the US, or, if outside the US, may apply for an H-1B visa at a US embassy overseas. H-1B visas are granted for an initial period of up to three years, but may be extended for three more years, for a total of six years, subject to further extensions if the residency application process has been initiated for the H-1B worker before the end of the fifth year of authorised stay.

## The H-1B Cap and the H-1B Season

On 1 October each year, the start of the fiscal year for USCIS, Congress makes available an annual quota or cap of 65,000 H-1B visas (the 'bachelor's degree cap') and an additional 20,000 more H-1B visas for

those foreign students holding US master's or higher degrees (the 'advanced degree cap').

With the bachelor's degree cap of 65,000, and the advanced degree cap of 20,000, there is essentially a quota of 85,000 H-1B visas that are made available on 1 October each year on a first come, first served basis.

Employers may file petitions to sponsor prospective H-1B workers as early as 1 April for an employment commencement date of 1 October. With a finite supply of H-1B visas, employers must file their petitions as soon as possible each year; if they wait, they risk that the supply of H-1B visas will be exhausted. Over the last four years (FY 2014 – FY 2017), this has been the case: H-1B visas have been used up *within the first week* of the filing period.

This short H-1B season requires USCIS to institute a computer-generated process or 'visa lottery' system to randomly select for adjudication 65,000 petitions under the general H-1B category and 20,000 petitions under the advanced degree category.

If an employer's H-1B petition is one of those selected in the lottery it will be adjudicated and, if the petition is approved, the foreign worker can be employed as of 1 October. But, if unlucky in the lottery, US employers and foreign workers alike will be scrambling to find visa alternatives.

## Criticism of the H-1B Visa Programme

Since it was revamped in 1990, the H-1B visa programme has not been without its critics.

Now that President Trump is in the White House, the programme is in the spotlight again. Critics make their charges based primarily on the ground that US employers are using H-1B employees to replace American workers with lower cost foreign workers.

Most notably, in 2015 Walt Disney Co. replaced 250 IT workers with H-1B employees and even had the audacity to make the existing employees train their replacements.

Critics claim that large outsourcing companies are using the H-1B visa programme to undercut US jobs by sponsoring tens of thousands of H-1B workers, offering them lower pay, and placing them at large tech companies nationwide.

But how is this possible and what can be done about it?

## The source of the H-1B Problem – Attestations and insufficient enforcement

Federal regulations governing the H-1B programme require an H-1B employer to file a labor condition application ('LCA') pursuant to which the employer attests that, among other things, it will pay the H-1B worker the 'required' wage (that is, at least the lower of the prevailing wage or the wage being paid already to a similarly qualified employee in the same position).

The LCA also includes an attestation that the H-1B employment will not adversely affect the working conditions of workers similarly employed.

In other words, an H-1B employer must attest that the H-1B worker will be treated and paid the same as a similarly qualified US worker filling the same position, thus taking away the argument that the employment of the foreign worker undercuts that of a US worker. The employer also obligates itself to prepare and retain certain documentation for public and US Department of Labor ('USDOL') inspection, and subjects itself to severe monetary penalties and sanctions for failing to comply.

Do these attestations and documentation retention requirements protect US employers? Notwithstanding the intentions of the programme, the fact of the matter is that critics do believe that employers can and do use the H-1B programme to replace American workers with lower cost foreign workers. Employers are required to pay, at a minimum, the prevailing wage, but that wage varies depending on skill level, job requirements and the geographical location of the job.

Critics charge that an H-1B employer can merely attest that it will pay one (low) prevailing wage when the position is really one that commands more experience and another, higher prevailing wage.

Similarly, even though H-1B employers must attest that the hiring of H-1B employees will not 'adversely affect' existing workers in similar positions, there is an exemption from this attestation requirement for those employers paying H-1B workers $60,000 or more a year or employing H-1B workers holding master's or higher degrees.

The problem is that these days most high tech jobs are paid more than $60,000. Critics therefore argue that this exemption is a loophole within the law that allows large outsourcing companies to bring in H-1B workers at lower salaries (but above $60,000 per year) to replace higher paid US workers. After all, why pay a US worker $90,000 if you can pay an H-1B worker $70,000?

The strength of the H-1B visa programme is only as good as the strength of the attestations. And that's all they are – attestations. With an estimated one million

H-1B workers in the US at any time, without proper enforcement, it is certainly true that employers *could* attest to many things without fear of government reprisal.

## Can the H-1B Programme be repaired and, if so, how?

President Donald Trump is weighing in, too, with his plan to 'enforce all immigration laws' and to 'reform legal immigration to serve the best interests of America and its workers.'

It appears likely that some kind of reform is inevitable. Rather than eliminate the H-1B programme altogether, what can be done within the existing system to protect US jobs from lower paid H-1B workers?

Some might argue that the H-1B employer should test the job market for available US workers before being permitted to file an H-1B petition (which would effectively eliminate the H-1B programme by rolling it into the H-2B programme, where employers are required to advertise positions for available US workers before filing visa petitions for skilled or unskilled workers in short supply).

In the author's opinion, such drastic reform should not be necessary. If the true source of H-1B criticism lies in the ability of US employers to use the LCA attestations in such a way as to show a lower prevailing wage and thereby undercut the employment of US workers, then perhaps the remedy lies in the LCA process itself.

Rather than allow employers to merely attest to what they believe the prevailing wage level to be and present it to USDOL as the current system requires, perhaps USDOL itself should determine the prevailing wage in the same manner that it does for both employment-based residency petitions and H-2B visa petitions. Instead of including an exemption for employers of H-1B workers paid over $60,000, Congress could increase that figure or even eliminate it altogether and thereby open up the H-1B programme to many other employers who have been effectively shut out of the H-1B programme in recent years due to the monopoly held on the programme by the large, high tech outsourcing companies.

Congress should back up these changes up with enforcement using the mechanisms already within the LCA process in order to prevent US employers employing lower cost foreign labour: on-site investigations and money penalties, among other things. This will require more investigations, more manpower and more audits. It will also slow the H-1B visa process down. However, if the voices of critics are to be quieted in this Trump era of immigration reform, then this is one way to lessen the noise coming from critics of the H-1B visa programme and ensure that the programme survives for another H-1B season next year.

**Notes**

1 See, eg, Julia Preston, 'Large Companies Game H-1B Program, Costing the US Jobs', *NY Times*, 10 Nov 2015, available at www.nytimes.com/2015/11/11/us/large-companies-game-h-1b-visa-program-leaving-smaller-ones-in-the-cold.html ; Patrick Thibodeau, 'Laid-off IT workers muzzled as H-1B debate heats up', (*Computerworld*, 28 Jan 2016), available at www.computerworld.com/article/3027640/it-outsourcing/laid-off-it-workers-muzzled-as-h-1b-debate-heats-up.html; and Stephen Dinan, 'H-1B visas quickly snatched up as critics decry lost American jobs, wages', *The Washington Times*, 7 April 2016, available at www.washingtontimes.com/news/2016/apr/7/h-1b-visas-quickly-snatched-up-as-critics-decry-lo/.

2 Immigration and Nationality Act, 8 USC. §§1101(a)(15)(H)(i)(b) and 1184(i); 8 CFR §214.2(h)(1) (2016).

3. 8 CFR §214.2(h)(4)(ii) (2016).

4. 8 CFR §214.2(h)(4)(iii) (2016).

5. 8 CFR §§214.2(h)(9)(iii)(A)(1) (2016); 214.2(h)(13)(iii)(A); 214.2(h)(15)(ii)(B)(1) (2016); American Competitiveness in the 21st Century Act of 2000 §§104(c) and 106.

6. Immigration and Nationality Act, 8 USC §§1184(g)(1)(A) (as to the bachelor's degree cap) and 1184(g)(5)(C) (as to the advanced degree cap). The bachelor's degree cap of 65,000 visas includes 6,800 H-1B free trade visas available for citizens of Chile and Singapore pursuant to the United States-Chile Free Trade Agreement and the United States-Singapore Free Trade Agreement. Immigration and Nationality Act, 8 USC §1184(g)(8)(B).

7. See, eg, Wendy Feliz, 'H-1B Visa Cap Reached in Five Days for Fourth Consecutive Year', American Immigration Council, 8 April 2016, http://immigrationimpact.com/2016/04/08/h1b-visa-cap-fy-2017/.

8. CFR §214.2(h)(8)(ii)(B) (2016).

9. See n1 above.

10. Julia Preston, 'Lawsuits Claim Disney Colluded to Replace US Workers With Immigrants', *NY Times, 25 Jan 2016, available at www.nytimes.com/2016/01/26/us/lawsuit-claims-disney-colluded-to-replace-us-workers-with-immigrants.html?_r=0.*

11. See, eg, Ron Hira, 'Top 10 employers are all IT offshore outsourcing firms, costing US workers tens of thousands of jobs', Economic Policy Institute, *Working Economics Blog*, 22 Aug 2016, www.epi.org/blog/top-10-h-1b-employers-are-all-it-offshore-outsourcing-firms-costing-u-s-workers-tens-of-thousands-jobs/.

12. 8 CFR §214.2(h)(4)(iii)(B)(2) (2016); 20 CFR §§655.700, .710, .720, .730 (a)-(d) and .731 (2016). The US Department of Labor's regulations relating to the labor condition application process, requirements and enforcement are found at 20 CFR §655.700 *et seq.*

13. 20 CFR §655.732 (2016).

14. 20 CFR §§655.734(c), .760 and .810 (2016).

15. 20 CFR §§655.731 (2016).

16. See, eg, Patrick Thibodeau, 'H-1B Visa Fraud Used to Undercut Wages', (*CIO, 13 Feb 2009), www.cio.com/article/2430712/offshoring/h-1b-visa-fraud-used-to-undercut-wages.html.*

17. 20 CFR §§655.737 (2016).

18. 'Donald J Trump's 10 Point Plan to Put America First', *Trump Pence Make America Great Again, www.donaldjtrump.com/policies/immigration/ accessed 30 January 2017.*