



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

H-1B Class Action Could Bring Needed Transparency

By **Allissa Wickham**

Law360, New York (September 28, 2016, 10:24 PM EDT) -- A federal court's decision to move forward with a case challenging the H-1B lottery gives attorneys hope the nebulous selection process will be put under the judicial microscope, but the case could also result in the end of the lottery, which may bring troubling backlogs.

In a key development in one of this year's most closely watched business immigration cases, an Oregon federal judge last week **staunchly refused** to throw out a class action seeking to eliminate the lottery process for picking H-1B visa petitions.

Although the annual H-1B lottery is a regular source of anxiety for both skilled foreign workers and U.S. employers, not much is publicly known about its mechanics, aside from the fact the government says it's a "computer-generated" process in which U.S. Citizenship and Immigration Services randomly selects H-1B petitions after a five-day filing window. But this lawsuit could shed light on the lottery, according to attorneys, as the government is forced to file response briefs and potentially describe the system in greater detail.

"[The judge is] going to put the H-1B lottery sort of under a spotlight," said Kim Thompson, chair of the Global Immigration Practice Group at Fisher & Phillips LLP. "That's what I'd like to see, that he really digs into it, to understand how that system works and what they actually do."

And the plaintiffs might even win this case, according to some attorneys.

Susan Cohen, who heads the immigration practice at Mintz Levin Cohn Ferris Glovsky & Popeo PC, said the way U.S. District Judge Michael Simon's denial order was written suggests he would be inclined to require USCIS to process petitions in the order they're received, due to a requirement in the Immigration and Nationality Act.

"The statute's really clear," Cohen said.

Judge Simon noted as much in his order, although he held off on diving too far into the implications of that passage.

In light of hints like these, and the court's in-depth analysis of standing issues in the case, it's easy to see why some attorneys think this class action might have some traction with the court. Angelo Paparelli, a partner at Seyfarth Shaw LLP, said the judge could give USCIS a deadline to devise a new system, and issue it through notice and comment rule-making, similar to what happened with a recent work rule for foreign graduates.

"I suspect there will be discovery, and I hope it includes depositions," Paparelli said. "And I think USCIS might be forced, or might be well-advised on their own initiative, to put up a new rule on notice and comment."

However, not all attorneys are enamored of the lawsuit's solution to the H-1B lottery, as it seeks to have priority dates to assigned to H-1B petitions filed throughout the year. In fact, the government has argued that with the "excessive demand" for H-1B visas, a huge backlog would be created if the plaintiffs' proposal were put in place.

"What these people are advocating for, I think has the potential for creating real chaos," said David Grunblatt of Proskauer Rose LLP, although he was quick to add that the current system is also subpar.

No matter what the outcome, the suit — which was filed by Portland, Oregon, companies Tenrec Inc. and Walker Macy LLC and two beneficiaries of H-1B petitions — will certainly be closely watched, as H-1B visa numbers and petition selection is always a hot topic.

Demand is so high, USCIS received more than 236,000 H-1B petitions for skilled foreign workers this year. In any given year, the agency can accept only 65,000 applicants for its general category of H-1B visas and 20,000 additional applicants who hold master's degrees or higher from a U.S. institution.

And while the case presents plenty of big-picture questions about the H-1B lottery, it also touches on the interesting technical issue of standing. The judge showed himself to be in tune with one of the more cutting-edge positions in this arena as he rejected USCIS' claim that, as mere visa petition beneficiaries, the individual plaintiffs lacked standing to bring their claims.

The ruling follows something of a trend of courts finding that certain foreigners have standing, mostly notably with the Sixth Circuit ruling a few years ago in *Patel v. USCIS* that an immigrant had standing to challenge the denial of a potential employer's job-based visa petition.

"In terms of the court recognizing that truly there is standing and a personal stake, yes, from the petitioners' lens there's no question that they have standing," noted Dyann DeVecchio Hilbern of Seyfarth Shaw. "From the lens of the beneficiaries who are in this case, they totally have skin in the game. I mean, this is the future of their life."

As for what's next in the case, the parties' motions for partial summary judgment are due by Oct. 21, and oral argument has been set for Dec. 19 in Portland. Meanwhile, the American Immigration Lawyers Association has also **launched a suit** seeking to obtain information on the H-1B visa lottery system, meaning chances for more lottery transparency may emerge on several fronts.

--Additional reporting by Natalie Olivo, Kelly Knaub and Suevon Lee. Editing by Brian Baresch and Jill Coffey.