



Episode 51: “It’s H-1B Cap Season,” With Jennifer Behm

Speakers: Ari Kwiatkowski, Barclay Damon,
and Jennifer Behm, Berardi Immigration Law

[Ari Kwiatkowski]: Hi, everyone, this is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Ari]: Everyone, welcome to episode 51. It’s H-1B cap season, and I am so happy today to welcome Jennifer Behm on the podcast. Jennifer Behm is a partner at Berardi Immigration Law. Jennifer, welcome.

[Jennifer]: Thank you, Ari. It’s good to be back.

[Ari]: Thanks so much for joining us. You know, today we’re here to talk about some interesting and very timely immigration points that employers need to know. But before we do, I’m going to do my usual shtick where I ask a guest to share a fun or interesting fact about their personal or professional lives. And Jennifer, I know you were on the podcast last year and you’re no novice, so I’m going to turn it over to you.

[Jennifer]: Yeah. Well, a little bit about me. I’m a busy working mom and am very proud to hold that title. I have a seven-year-old and a four-year-old. So...

[Ari]: Major props!

[Jennifer]: Yeah. Thank you. Thank you. Everyone’s like, Oh, what kind of hobbies are you into? And I’m like, child-rearing. Plus being a professional working woman, as I’m sure a lot of your listeners know. But they’re my pride and joy, and I’m very lucky to have a supportive husband. So yeah, my family is my number one. That’s my fun fact.

[Ari]: I love it. I love it, Jennifer. And, you know, I think, you know, I’ve talked about this before. I don’t have kids, but I have many friends and family members who do. And, you know, I...kudos to all of you and any parents who work in any capacity. And stay-at-home moms. I know it’s a full-time job just to have kids. So throwing on a whole career on top of that. Major props to you.

[Jennifer]: Thank you. Thank you. It’s fun. It really is ... Not always easy, but it’s good.

[Ari]: Yes. Yes. All right. Well, thanks, Jennifer. I think that may be one of my most favorite fun facts that a guest has shared. So I’ll leave it at that. And let’s get into H-1B cap season. Give the people what they want.

[Jennifer]: Yes.

[Ari]: So, Jennifer, you know, to our listeners, Jennifer and I talked offline yesterday and we really chatted about these topics.

[Jennifer]: Mm-hmm.

[Ari]: And basically, I said to Jennifer, you're going to be educating me, when we're on the podcast tomorrow. So, Jennifer, can you tell us—myself and the listeners included—what exactly is the H-1B visa program and why should employers care?

[Jennifer]: Okay, so our US immigration system is incredibly restrictive, and especially when it comes to the employment-based sponsorship system, we only have a small handful of visa categories that allow a foreign national to come in and work in the United States or stay in the United States. And one of the most popular or sought-after categories is the H-1B visa. So the H-1B program allows a US employer to sponsor a foreign national for temporary employment in the US in what we call a “specialty occupation.” And that's essentially a position that requires a bachelor's degree or higher. So what's the catch? That sounds great. You have a bachelors, you have a professional job offer. The problem with the H-1B category is that Congress limits the number of initial H-1Bs that they will issue each year, and they limit those numbers to 65,000 plus an additional 20,000 reserved for foreign nationals who have a US master's degree or higher. So they have a little bit of a slighter edge on that. But because the demand for initial H-1B visas greatly exceeds 85,000 each year, what we're stuck with is essentially a random lottery selection process. So that is what makes it really difficult for employers.

[Ari]: That is so surprising to me, Jennifer, just not, you know, having a... an immigration background and not really knowing a ton. And, you know, we have immigration questions internally, we usually are calling you. But that that is so surprising to me to learn. And can you tell our listeners a little bit about how many applicants there are or really why there's such a disparity as it relates to how many people actually are seeking this type of program and how many people actually get it.

[Jennifer]: Yeah, no, it's a great question. So there's a visa category called the F-1, and that's for foreign national students. There is no cap on the number of F-1 visas that will be issued each year. So you have... I don't even have the numbers, but hundreds of thousands of foreign national students studying across the United States. And then when they graduate, a lot of them want to stay and work for a US employer. You get a little bit of a work permit after they graduate, so they get a taste of what it's like staying and living and working in America.

[Ari]: Yep.

[Jennifer]: And then we're stuck with this H-1B lottery system, right? So when you have hundreds of thousands of students versus 85,000 initial H-1Bs, it's... there's terrible chances for lottery selection. I mean to put context to those numbers, we had over 400, almost 485,000 applicants in the lottery last year, and it's projected to be even more.

[Ari]: Wow.

[Jennifer]: Last year was the highest amount since Congress created the H-1B category in 1990. So the selection rate is under 20%, which really stinks. And it's a tough sell for US employers because they don't know if their candidates will be able to stay. They... it's you know, it's expensive. It's just a tough category, not ideal from that standpoint.

[Ari]: Yeah, I'm just as surprised today as I was yesterday to hear the numbers and how it plays out. So, Jennifer, can you tell our listeners exactly how it works and the process for going through, you know, the H-1B visa program?

[Jennifer]: So the H-1B program is aligned with the government's fiscal year, which starts October 1, of every year. In preparation for that, what happens is the USCIS, US Citizenship and Immigration Services, they have an electronic registration process that is opened up each March and it usually remains open for about two weeks. During that time, employers register their employees who they want to be considered for the H-1B lottery drawing. And we just are providing some simple information. The employee's name, the company's

federal employer identification number, their FEIN, obviously their legal entity name, some basic information about the employer contact, address, telephone number, all of that good stuff. So the registration process itself is fairly simple. That's open for about two weeks. But once it's closed, it's closed. That's it. So that's what's super important for employers to prepare for now. Get their roster of individuals, whether they're employees or potential hires, who they want to consider. They got to have that information ready during that registration period. So once it closes, selections in the random lottery process will occur in April.

[Ari]: Okay.

[Jennifer]: And if you're selected, we then turn around and file a full petition showing why a candidate is eligible for the H-1B visa. We usually have April, May, and June to file those petitions.

[Ari]: Okay.

[Jennifer]: Here's the catch, Ari, which is really wild. If a petition is approved, that H-1B visa work permit is not valid for use until at least October 1 of 2023 this year.

[Ari]: Okay.

[Jennifer]: So that's what makes it tricky for employers. They're planning now, right, knowing that the individual won't hold H-1B status before October 1 of this year. Right now, a lot of applicants might hold interim F-1 student work authorization or graduate authorization. We call that OPT or STEM OPT. That's pretty common. Right. You're trying to... if you have an employer who's trying to recruit someone from the UK or, you know, China and that individual's over there without any sort of underlying work authorization, you're not getting them until October 1. And that's if they're selected and approved...

[Ari]: Right. Yeah. Yes, that's a really good point. So basically, if I'm hearing correctly, Jennifer, the messages, this is a process that maybe once you're in it, it's not super arduous, but the timing's really important.

[Jennifer]: Exactly. Timing is super important. Yeah, you nailed it. It's not overly arduous. You're either more or less qualified or not. If you have an individual who holds a strong bachelor's degree and they have a professional job offer that's related to their background, their educational background doesn't always need to be a perfect match. We can get creative and explain why a certain degree might be related to an employer's industry or whatever the job offer is. But if you have that nailed down and you're a strong employer, if you're selected, you're pretty much good to go.

[Ari]: Got it. So on that note, I'm glad you ended that with the selection piece of it, Jennifer, because I think a lot of us are wondering as we're listening, what are the chances of selection in the lottery and is it really random? How does that whole process work?

[Jennifer]: It is truly a random selection process. We've filed H-1Bs for some pretty well-known names, may or may not have been within the royal family in the past. Some high-end Hollywood names, they don't get any preferential treatment. I think that these numbers go in, or these electronic registrations go in, are assigned a random number, and it truly is random. Now, interestingly, during the Trump administration, there was a lot of talk about revamping the H-1B program and there were some policies that were rolled out trying to acknowledge or more so give preferential treatment to foreign nationals who are making more money or had higher degrees. But at the end of the day, that didn't stick. Congress obviously needs to be the ones who change the H-1B law, and those sorts of policy implementation went outside of the regulations. So it is truly random. And yeah, it's I think the selection rate this year will be maybe 15%. Last year it was 17 and a half, so I can't imagine it'll be any better.

[Ari]: Right. And as you mentioned a few minutes ago, it sounds like the number of people applying or participating is going to go up even more probably this year.

[Jennifer]: Yeah. No, for sure. I you know, it's interesting because we're also seeing a lot of layoffs in the tech industry. So there is a lot of people wondering, well, how are those layoffs going to impact the H-1B lottery process? But at the same time, you have a lot of foreign nationals who are finding job opportunities with employers. One thing I want to mention is that if you have a foreign national who already holds H-1B status, they are not subject to this lottery system. Okay. There are a couple of exemptions from we call it the cap. That includes somebody who was selected in a previous cap year. So maybe they're filing an extension of status or a change of employer application. Those are not applications that are subject to this lottery system. It's for initial, first-time H-1B applicants.

[Ari]: Got it. No, I'm glad you pointed that out. That's important, I think.

[Jennifer]: And another thing kind of along the same line, there are some employers who are also exempt from the cap and that includes universities and institutions of higher education, nonprofit institutions that are related or affiliated in some capacity to an institution of higher education, and then also nonprofit or government research organizations. So those four types of entities or employers, they're not... they can file H-1Bs for potential employees any time throughout the year.

[Ari]: Good to know. Yeah, I'm glad you pointed that out. So, Jennifer, how long can someone hold H-1B, assuming you're one of the lucky ones?

[Jennifer]: Yeah. So interestingly, the H-1B visa period for an individual is typically capped at six years and the approval periods are issued in three-year increments. So there are again, like there's always exceptions to the rules, of course. Without getting into too complex of an explanation, a lot of times when individuals are starting on the H-1B, they ultimately want to apply for a green card, which is the permanent ability to work in the United States. The H-1B is employer-specific. They are tied to that employer and it will always have an expiration date. What happens in that green card process? The... again, Congress limits the number of green cards they'll issue each year, and that's essentially created a demand and a backlog. So individuals that were born in China and India in particular are subject to like an eight-to-10 year backlog or waiting for their green card. So the government's acknowledged this crappy system and they've essentially said, okay, if you've achieved certain parts of the green card process and you're hitting the end of your six year H-1B cap, we will allow you to extend beyond that six year cap. So kind of more of a complex aspect of our US immigration system. It's all convoluted and complex, but yet the takeaway six years, with some exceptions.

[Ari]: Yes. Some caveats. Well, we wouldn't be lawyers if we didn't if we didn't have some sort of "it depends" response rate with this exception or that. Sorry, to our listeners, but you've heard that before. Jennifer, can you tell us a little bit about the cost of pursuing H-1B and kind of run that down for us?

[Jennifer]: Yes, definitely. So you have your legal fees. As far as government fees go, the electronic registration right now is \$10. But recently there was an announcement that USCIS is considering bumping that to \$215...

[Ari]: From \$10. That's quite a bump.

[Jennifer]: Mm hmm. It's quite a bump. Let me come back to that, because I have an interesting point to make. If the application is selected and the employer chooses to go forward with a filing, there's a couple of filing fees involved. So the first is a \$460 petition filing fee, then a \$500 anti-fraud fee. And then depending on whether an employer has under 25, or over 25, or 25 and over employees, there's either a \$750- or \$1,500 fee, respectively, that gets filed with a petition and then the government slow. Right? So they take months to adjudicate these applications. But if you want to pay a \$2,500 premium processing fee, that may be an option when you file. USCIS is a bit inconsistent on whether they accept premium processing requests for cap cases. So we'll see if they allow it this year. And then you have legal fees to prepare the petition. So, you know, when you look at, okay, maybe they're not going to be selected. Oh, or and if they are selected, it's not good until October 1. And then you have all of these fees. It's a tough sell for an employer, right. But the demand is there,

obviously. And I think that speaks to the fact that us employers do need this type of foreign talent. Right. They couldn't find enough qualified US workers. Most employers don't want to spend this money on this kind of thing, if they can find a qualified American. But are universities and educational institutions I mean, we need more STEM workers in the States. Right.

[Ari]: So definitely, definitely.

[Jennifer]: Going back to the \$10 to \$215 fee... three years ago, the electronic registration process didn't exist so effectively, what we would do is prepare for petitions and employer would be paying legal fees in full without knowing that their employees are going to be selected. And we prepare these packages. There would be FedEx trucks lined up for miles outside of the USCIS processing centers, and then everything's in there, and the process was a lot good or it was less efficient than what it is now.

[Ari]: So non-electronic systems like stress me out now, in the COVID world. Yeah, so but we're all I mean.

[Jennifer]: I know right? And it crashed. It's a... it can be a glitchy system for sure, but it's... as an immigration attorney, I like it a lot more, I'm sure. So.

[Ari]: So why the jump in costs? Sorry if you explained that. I missed it. Right?

[Jennifer]: Yeah. USCIS is...so US Citizenship and Immigration Services, that's an agency under Department of Homeland Security that adjudicates benefits for immigrants, employment based, family-based asylum filings. They kind of do it all, and it is not a taxpayer-funded agency.

[Ari]: Interesting.

[Jennifer]: And it's fully funded by filing fees and attached to petitions and a lot of immigration benefits they adjudicate don't necessarily include filing fees, asylum applications don't always require filing fees. So they're really relying on the family- and employment-based system to fund the agency. They're understaffed right now. They're underfunded. There's a lot of problems with the agency that goes beyond the scope of this podcast. And I, you know, I think in the grand scheme of things, it is a huge jump. But I don't think that will deter employers from throwing names in the hat.

[Ari]: I agree. Yeah. So it maybe it's a smart thing to do then maybe.

[Jennifer]: Yeah, it's probably.

[Ari]: Right, to fix some issues essentially.

[Jennifer]: I also want to point out an employer cannot put any H-1B cost on its employee. That has to be solely incurred by an employer. Otherwise it's a Department of Labor violation. So that's something to be considerate of if you're an employer and you're listening and you want to consider the H-1B category, make sure you're budgeting appropriately.

[Ari]: Yes, that's a really important point, Jennifer, and that includes the filing fees and any legal associated legal fees and things like that.

[Jennifer]: Exactly. Exactly. Ari.

[Ari]: Great. Well, thank you so much. I think this has been a great rundown or summary of this program really is and why employers should care. You know, I think as we mentioned as the date of this recording, we don't have the specific dates. Right. That this process will be open.

[Jennifer]: You got it. We're waiting for USCIS to announce exactly when that registration period is happening and then the lottery selection period. But we're betting on sometime mid-March and then selections in April and filings thereafter. So the season comes upon us quickly. It's kind of an immigration attorneys tax season, if you will, and we're here to support. So if you have any candidates you'd like us to review, please reach out.

[Ari]: Amazing. Thanks, Jennifer. And to our listeners, we'll obviously keep you updated on those dates that you need to know. But again, thank you so much, Jennifer. Before we sign off, any final words of wisdom or things employers should keep in mind if they're going through this process?

[Jennifer]: No—just those who are best prepared and aren't scrambling last minute to collect your information. It leads to a much smoother H-1B season. So prepare now and get your information together.

[Ari]: Life generally! Well, thank you so much, Jennifer. To our listeners, for our next episode, where we will give you an update on employee handbooks for 2023 and tell you what you need to know. Thanks so much.

[Jennifer]: Thanks for having me. It's been fun.

[Ari]: Our pleasure. Thank you.

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