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Decoder: Could multiple H-1B lottery petitions be filed for the same employee?

Synopsis
Often, multiple employers are competing to hire the same employee. It is obviously in the best interest of an employee to have multiple filings because that increases their chances of being selected in the electronic selection system (lottery). And equally obviously, this could amount to an abuse of the system if there were no checks on multiple filings.

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The question most frequently asked during the **H-1B lottery** season (9th March – 25th March this year) is whether it is legal for multiple employers to file for an **H-1B** electronic registration for the same **employee**? The answer is yes, but with caveats.

Often, multiple employers are competing to hire the same employee. It is obviously in the best interest of an employee to have multiple filings because that increases their chances of being selected in the electronic selection system (lottery). And equally obviously, this could amount to an abuse of the system if there were no checks on multiple filings.

In the year 2018, the USCIS detailed their position on this issue. Multiple filings are permitted as long as they are NOT:

- in the same fiscal year;
- for the same employee;
- for substantially the same position; and
- by employers that are related to each other.

Multiple filings are permitted if they are from different fiscal years. For instance, there are instances where petitions from the past fiscal year are still pending in the current year. In such cases, it does not appear that there is any prohibition against filing again for the same employee. An employer would be well within their rights to try for an H-1B lottery selection again.

The issue of what is the “same position” came up in a case where two different employers had filed for an H-1B lottery for the same employee, for the same project, at the same end client, through the same middle vendor. This, said the USCIS, was obviously the same position, and thus impermissible. But what if two or more positions have a similar description? Obviously, a professional is expected to work in their own profession. The job descriptions can be quite similar even when they work for unrelated employers at unrelated jobs. That would not be prohibited. Such jobs are merely similar in description, not in substance.

The last part of the test, whether the employers are related to each other, is counterintuitive if one does not understand the underlying policy of stopping people from "gaming the system." The USCIS approved this ruling on policy:

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“We decline to adopt a construction that employers could so easily circumvent through corporate law stratagems. Instead, we construe “related entities” to include petitioners, whether or not related through corporate ownership and

control, who submit multiple petitions for the same beneficiary for substantially the same job. Whether two jobs are "substantially the same" is an issue of fact that we determine based on the totality of the record. Some factors relevant to relatedness may include familial ties, proximity of locations, leadership structure, employment history, similar work assignments, and substantially similar supporting documentation."

Thus the definition of "relationship" between employers is far broader than that under corporate or business laws. Under these laws, every corporation is considered to be a separate legal entity whose actions should have no bearing on the actions of another separate legal entity. Not so under immigration law, as the factors noted above in the ruling indicate.

There is one exempt situation where related entities could file petitions for the same individual. The employers must demonstrate "a legitimate business need to file more than one H-1B petition on behalf of the same" individual. That exemption has not been elaborated much, but there could at least theoretically be such a legitimate need.

The caveats and complications attached to multiple filings make it clear that the USCIS can call upon each participating employer to justify their filing. As long as that is understood, multiple H-1B lottery filings for the same prospective employee are permitted.

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