



FOUR WAYS TO BEAT THE H-1B LOTTERY BLUES

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Every year around this time businesses and their foreign employees are subjected to the H-1B lottery. There are 65,000 new H-1B visas available each year for professional employees with at least a bachelor's degree, plus an additional 20,000 for those with a master's degree or higher. In 2019,

the Immigration Service received 201,011 applications within the first week of the opening of the H-1B lottery, randomly selecting 85,000 winners from this pool of applicants. Applications for the 2020 lottery are expected to increase due to the backlog of green cards for extremely highly skilled

employees (like multinational executives, accomplished scientists, and others) from China and India, whose employers are now stuck with the random selection of the H-1B lottery in order to keep their talented workers in the U.S.

Employees who are randomly selected

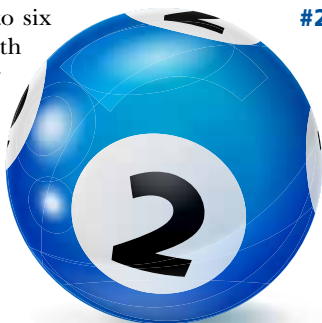
in the H-1B lottery can get up to six years of work authorization with their employers and normally have a direct path to a future green card. Those not selected in the lottery may not have alternative means to get work authorization, which is a serious concern for both the employees trying to advance their careers in the U.S. and their employers trying to retain these talented professionals and fill critical workforce gaps.

Historically, since 1990, the Immigration Service accepted applications for the H-1B lottery starting on April 1 each year. Often it would take until as late as August to find out if an employee was selected or rejected in the lottery. This year, for the first time, the Immigration Service will open the lottery one month earlier, on March 1, 2020, indicating that it intends to conduct the lottery and notify applicants by March 31, 2020. While this new accelerated timeline will give employers of lottery winners more advanced notice in planning their future workforce needs, it also means that the applicants who did not win one of the coveted 85,000 visas available need to start thinking about alternatives and taking action earlier. So, whether you're an employer, a foreign professional looking to work for a U.S. business, or a recruiter trying to connect the two, before getting the H-1B lottery blues, consider the four options below.

#1: SKIP DIRECTLY TO GREEN CARD



An employer can choose to bypass the H-1B cap entirely by sponsoring an employee for permanent employment authorization (a "green card"). This process takes longer and requires greater commitment from the employer but avoids the uncertainty of the lottery system. Unfortunately, this alternative will not work for employees born in India or China, because they face such long wait times to receive their green cards due to the backlog.



#2: USE AN EXEMPTION

Some employers do not need to use the H-1B lottery process and may instead apply for H-1B status for employees at any time. These "cap-exempt" employers are primarily universities and their affiliated non-profit organizations, as well as non-profit research organiza-

tions.

Employers who are subject to the cap can take advantage of this by hiring these employees part-time. For example, an IT company could hire a computer scientist currently working at a university in H-1B status for a part-time position at their company without having to go through the cap.

Similarly, a cap-subject employer can place an employee at a cap-exempt entity full time without going through the cap. For example, a physician staffing company could place its physicians at a non-profit university hospital full time, without having to go through the cap.

#3: SPECIAL IMMIGRATION LAWS

There are several one-off provisions that provide for employment authorization for certain employees without having to go through the H-1B cap. For example, employers hiring extraordinarily skilled and accomplished employees with lengthy CVs can use the O-1 visa to get employment authorization for these employees.

Other provisions apply to certain occupations, such as doctors. The Conrad waiver program makes 30 cap-exempt H-1B visas available each year for hospitals and clinics to hire immigrant physicians to work in specified physician shortage areas in each state.

Special provisions based on international treaties (like NAFTA) also exist for employers to hire citizens of Canada, Mexico, Australia, Chile, and Singapore to work in professional positions.



#4: BETTER LUCK NEXT YEAR

In some cases, little can be done except to try again in the 2021 lottery. Employees cannot keep working if they don't have ongoing employment authorization, so many foreign workers will need to find a way to extend their employment authorization if it's expiring before next year's lottery. For example, the two-year STEM OPT extension for employees who recently graduated from a science, technology, engineering, or mathematics university program can give an employee two additional opportunities at the lottery. Extensions for Dreamers (undocumented immigrants who were brought to the United States as children) are still available as of the writing of this article, but may not be around much longer, as the policy granting them employment authorization (known as "DACA") is on the Supreme Court's docket this summer. Likewise, the spouses of employees already in H-1B status are currently able to get extensions of their employment authorization, but this too is on the Immigration Service's regulatory chopping block and currently being litigated.

An employee can also improve the odds by working toward a master's degree and finishing it before the next lottery. As of 2019, the Immigration Service prioritizes H-1B petitions filed for employees with at least a master's degree. But if the prospect of returning to the classroom does not appeal to you, and none of the other options above work, you might get the H-1B lottery blues. In that case your best bet may be to turn on some B.B. King (or, if you prefer something equally good, but never better), sit back, and wait for April 1st.



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