



Rolling the Dice: How to Navigate the H-1B Lottery and Other Visa Options

MILLER MAYER

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Introduction

Miller Mayer's immigration lawyers have over 25 years of experience working with business clients to further their growth and talent development. Clients in start-up companies, hospitals, universities, financial and tech industries across



America appreciate our wise and successful strategies for management, employees and family members.

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2017: Uncertain Immigration Policy

- Proposals to change H-1B program in Congress
- Draft executive order on reform of H-1B system to better protect American jobs
- General anxiety high
- Travel and enforcement impacts on all

- What can you do?

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Basics of H-1B Temporary Work Visa

- Most common type of temporary work visa
 - 6 year maximum
 - 1 year stay outside U.S. refreshes 6 years
 - Additional H extensions if green card started by end of 5th year
- Time to work toward green card
- No advertising or test of the U.S. labor market

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Basic Problems of H-1B

- Each employer must file separate petition
- Not flexible like F-1 OPT
- Paperwork, cost and delay. Fees approx. \$5,000 per filing
 - \$960 – cap-exempt
 - \$1,710 to \$1,960 – cap-subject
 - \$1,225 – expedite
 - \$3,000 approx. – legal fee
- **Primary Disadvantage is inadequate supply – H-1B lottery for cap-subject (non-university affiliated) employers**

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What Do We Mean by the H-1B “Cap”?

- H-1B petitions filed by non-university employers are “cap-subject,” meaning they draw from a limited supply -- Less than 85,000 annually
- H-1B petitions filed by university employers are “cap-exempt” – meaning there is an unlimited supply

65,000 per fiscal year

Reduced by 6,800 allocation for Chile and Singapore

Separate 20,000 for **U.S.** master’s degree or higher

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What Do We Mean by the April H-1B Lottery?

- Cap-subject (non-university) H1Bs are allocated on 'first come-first serve' basis
- Employers file as early as possible: April 1
- Annual cap-H1B supply exhausted in one week

- **USCIS in recent years receives applications for 1 week, then randomly selects enough to fill quota = lottery**

FY 07	May 26, 2006	8 weeks
FY 08	April 3, 2007	1 day
FY 09	April 7, 2008	1 week, lottery
FY 10	December 21, 2009	9 months
FY 11	January 26, 2011	10 months
FY 12	November 22, 2011	7.6 months
FY 13	June 11, 2012	2.4 months
FY 14	April 5, 2013	1 week, lottery
FY 15	April 7, 2014	1 week, lottery
FY 16	April 7, 2015	1 week, lottery
FY 17	April 8, 2016	1 week, lottery

- USCIS issues receipt to lottery 'winners'
- USCIS will still RFE and deny some 'winning' applications

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What Happened in April 2016 Lottery?

- 236,000 filed
- H-1B extensions not included in lottery
- Recent lottery success rate approx. 35% for bachelor's degree holders, approx. 57% for U.S. master's degree holders
- Some were denied, withdrawn, not used
- Higher percentage of RFEs
 - Specialty occupation
 - 'project nature' of employment
 - computer programmer and other IT jobs, scrutinized
 - Some H-1Bs approved for only for one year

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Are There Any Changes in Place for the April 2017 H-1B Lottery?

- None yet announced
- Same process: lottery during first week of April 3-7
- File in the right location, with right forms and fees
- Fees increased modestly in December 2016
- New version form required this year

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Does the H-1B Job need to Pay \$100,000–130,000?

- Who would be affected?
- Not current law
- If law, would only affect 'dependent employers' who employ >15% of employees on H-1Bs AND are filing new H-1B petitions for positions requiring only a bachelor's degree
 - Large IT consulting firms
 - Last year, 34% of all cap-subject H-1B's claimed by 10 large IT consulting (outsourcing) companies
- This proposal could benefit smaller, and direct employers

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Will Lower Salaried Jobs be Eliminated From the H-1B Program?

- Changing wage requirements would require Department of Labor regulatory change: a slow process
- Changes to prioritize higher salary jobs are discussed but not proposed
- Speculative
- One bill would eliminate the Level 1 wage (entry level) option for all positions, not all lower paid positions

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Is F-1 STEM OPT Going Away?

- Not soon and not easily
- STEM is a regulatory program
- To undo it would require new proposed regulation, public comment period, issuance of final regulation
- STEM OPT allows up to 3 years of work permission after graduation if employing company is E-Verified and submits and updates training program outline to student's university
- Draft EO would direct study of OPT programs to ensure compliance with immigration law
- Draft EO is not necessarily bad, and not legislative

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How Quickly Can H-1B Changes be Made?

- Legislative Timeframe
- Regulatory Change Timeframe
- Executive Orders are directives, some in draft form

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Will Competition for H-1Bs be Greater This Year?

- If DACA ends, will not affect H-1B demand
- NAFTA uncertainty could create more applicants for H-1B
- New skilled worker rule makes cap-exempt H-1Bs clearer, could reduce demand
- Will IT companies shy away from H-1B program or try harder before changes?
- Demand has held steady at about 230,000 applications

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How to Maximize H-1B Chances in 2017

- Apply through more than one employer
- Apply based on master's degree if degree issued or completed before April 1
- Ensure close match between course of study and job duties
- Apply concurrently for OPT or STEM OPT and H-1B
- Apply 'consular notification' not change of status, to preserve OPT, if OPT lasts beyond October 1
- Apply 'change of status' if OPT expires before October 1 to preserve work eligibility under "cap gap" policy, but avoid travel
- Choose SOC code and wage level carefully
- Be careful of Level 1 wages
- Check USCIS website for changes to form, fee, filing location

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Do I Need to File Premium Processing?

- Not initially
- If using cap gap then upgrade to PP to gain approval by October 1
- If using cap gap and need to travel (some risk), use PP
- If desire certainty and ease of communication (by email) with USCIS, file PP
- Otherwise, not needed

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How Do I Find Out if I Was NOT Chosen in Lottery?

- Find out because no receipt received by employer
- Package returned to employer with filing fees in June-July
- Continue in existing visa status unchanged

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What if I Lose H-1B Lottery? Options Summary

- Know F-1 rules, use maximum OPT
- Return to school and seek on-campus employment or CPT
- Consider spousal options: F-2, J-2, H-4, O-3
- Consider other visas: E, J, O, TN
- Consider new cap-exempt H-1B at a university, then concurrent H
- Consider fast track green card in extraordinary or national interest waiver categories
- Consider overseas employment if multinational company, then future L-1

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Other H-1B Options

- Change employers to cap-exempt employer
- Other Cap-exempt H-'s:
 - "At" University worksite but H-1B sponsored by private company = joint venture between private employer and university
 - University employment first, then add "concurrent " private employer H
 - "Affiliated" with university not for profit sponsor
- If spouse is H-1 with approved I-140, use H-4 EAD work permit

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Stay in F-1

- Return to campus
- Enroll in new degree program, with on-campus or curricular practical training option
- If non-degree program, then no OPT
- If degree program at a higher level degree, again receive OPT
- Choose a STEM field of study
- If a for-profit school, then degree not recognized for H-1B U.S. master's treatment

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Bypass H-1B: STEM OPT to Permanent Resident

If employer willing to sponsor for Permanent Residence early;

If student from a country with no significant backlog for PR and in a STEM field,

May not need H-1B at all.

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Other Temporary Work Visas

More flexible – no lottery

Special conditions – special workers

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Nonimmigrant Visa Terminology – by Letter

- **A** Diplomats
- **B** Visitors (business/pleasure)
- **C** Transit
- **D** Crewman
- **E** Treaty trader/investors
- **F** Academic students
- **G** International Organization
- **H** Temporary workers
- **I** Journalists/Media
- **J** Exchange visitors
- **K** Fiancés/fiancées of US citizens
- **L** Intra-company transferees
- **M** Vocational students
- **N** Parents or children of special immigrants
- **O** Persons of extraordinary ability
- **P** Athletes or entertainers
- **Q** International cultural exchange visitors
- **R** Religious workers
- **S** Federal witnesses (sneaky snitches)
- **T** Trafficking of persons victims
- **TN** NAFTA professionals (Mexico and Canada)
- **U** Certain crime victims
- **V** Certain spouses/children waiting for green cards

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J-1 Work Options – Interns and Trainees through a Program

- J-1 Program sponsors are international exchange companies who contract with employer
- J-1 Program sponsor sends intern or trainee to host employer for up to 18 months
- An “intern” is a foreign national who either: (1) is currently enrolled in and pursuing studies at a foreign degree- or certificate-granting post-secondary academic institution outside the United States; or (2) has graduated from such an institution no more than 12 months before his or her exchange visitor program start date.
- A “trainee” is a foreign national who either: (1) has a degree from a foreign post-secondary academic institution and at least one year of prior related work experience in his or her occupational field outside the United States; or (2) has five years of work experience outside the United States in the occupational field in which he or she is seeking training.

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O-1 for Extraordinary and Prominent Individuals

- **O-1A for business, science, education, sports: “extraordinary ability”**
- **O-1B for arts, media, television: “prominence”**

Show several of:

- Prizes
- Media coverage
- Memberships
- Publications
- Citations
- Scholarly contributions
- Leading role
- High salary

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Other Professional Nonimmigrant Visas

L-1: Multinational Transferee

- For employers with related foreign companies
- 12 months foreign employment
- Executive, manager, specialized knowledge
- Spouse work permits

Treaty visas: E-3 Australia and H-1B1 Singapore, Chile

- Less demand
- Professional positions
- Spouse work permits for E-3

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TNs

- Mexican/ Canadian citizens
- Up to 3 years in job offer in listed occupation
- Same day application process possible for Canadians
- Unlimited extensions
- Bachelor's degree/license in that field

Common TN Occupations:

- Accountant
- Architect
- College/university professor
- Computer systems analyst
- Engineer
- Management consultant
- Occupational therapist
- Registered nurse
- Scientific technician
- Graphic designer

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Buy or Start a Business if E-2 Treaty Country

- <https://travel.state.gov/content/visas/en/fees/treaty.html>
- Manage, lead, direct a new business
- Qualified visa principal
- Spousal work permits
- Renewable indefinitely
- Flexibility to grow job with company, not locked into a specific role
- Requires substantial investment
- Small, retail, hospitality businesses often E-2 companies

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Fast Track: Green Card Pathways

- **Two 'fast track' green card categories allow concurrent AOS filing to remain in U.S. with work authorization.**
- **EB-1A priority workers:**
 - Extraordinary ability
 - Self-sponsor
- **EB-2 national interest waiver (NIW) workers:**
 - Self-sponsored
 - Advanced degree or exceptional ability
 - New case makes it easier to qualify
 - Concurrent AOS not possible for India, China

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EB-5 Immigrant Investors

- Self-Sponsored
- Must invest in U.S. companies that benefit U.S. economy and create or save at least 10 full-time U.S. worker jobs
- \$1 million normally required to invest; \$500,000 in rural or poor areas
- Receive conditional residence for two years; then file again to show job creation and receive permanent green card
- Quota backlogs for Chinese nationals

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Immigration Under the Trump Administration

- Focus on enforcement and detention
- Might end existing deferred action (DACA) program
- Might revise NAFTA trade agreement
- Additional security clearances for individuals seeking to enter the US, or applying for benefits in the US
- Reduce refugee numbers
- Might reinstitute special registration for Middle Easterners
- Opportunity for comprehensive immigration reform?
- Opportunity for expanded investor/entrepreneur immigration?
- Border wall with Mexico?
- Info-sharing between local, state and federal law enforcement to enforce immigration law
- Courts to define limits of executive power over immigration?
- Courts to define constitutional protections extending to immigrants?
- Congress to redefine who qualifies for H-1B?

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Summary of Opportunities for Hiring Foreign Nationals in 2017

- Highly educated employees
- Science, Technology, Engineering and Math (STEM) students
- Multinational company transferees
- Portable H-1Bs = Prior company H-1B transfer to new employer
- H-1Bs employed 'at' university or concurrently with university employment
- Extraordinary ability workers and national interest workers
- Investors in companies
- Medical professionals
- Academic-type employment
- Portable green card beneficiaries, limitless H-1B time
- More cap-subject H numbers available if IT consulting companies are limited by \$130,000 wage requirement for dependent employers

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607.273.4200
215 E. State Street, Suite 200
Ithaca, NY 14850
info@millermayer.com



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