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The H-1B cap lottery is broken. It's time to fix it

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The FY2024 H-1B cap lottery (with a registration period in March 2023) resulted in a record number of H-1B lottery registration submissions. Despite the downturn in the economy and the fact that many U.S. employers had gone through layoffs or had hiring freezes, the number of H-1B registration submissions increased by approximately 60%.

In late April, 2023 USCIS announced the number of registration submissions in the Fiscal Year 2024 (FY2024) H-1B cap lottery (for registrations submitted in March 2023). The submission numbers, while expected to be high due to the low selection rate in this year's lottery, were shocking nonetheless.

This is the fourth year of the H-1B cap lottery registration system, and the USCIS announcement[1] showed that in each of the past two cap seasons, the number of registration submissions has increased substantially:

Fiscal Year	Total Registrations	Eligible Registrations*	Beneficiaries with Multiple Eligible Registrations
2021	274,237	269,424	28,125
2022	308,613	301,447	90,143
2023	483,927	474,421	165,180
2024	780,884	758,994	408,891

**The count of eligible registrations excludes duplicate registrations, those deleted by the prospective employer prior to the close of the registration period and those with failed payments.*

From FY2023 to FY2024, the number of eligible registrations increased by 60%, which included a 240% increase of multiple registrations deemed eligible by USCIS. (Multiple registrations occur when the same beneficiary is sponsored for a registration by more than one employer.)

USCIS opines that the number of multiple registrations is a concern, stating,

> *"The large number of eligible registrations for beneficiaries with multiple eligible registrations — much larger than in previous years — has raised serious concerns that some may have tried to gain an unfair advantage by working together to submit multiple registrations on behalf of the same beneficiary. This may have unfairly increased their chances of selection.* ***We remain committed to deterring and preventing abuse of the registration process, and to ensuring only those who follow the law are eligible to file an H-1B cap petition****."* (emphasis added)

The H-1B registration system was largely applauded when it was announced, and has reduced the burden on employers in sponsoring foreign national employees and candidates in the H-1B cap lottery. However, the relative ease in submitting an electronic H-1B registration has created a logjam that must be addressed.

How did we get here?

The H-1B "cap" or "quota" is a limitation on the number of "new" H-1B petitions that can be approved in a fiscal year. The current quota is 85,000, of which 20,000 are reserved for individuals who hold a United States master's degree or higher degree.

Historically USCIS had accepted H-1B cap-subject petition filings in the first five business days in April, six months before the start of the government's fiscal year. Employers were required to submit a full H-1B petition, with filing fees, during that five-day window in April.

Because demand far outpaced the 85,000 available new H-1B visas, USCIS conducted a computer-generated lottery to determine which petitions would be selected. The filing process was overly burdensome, and the USCIS notification process took months which created a stressful waiting period for sponsored foreign nationals.

In 2019, USCIS proposed the current H-1B registration process, which was implemented in March 2020 (FY2021). Under the current process, employers submit electronic H-1B registration requests on behalf of foreign national employees and candidates, and pay a $10 registration fee.[2]

The ease of H-1B registration submission has created increased demand

As shown by the above data published by USCIS, the number of H-1B registrations has skyrocketed. And based on the language in its recent announcement, it is clear that USCIS feels that the system is being abused by certain U.S. companies.

Employers that legitimately seek to employ H-1B workers are now suffering due to the increased demand. Employers and law firms reported a registration selection rate of 13% - 16% in FY2024. Employers that have invested in the hiring and training of F-1 student graduates now have little chance of sponsoring these employees for H-1B status, and will lose valuable professional talent.

No matter what the reason for the continued increase in H-1B registration submissions, the current H-1B lottery system is broken, and it is becoming more challenging for U.S. employers to retain foreign talent in the U.S.

Fixing the problem

One seemingly obvious solution is to increase the H-1B quota. However, this would require congressional action, which appears untenable given the current state of Congress. There are a number of potential solutions that are readily available for USCIS to implement. Below are some proposed solutions:

1. Eliminate the wrongdoers

In early May, USCIS announced[3] that it had identified a number of small technology companies that seemingly colluded to sponsor the same group of 96,000 workers, totaling 408,891 registration submissions.

USCIS should investigate and bar companies that do not have a legitimate job offer and are instead shopping H-1B beneficiaries to be placed at another company's worksite. It has been reported that Tik Tok and other social media platforms were blatantly advertising companies that would allow foreign nationals to sign up to be sponsored for an H-1B registration submission.

There are certainly circumstances where a beneficiary can be legitimately sponsored for an H-1B registration by two employers. A college graduate may be fielding multiple job offers, and be sponsored by each employer. However, the fact that over half of the total number of H-1B registrations were for beneficiaries with multiple sponsorships is an indication that abuse has become rampant.

2. Exempt U.S. Master's STEM degree holders from the H-1B quota

This solution would also require Congressional action. However, this proposal is more plausible than a straight increase in the H-1B quota.

There have been three occasions where the H-1B quota was increased.

- The H-1B Visa Reform Act of 2004[4] added 20,000 additional H-1B cap numbers to the existing quota of 65,000, reserved for beneficiaries with a U.S. Master's degree or a higher degree. This created the so-called, "Master's cap."
- The American Competitiveness in the Twenty-first Century Act of 2000[5] temporarily increased the H-1B quota to 195,000 for a period of three years in FY 2001 through FY 2003, but the same Act sunset the increase and the quota reverted to 65,000 in FY 2004.
- The American Competitiveness and Workforce Improvement Act of 1998[6] temporarily increased the H-1B quota to 115,000 for a period of two years in FY 1999 and FY 2000, but the same Act sunset the increase and the quota reverted to 65,000 in FY 2002.

These laws allowed Congress to engage in one of its favorite pastimes: vote both ways on an issue. Each law allowed Congress to state that the H-1B quota remained at its baseline of 65,000, while providing an increase (either temporary, or restricted to U.S. advanced degree holders) to help businesses retain needed talent.

An exemption from the H-1B quota would allow Congress to do the same: Keep the current H-1B quota at its current level, while allowing U.S. employers to hire and retain needed professional STEM talent.

3. Expand "dual intent" to additional nonimmigrant visa classifications

4. Expand the nonimmigrant visa classifications that allow for travel with a pending Adjustment of Status application

These two items are interrelated. H, L and O visas allow for "dual intent." This means that individuals in these visa classifications may have the intent to live in the U.S. temporarily; or to pursue permanent residence in the U.S. Other visa classifications are classified as "strict nonimmigrant" visas, which conceptually do not allow for a visa holder to pursue permanent residence in the U.S.

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Moreover, an individual who files a Form I-485 Application for Adjustment of Status to Permanent Resident ("Permanent Residence" or "Green Card" application) is prevented from traveling internationally until they are issued a travel document by USCIS, called Advance Parole. The exception is that individuals with H or L visa status can travel internationally with that visa classification with a filed Form I-485 application.

The Advance Parole travel requirement is a relic from a past era that is no longer practical. USCIS processing backlogs have resulted in Advance Parole applications taking well over a year to be issued. This essentially imprisons many I-485 applicants in the United States for an unreasonable period of time.

As a result, each year thousands of H-1B registration requests are filed for individuals with other employment visa classifications, such as H-1B1, E-1/E-2/E-3, TN, and O-1. It is patently ridiculous that an individual with O-1 Extraordinary Ability status would pursue H-1B classification.

However, this has become a common practice to eliminate the issue of being stuck in the U.S. for upwards of a year while waiting for an Advance Parole travel document to be issued. Imagine being a world-renowned research scholar who cannot attend an international conference for a year while waiting for a travel document.

USCIS continues to promise to improve processing times for Advance Parole. Instead, it should focus its efforts on expanding the visa classifications that are exempt from the Advance Parole requirement.

5. Expand the use of "Compelling Circumstances" EAD eligibility

At the very end of the Obama administration, DHS issued a Final Rule, Retention of EB-1, EB-2, and EB-3 Immigrant Workers.[7] Among its many provisions, this Final Rule created a "Compelling Circumstances" EAD category. This category has limited applicability, and among its limitations it is restricted to individuals in E-3, H-1B, H-1B1, L-1, or O-1 nonimmigrant visa status.

DHS should expand eligibility for a "Compelling Circumstances" EAD to individuals who:

- Hold or have held F-1 OPT status;
- Are employed by a U.S. company;
- Have been sponsored in the H-1B registration lottery, and not been selected; and
- Have a pending or approved I-140 petition.

Some employers have begun sponsoring foreign nationals for permanent residence while they are in F-1 status, due to the slim odds of selection in the H-1B lottery. This option is limited, as not every F-1 graduate has a strong likelihood of success for succeeding with a PERM labor market test.

However, it is currently impractical to sponsor F-1 students who were born in India or China for permanent residence, due to the lengthy green card quota backlogs for individuals from those countries. The expansion of "Compelling Circumstances" EAD eligibility to F-1 students who meet the above criteria would provide at least some individuals with the opportunity to remain employed and in lawful status following rejection from the H-1B lottery.

Conclusion

The U.S. Department of Labor's Bureau of Labor Statistics has stated[8] repeatedly that there is an ongoing and increasing demand for STEM talent in the U.S. The United States welcomes foreign students to study in the U.S., and yet limits the number of new graduates who can remain on a long-term basis.

USCIS processing backlogs have resulted in Advance Parole applications taking well over a year to be issued. ... As a result, each year thousands of H-1B registration requests are filed for individuals with other employment visa classifications.

Our educational system produces pool of immigrant talent, many of whom are forced to emigrate to other countries where their skills are welcomed. It is long past the time to fix the H-1B quota problem so that the U.S. can retain these talented professionals.

Notes

[1] https://bit.ly/3PNqWUo

[2] Mintz' coverage of the H-1B registration process can be found here: https://bit.ly/44ksKss

[3] https://bit.ly/3rgT73L

[4] https://bit.ly/44tcSE5

[5] https://bit.ly/3PEZk3E

[6] https://bit.ly/3JMkWaG

[7] https://bit.ly/3reKPt8

[8] https://bit.ly/43gwJ83

About the author

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