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# Trump administration fires another bullet on H-1B program: Random lottery to be replaced with wage-based selection process

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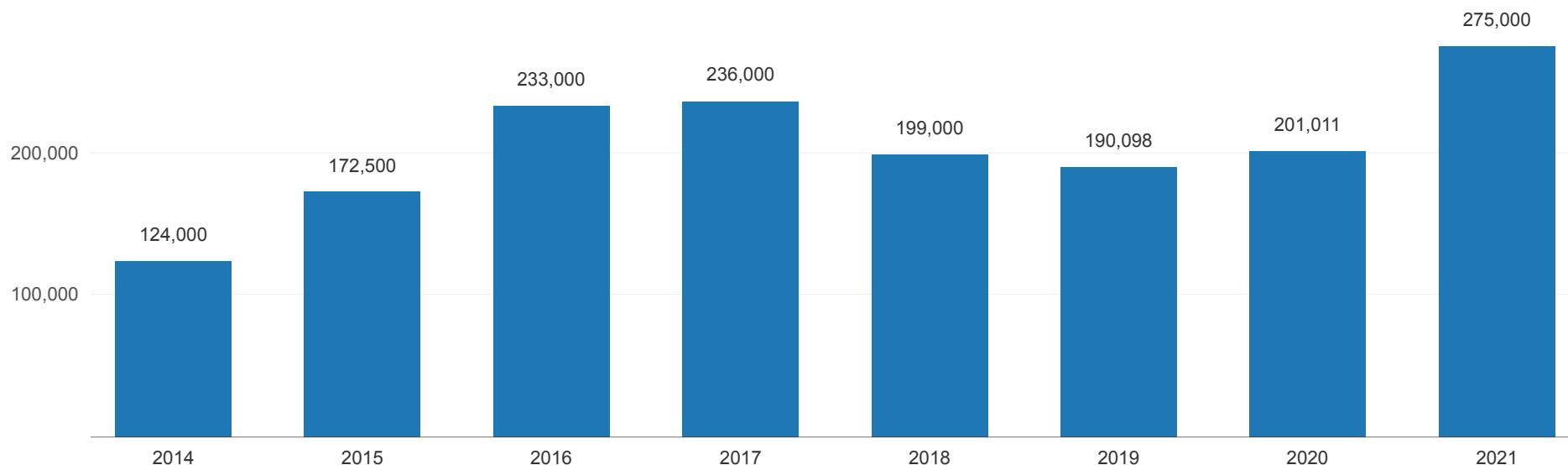
MUMBAI: There are just a few days left for the US elections and the Trump administration has fired another bullet on the H-1B visa program, by seeking to replace the annual H-1B cap lottery process (which is a random selection method which leads to allotment of 85,000 visas), with a wage-based selection process.

“If finalised as proposed, this new selection process would incentivise US employers to offer higher wages or petition for positions requiring higher skills and higher-skilled workers, instead of using the program to fill relatively lower-paid vacancies,” states US Citizenship and Immigration Services (USCIS), in its release.

As the procedural system for implementation of a new policy has been followed – which includes a 30-day window for public comments, it will be some months before the proposed rule is finalised and implemented.

## Lottery down the years: demand exceeds annual quota

No of H-1B cap applications received



*Note: Indians typically constitute a major share of the beneficiaries. Of the 2.75 applications received for fiscal ended September 30, 2021, 1.9 lakh (70%) were Indian beneficiaries.*

The proposed rule, in essence, stems from the April 18, 2017 – ‘Buy American, Hire American’ executive order, of President Trump, which called for reforms to ensure that H-1B visas are awarded only to the most-skilled or highest paid beneficiaries.

“USCIS is proposing changes in the H-1B selection process so that the H-1B quota selection is made from the highest wage down. This looks more like an election stunt than regulations that are properly thought out,” Rajiv S. Khanna, Arlington based, managing attorney at Immigration.com told TOI.

If elected, the Biden-Harris government could choose not to proceed on these lines, add immigration experts and IT sector representatives.

Under the proposed rule, H-1B cap visas would be awarded first to beneficiaries (individuals being sponsored by US companies) in the highest of the four wage categories, then to those at Level 3, and so on, until the annual quota has been met.

There are four wage levels (Level 1 to 4) for each occupation classification, in a given region, and US employers are required to pay salaries to H-1B workers at or above those levels. Incidentally, recently via an interim final rule, wages were significantly hiked across all four levels and the US Department of Labour is facing three lawsuits across US district courts challenging its new wage policy.

## H-1B: The most popular work visa for Indian nationals

Country	Total H-1B visas issues (% of total)	New visas issued ( 12 month ended Sept 30, 2019)	Visa extensions (12 month ended Sept 30, 2019)
India	278491 (72%)	79,423	199,068
China	50609 (13%)	25,490	25,119
Canada	4615 (1%)	2,916	1,699
Global total	388403	138,927	249,476

Source: Characteristics of H-1B speciality occupation workers (USCIS Report). There is an annual quota of 85,000 for new H-1B cap visas, the figure of 1.38 lakh includes non-cap applications – say filed by exempt educational/research outfits.

While it was almost impossible to obtain H-1B visas for those at Level 1 (entry level), the new rules will make it challenging to even obtain visas for those at Level 2, say immigration experts.

H-1B cap visas have an annual quota of 85,000 (which includes 20,000 in the Masters' category for which beneficiaries holding US advanced degrees are eligible). Each year, since 2013-14, USCIS has had to resort to a lottery mechanism, as the number of H-1B applications far exceeded the annual quotas. For fiscal ended September 2021, 2.75 applications were received, of which 1.9 lakh (70%) were Indian beneficiaries.

Under the current system, companies apply during the first week of April and applications are selected randomly. USCIS first runs the H-1B cap lottery to select enough applications to meet the 65,000 H-1B quota. It then runs a lottery to select enough qualifying applications to meet the cap-exemption of 20,000 for holders of US advanced degrees.

If the proposed rule is finalised, this rule together with the wage-hike rule, would badly impact the prospects of H-1B Indian aspirants, say immigration experts.

“It would also dissuade international students from opting for US as a destination. Post their optional practical training, which is a post-study three-year work opportunity for STEM students, many go on to procure H-1B visas and continue working. Their wages are generally at Level 1 or 2 – the new system would make it challenging for employers to sponsor H-1B visas at these wage levels,” says a counsellor attached to a US university.

The 100-page proposal issued by the Department of Homeland Security (of which USCIS is a unit) states that under the current system the majority of H-1B cap-subject petitions have been filed for positions certified at the two lowest wage levels: Level I or Level 2 prevailing wages. This contradicts the dominant legislative purpose of the statute because the intent of the H-1B program is to help US employers fill labour shortages in positions requiring highly skilled or highly educated workers.

Modifying the H-1B cap selection process by replacing the random selection process with a wage-level-based selection process is a better way to allocate H-1Bs when demand exceeds supply, states USCIS.

“With this proposed rule, the Trump administration is continuing to deliver on its promise to protect the American worker while strengthening the economy. The H-1B program is often exploited and abused by US employers, and their U.S. clients, primarily seeking to hire foreign workers and pay lower wages,” said Ken Cuccinelli, Acting Deputy Secretary, at DHS. “The current use of random selection to allocate H-1B visas makes it harder for businesses to plan their hiring, fails to leverage the H-1B program to truly compete for the world’s best and brightest, and hurts American workers by bringing in relatively lower-paid foreign labour at the expense of the American workforce,” he added.

David Nachman, managing attorney at NPZ Law Group told TOI, “The new H-1B proposal is completely untenable as is likely to

meet with litigation seeking restraint from many professional interest groups. Essentially the proposed rule requires the US administration to discriminate against organisations and individuals based upon a perception of the value of the services to be provided by the proposed H-1B beneficiaries. To illustrate, aren't medical professionals who may be paid lower, worthy of prioritisation?"

Khanna adds that "I see several legal problems with the proposed regulations including an attempted interpretation of a statute that is quite clear already. An agency cannot interpret a law that does not need to be interpreted. USCIS has tried to justify the regulations partly based upon the power of emergency and ensuing executive orders from the Trump administration. This justification has recently been rejected by California courts holding that a declaration of emergency does not give the President unlimited power to change the laws, especially, domestically."