

**In Focus**

# Is The H-1B Finished?

Immigration experts say the H-1B visa, long 'misused' and 'abused', has fallen out of favour with both the Republican and Democrat administrations for decades. Even with Joe Biden as US president, it is unlikely to become easier

By PANKTI MEHTA KADAKIA

SHUTTERSTOCK



24

**A** few weeks ago, as a heady blue-versus-red vote count was underway, punctuated by seesawing percentage points, halfway across the globe to elect arguably the world's most powerful political leader, many Indian and Indian-Americans were on tenterhooks.

In October, the outgoing Donald Trump administration proposed yet another series of obstacles to the H-1B visa process, a popular way for Indians to immigrate into America. It hopes to do away with the computerised lottery system, which is a random selection process, and replace it with a wage-

based system in which applicants will be selected based on salary levels.

This is the latest in a series of attacks against the H-1B programme, including a suspension on the entry of foreign workers (and therefore, issuance of new immigrant visas) until the end of the year that Trump announced in June.

However, Trump was not the only obstacle. Let's break it down.

#### What's going on with the H-1B?

According to the new rules, the wage criteria for those coming to the US on an H-1B visa, which is widely used by technology companies to hire skilled Indian workers, has

been significantly increased by the Department of Labor (DOL). Later in the month, the Department of Homeland Security (DHS) made the announcement of doing away with the lottery, in a statement titled 'DHS, Trump Administration Protect American Jobs from Unfair International Competition'.

"[This] would prioritise the selection of H-1B registrations (or petitions, if the registration process is suspended) based on corresponding wage levels in order to better protect the economic interests of US workers, while still allowing US employers to meet their personnel needs and remain globally competitive," the



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**MARK DAVIES**  
GLOBAL CHAIRMAN,  
DAVIES & ASSOCIATES, LLC

outside of the United States—  
inflicting long-term damage to  
our nation’s economic growth.”

**What are the issues with the H-1B?**

“I don’t know why people keep  
talking about H-1B—it’s finished.  
It’s over,” says Mark Davies, global  
chairman at Davies & Associates, LLC,

H-1B VISA

statement said. “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.”

“If finalised as proposed, this would incentivise employers to offer higher wages or petition for positions requiring higher skills and higher-skilled workers instead of using the programme to fill relatively lower-paid vacancies,” the statement added.

Many Indians worry this will put them at a disadvantage against American workers, since they have traditionally commanded lower wages. On October 30, 46 tech companies, including Twitter, Facebook, Google and Amazon, filed an amicus brief challenging the new rules.

“The new DHS and DOL rules will dramatically reduce US businesses’ ability to hire these skilled foreign workers—one senior DHS official estimated that they will render ineligible more than one-third of petitions for H-1B visas,” the brief states. “That will significantly reduce the economic benefits provided by the H-1B programme, stunt the US economy’s recovery from the coronavirus pandemic, and lead to greater reliance by US companies on operations

an immigration law firm based in New York. “US politicians, for years, Democrat or Republican, even under the Obama administration, did not want the H-1B. It’s going to continue to get more and more restricted.”

H-1B is the most popular category with Indians in the US. In 2020 alone, the US received nearly 275,000 unique registration requests for the 85,000 H-1B visas available for foreign technology professionals; of these, more than 67 percent are from India. In 2019, the US issued 188,123 H-1B visas for both new applicants and renewals. Of these, 131,549 were to Indians and 28,483 to Chinese. According to the Department of State, while 13,678 H-1B visas were issued in May 2019, only 143 were issued in May 2020.

But right from the Clinton era, the H-1B visa has faced hurdles with the government, while also being ‘misused’ by companies. Originally, the programme was designed for highly skilled workers. Now, a lot of students use it when they graduate. “If you look at the legislative intent, it’s designed for shortages where companies can’t really find workers locally, but that’s not what it’s being used as,” Davies adds. “It’s reasonable to say that when a student comes to study in the US and graduates, they should be allowed to work here for a year or two,” he adds. “But that’s not what the H-1B is for. It’s being misused for this category, that’s the position of the American politicians.”

“The H-1B programme overall, we all have to agree, is not ideal. It’s fraught with misuse, abuse, and it isn’t fair for Indian engineers,” agrees Anil Advani, founder, Inventus Law. Advani is also a member of the USISPF Startup Connect programme, which focuses on cross border startups across the US and India. “The lottery system is arbitrary. A lot of changes need to be made.”

Moreover, the H-1B is a three-year temporary visa, and employees have no certainty of renewal, often left at the mercy of employers. “Even if you

**US Visa Categories: A Comparison**

	H-1B	L-1	EB-5
<b>Duration</b>	Temporary non-immigrant visa valid initially for three years... can be extended to another three, after which the foreign worker must acquire a different status	Temporary non-immigrant visa via an intra-company transfer. The L-1A is valid for seven years, and L-1B for five	Direct path to permanent residency (green card)
<b>Investment Required By Applicant</b>	None, employment-focussed	None, employment-focussed	Applicant must invest at least \$900,000 in a Targeted Employment Area or at least \$1.8 million outside a Targeted Employment Area in a new commercial enterprise; must create and sustain jobs for at least 10 qualifying employees
<b>Quotas</b>	85,000 visas issued each year, with a country-wise quota	No cap; only multinational companies can apply	700 visas per country per year
<b>Family</b>	Immediate family members can get work permits, but subject to I-140 petitions	Spouse and unmarried minors can find work	Covers the entire family; dependents can seek work

25

INFOGRAPHIC: SAMEER PAWAR

**In Focus**

survive the renewals, it takes nine to 10 years to get that green card," Advani adds. "All this time, you're worried—if you're going to have kids, you don't know if you'll be living in the US or not, don't know whether or not to buy a house, develop roots, and so on. It was never an attractive way to come in."

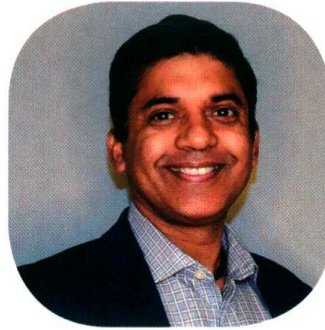
**Impact of Joe Biden's victory**  
Joe Biden is the first presidential candidate to release an agenda proposal especially aimed at Indian-Americans. He says, he will "first reform the temporary visa system for high-skill, specialty jobs to protect wages and workers, then expand the number of visas offered and eliminate the limits on employment-based green cards by country, which have kept so many Indian families in waiting for too long".

Biden does mention protecting wages, and experts say he may not be opposed to doing away with the lottery system in favour of the wage process either. Moreover, this point of reform may be low down in the priority order when Biden takes over, as the US is grappling with issues, including the pandemic, unemployment and race protests.

"With all that's playing out, it doesn't matter who won the election, no one is going to make it easier to get the H-1B," Davies says. "The speed at which H-1Bs become harder to obtain might be different. But I very much doubt that a Democrat government is going to ease it up—there's no Congressional interest in doing that."

With Biden's win, we could expect some review of the system, but not much, Advani says. "It'll probably be status quo on the H-1s. I do expect they will pick up on the founder visa we began working on at the end of the Obama administration."

A lot depends on who controls the Senate and the Congress. "The big difference in my mind is that with executive action, Biden could push the founders visa, by



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**ANIL ADVANI**  
FOUNDER, INVENTUS LAW

which Indian entrepreneurs can be incentivised to set up businesses in the US," Advani says.

**Other options for Indians**  
A lot of companies have moved from the H-1B to the L-1 visa, which is an intra-company transfer—if a worker is employed in India, she or he can be transferred to the US to the same

or a related company with the L-1. Another option is the EB-5, which is an 'investor visa' and requires the individual to make a \$900,000 investment in a US venture; the EB-5 is a permanent visa, which doesn't face renewal uncertainty like the others.

Many graduates from US universities with wealthy parents are exploring the EB-5 option. "EB-5 basically costs an additional year of tuition for families that can afford it," says Suresh Rajan, founder and executive chairman, LCR Capital Partners, a private investment and advisory services firm. "The changes to the H-1B regulations show the administration will work aggressively to curtail the programme, regardless of the election results. We also expect changes to the L-1 and F-1 OPT programmes, which is why permanent visas such as the EB-5 are important for people who can afford it."

"Recently we had an Indian prospect who, despite being a senior executive at an American multinational company that was in the process of applying for an L-1 transfer for him, is still considering the EB-5 visa," Nirbhay Handa, head of global South Asia team, Henley & Partners, adds. "The EB-5 saw tremendous interest from Indian families, but it does have a five- to eight-year waiting period for Indians due to the country-wise cap on visa allocations. So we have seen clients considering other avenues of getting to the US, via other countries."

For instance, a faster, cheaper route that's gaining popularity among Indians is to get citizenship to Grenada, a Caribbean country. Indians are not eligible under the E2 Treaty Investor visa in the US, so by getting Grenada citizenship (which doesn't require residency) that has an E2, the applicant and their family can enter the US for five years initially, with indefinite extensions.

Is this the beginning of the end for H-1B queues? We'll have to wait and watch. **P**

H-1B VISA ◀ ●

26

**Entry Point**

EB-5	E-2
Leads to a green card (permanent residence)	Is a visa
Processing time is in excess of two years (plus quota backlog)	Can be obtained quickly
Results in taxation on worldwide income	May not (depends on time spent in the US)
Requires a majority residence in the US (unless re-entry is permitted)	Holder can spend a majority of time outside the US
Has exact investment and jobs requirements	Does not (just "substantial")
Has a quota (very lengthy for three countries)	Has no quota

SOURCE: Klasko