



# AMERICA CANNOT BE OPEN FOR BUSINESS THROUGH AN H-1B VISA LOTTERY

*Posted on March 30, 2015 by Cyrus Mehta*

By [Gary Endelman](#) and [Cyrus D. Mehta](#)

In America, the best day of the week has always been tomorrow except, it seems, when it comes to immigration. On April 1, 2015, U.S. Citizenship and Immigration Services (USCIS) will begin accepting H-1B petitions subject to the fiscal year (FY) 2016 cap. U.S. businesses use the H-1B program to employ foreign workers in occupations that require highly specialized knowledge in fields such as science, engineering, and computer programming.

The congressionally mandated cap on H-1B visas for FY 2016 is 65,000. The first 20,000 H-1B petitions filed for individuals with a U.S. master's degree or higher are exempt from the 65,000 cap.

USCIS expects to receive more petitions than the H-1B cap during the first five business days of this year's program. The agency will monitor the number of petitions received and notify the public when the H-1B cap has been met. If USCIS receives an excess of petitions during the first five business days, the agency will use a lottery system to randomly select the number of petitions required to meet the cap. USCIS will reject all unselected petitions that are subject to the cap as well as any petitions received after the cap has closed. USCIS used the lottery for the FY 2015 program last April. It is anticipated that USCIS will also use the lottery again for the FY 2016. The very existence of the H-1B lottery speaks most eloquently to the economic illiteracy of the current H-1B cap. Perhaps more than any other visa, the H-1B is viewed by those in charge as a problem to be contained, not an asset to be maximized. In a political system that has an almost mystical faith in the market, the inflexibility that characterizes the H-1B cap is eloquent testimony to an absence of imagination and a refusal to let the market set the level of H-1B demand.

A few days back, President Obama addressed the [SelectUSA Investment Summit](#), and these were his words:

*So the bottom line is this: America is proudly open for business, and we want to make it as simple and as attractive for you to set up shop here as is possible. That is what this summit is all about. I hope you take full advantage of the opportunities that are here.*

These words sound hollow if employers who desire to hire foreign talented workers on the H-1B visas have to depend on a lottery. If an H-1B visa petition is selected, the foreign worker can only start employment on October 1, 2015. If the H-1B visa petition is not selected, the employer has to try again in April 2016, with the hopes that the employee will come on board on October 1, 2016. It is self evident that the cap hinders the ability of a company to hire skilled and talented workers in order to grow and compete in the global economy. The hiring of an H-1B worker does not displace a US worker. In fact, [research shows](#) that they result in more jobs for US workers. The notion of a nonsensical quota reminds us of Soviet era central planning, and then to inject a casino style lottery into the process, just rubs salt into an oozing old wound. The lack of flexibility that robs our H-1B policies of any notion of flexibility reflects a bedrock belief, as wrong as it can possibly be, that immigration is only for the benefit of the immigrants. It is about them, we seem to be saying, not about us. Our self-interest is not at stake. Not only is this economically incoherent but it ignores the moral integrity of allowing an employment-based immigration system to function in harmony with the economy that it is supposed to serve. It will not only fail to prepare American workers for the future; it will fail utterly to protect them against the present. That is the most telling indictment of our current H-1B approach, namely it does nothing to benefit those who are presumably its intended beneficiaries. So long as this Maginot line of defense persists, those in charge of H-1B policy will have no incentive to look for anything better.

This absurd situation can be remedied quite quickly. The [Immigration Innovation Act of 2015](#) (S. 153) ("I-Squared" Act) was introduced by Senators Hatch (R-UT), Klobuchar (D-MN), Rubio (R-FL), Coons (D-DE), Flake (R-AZ), and Blumenthal (D-CT). When partisan rancor is the norm in Congress, the I-Squared Act is genuinely bipartisan, and endeavors to [provide critical reforms needed in the area of high-skilled immigration](#). The I-Squared Act will raise H-1B numbers so as to avoid these unnecessary scrambles for the H-1B visa. What is

unique is that the H-1B numbers will not be the subject of an arbitrary cap just picked from a hat, but will fluctuate based on actual market demand. The cap will not go above 195,000, but not below 115,000. In essence, for the first time, the H-1B allotment will be infused with the lubricant of capitalism, rising and falling in concert with the needs of the American economy.

Among the bill's provisions are the following, although we refer readers to [Greg Siskind's detailed summary](#):

- Increases the H-1B cap from 65,000 to 115,000 and allows the cap to go up (but not above 195,000) or down (but not below 115,000), depending on actual market demand.
- Removes the existing 20,000 cap on the U.S. advanced degree exemption for H-1Bs.
- Authorizes employment for dependent spouses of H-1B visa holders.
- Recognizes that foreign students at U.S. colleges and universities have "dual intent" so they aren't penalized for wanting to stay in the U.S. after graduation.
- Recaptures green card numbers that were approved by Congress in previous years but were not used, and continues to do so going forward.
- Exempts dependents of employment-based immigrant visa recipients, U.S. STEM advanced degree holders, persons with extraordinary ability, and outstanding professors and researchers from the employment-based green card cap.
- Eliminates annual per-country limits for employment-based visa petitioners and adjusts per-country caps for family-based immigrant visas.
- Establishes a grant program using funds from new fees added to H-1Bs and employment-based green cards to promote STEM education and worker retraining.

Unfortunately, the prospects of this bill's passage are not too strong. Senator Grassley chairs the Judiciary Committee in the Senate and he will [likely not consider the bill](#). Nor will Senator Jeff Sessions who chairs the Immigration Subcommittee. Both of them are arch foes of positive skilled immigration reform. They also do not see that passing the I Squared Act will indeed benefit

rather than harm the United States. They also have allies on the left such as the [AFL-CIO](#) and think tanks like the [Economic Policy Institute](#) who oppose the H-1B visa. The reason that they do not know how to use immigration to create economic opportunity is that they do not think of immigration in this fashion. They have a static view of the economy where the focus is on not letting foreigners steal the jobs that do exist rather than examine how employers or entrepreneurs can use immigration to create new economic opportunity. Indeed, the odd marriage of the left and the right in opposition to a rational H-1B program reflects a shared belief that immigration is bad for American workers, that no new wealth can be created, that opportunity is gone, that we have to protect what now exists rather than seek to invent that which has yet to be imagined. The H-1B illustrates the Luddite pessimism of its opponents who believe that America's best days are behind it. At a time when change is the only constant, those who want to place a straightjacket around the H-1B vainly seek to hold back the future. Operating from these misplaced assumptions, it is not at all surprising that the United States ranks near the bottom among major economies in terms of policies to allow hiring highly skilled immigrant workers, according to a [study](#).

IT consulting employers who hire professional workers from India unfortunately seem to be getting more of a rap for indiscriminately using up the H-1B visa. However, it is this very business model that has provided reliability to companies in the United States and throughout the industrialized world to obtain top-drawer talent quickly with flexibility and at affordable prices that benefit end consumers and promote diversity of product development. This is what the oft-criticized "job shop" readily provides. By making possible a source of expertise that can be modified and redirected in response to changing demand, uncertain budgets, shifting corporate priorities and unpredictable fluctuations in the business cycle itself, the pejorative reference to them as "job shop" is, in reality, the engine of technological ingenuity on which progress in the global information age largely depends. Such a business model is also consistent with free trade, which the US promotes vehemently to other countries, but seems to restrict when it applies to service industries located in countries such as India that desire to do business in the US through their skilled personnel.

While Senator Grassley and his cheerleaders may gloat, decent people should feel bad for all the rejected foreign national prospective employees who would

have otherwise qualified to work in a specialty occupation, as defined under the H-1B visa law. More people will get rejected than selected, and their hopes and dreams will be dashed. Many who are in the United States after graduating from American universities may have to leave. Others won't be able to set foot into the United States to take up their prized job offers. Imagine if all of these rejected folks could actually come and work in the United States. Their employers would benefit and become more globally competitive – and could have less reason to outsource work to other countries. They would have also been productive workers, and spent money in the US economy, including buying houses and paying taxes. The H-1B cap will once again rob the economy of this wonderful cascading effect.

We have said this before and it is worth repeating again. What we are dealing with is a global battle for talent. More than any other single immigration issue, the H-1B debate highlights the growing and inexorable importance of a skilled entrepreneurial class with superb expertise and a commitment not to company or country, but to their own careers and the technologies on which they are based. They have true international mobility and, like superstar professional athletes, will go to those places where they are paid most handsomely and given a full and rich opportunity to create. We are no longer the only game in town. The debate over the H-1B is, at its core, an argument over whether the United States will continue to embrace this culture, thus reinforcing its competitive dominance in it, or turn away and shrink from the *competition* and the benefits that await. How can we, as a nation, attract and retain that on which our prosperity most directly depends, namely a productive, diverse, stable and highly educated work force irrespective of nationality and do so without sacrificing the dreams and aspirations of our own people whose protection is the first duty and only sure justification for the continuance of that democracy on which all else rests? This is the very heart of the H-1B maze. The H-1B has become the test case for all employment-based immigration. If we cannot articulate a rational policy here that serves the nation well, we will likely not be able to do it anywhere else.

The ongoing H-1B debate is really about the direction that the American economy will take in the digital age and whether we will surrender the high ground that America now occupies. History teaches us that those who shrink from new challenges rarely achieve greatness. In the 15<sup>th</sup> century, vast Chinese armadas with ships far larger than Columbus' fleet crossed the Chinese sea

venturing far west to Ceylon, Arabia and East Africa. Seven times from 1405 to 1433, Chinese traders sailed to the Persian Gulf and beyond, bringing vast new trading areas under Chinese imperial control. Yet, precisely at a time when China was poised to create this global commercial empire, they drew back. Less than a century later, all overseas trade was banned and it became a capital crime to sail from China in a multi-masted ship. This was one of history's great turning points. The high ground in the information age global economy of the 21<sup>st</sup> century will belong to those who dare to dream. Maybe a rational H-1B policy would be a good place to start.

*(Guest Author Gary Endelman is the Senior Counsel of [Foster](#))*