



Dear Sophie: Hacks for the March 2021 H-1B lottery?

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Dear Sophie:

The startup I am co-founding will be sponsoring my co-founder for a visa in the March 2021 H-1B lottery.

We've been so focused on building our startup that we haven't kept up with all the recent changes. What are we supposed to do?

—Focused in Foster City

Dear Focused:

You are right on track as the time to start is now. In December, we usually kick off our H-1B planning and prep work with startups, companies, HR and people ops, employees and recruits for the spring lottery. Although there are a lot of recent proposals and changes, please go ahead now and initiate retaining counsel to put any and all potential candidates in the lottery.

Although there are several new rules slated to go into effect in December and early January, these are subject to potential removal by President-elect Biden and may also be the topic of a great deal of litigation, so we should proceed as usual. [H-1B](#) visas for specialty occupations are still available. In my recent [H-1B podcast](#), I discuss what the 2021 lottery will look like and there's a [free H-1B guide](#) for you to download. Same as before, you can also check out the podcast episode on [What Makes a Strong H-1B Petition](#).

Looking into my crystal ball, the three new rules that may have the biggest effect on the H-1B process are:

- A [new rule](#) by the U.S. Department of Labor (DOL), which went into effect immediately when it was announced in October. That rule substantially increased the minimum wage that employers are required to pay to H-1B candidates. According to the [Cato Institute](#), the average H-1B employer will have to increase wage offers to H-1B candidates by more than 30%. It's not worth being concerned about this potential wage increase now as you don't have to commit to a proposed wage for your future H-1B hire until your candidate is actually selected in the lottery and you prepare and file the full petition in Q2. And even then, the new wage wouldn't take effect until the H-1B is approved and the earliest possible start date is October 1, 2021. So don't let it scare you.
- Another rule proposed by U.S. Citizenship and Immigration Services (USCIS) in November seeks to replace the random H-1B selection process — or lottery — with a new selection process that would prioritize the selection of H-1B candidates based solely

on the highest wages paid by the employers who sponsor them. It does not consider the experience of the candidate nor whether the candidate is a specialized worker in an in-demand field, such as medicine or research. Once again, we have no idea when and if this will actually go into effect. Although it sounds scary, it might actually be great for funded startups that need more predictability than a random lottery about whether key hires will be able to join the team.

- Finally, a rule proposed by USCIS in October requires an H-1B candidate to have a bachelor's or higher degree specifically related to the specialty occupation the H-1B candidate is applying for and H-1B employers must show the position is directly related to the education degree. This for sure will be the subject of lots of litigation. If you're hiring folks for professional or tech roles and you have funding to pay them, this isn't really an issue, just an annoyance, and you can avoid questioning by doing a very thorough job on the original petition, which my firm specializes in.

So tips and tricks: I am recommending that everyone begin preparing based on the H-1B lottery in 2020 and to consult with an immigration lawyer to devise a strategy and discuss options. Your co-founder needs to remain in valid legal status if they are already in the United States. If your startup/co-founder is not selected to apply for an H-1B, check out 7 of the Most Startup Friendly Visas Explained for alternative options.

Your startup may want to explore whether it can bypass the H-1B visa altogether by sponsoring your co-founder for either an O-1A extraordinary ability visa, an EB-1A extraordinary ability green card or an EB-2 NIW (National Interest Waiver) green card. If you would like to learn more, we will be hosting a webinar on Wednesday, December 16 at 11 a.m. PST. We will have a special promotion and a freebie for those who attend. Register here!

If you proceed with pursuing an H-1B, make sure your startup has the appropriate corporate structure and documentation in place that demonstrates a valid employer-employee relationship exists between your startup and your co-founder. That includes making sure your co-founder will have a true employee relationship with the company and they will be hired, supervised and can be fired. Listen to my podcast episode on what startups should know about sponsoring their first H-1B candidate.

Your startup will need to register your co-founder for the H-1B lottery on March 1. The USCIS registration fee is only \$10 so it's easy to do it for everybody who might benefit. The registration process closes on March 20. If your startup is selected to apply for an H-1B on behalf of your co-founder, USCIS will inform your startup by March 31. Your startup will have until June 30 to submit its H-1B petition. Over the next few months, your startup and your co-founder can start assembling documents and evidence so that you'll be ready if your startup/co-founder is selected to apply for an H-1B. If not selected in March, there may be a second digital lottery at the beginning of Q3 for any remaining H-1B visa slots.

I'll continue to keep you and the other Dear Sophie readers informed on the latest changes to the H-1B lottery process here in this column, so stay tuned!

You got this — go for it!

Sophie

