

## Diversity Visa Immigrant Lotteries -

### Reasons Why Attorney Processing Can Be Helpful!

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The question “Do I need a lawyer for the lottery?” is frequently asked. Here is the answer!

#### 1. Complying with Technicalities and Providing Complete Information is Critical

The State Department mandates strict compliance with technical rules and regulations. The strict enforcement of the requirements for entering the correct date of birth or, the correct spelling of names has resulted in many persons selected for registration – so-called “winners” being disqualified. Omissions such as failing to include a picture of your spouse, or omitting to list children can cause disqualification.

#### 2. Expedited Processing After Selection for the “Lottery Within the Lottery”

Lottery winners are assigned a rank order number. Twice as many “winners” are selected than there are “green cards” available. This means that as many as 50% of the notified “winners” do not succeed in obtaining green cards because the State Department notifies many more persons than there are available visas. A knowledgeable immigration attorney can optimize prospects of successful processing after selection -- as visas are often issued on a first come, first served basis as well as on the “winner” ranking system. Submitting the correct documents and expeditiously filing an immigrant visa processing is critical.

#### 3. Lottery Eligibility is Based on Country of Birth

Some applicants can enhance their prospects of success by cross-charging their nationality. The term native means BOTH someone born within one of the qualifying countries AND someone entitled to be “charged” to such country under the provisions of Section 202(b) of the Immigration and Nationality Act. Applicants for DV registration may be charged to the country of birth of a spouse; a minor dependent child can be charged to the country of birth of a parent; and an applicant born in a country of which neither parent was a native or a resident at the time of his/her birth may be charged to the country of birth of either parent.

There are several cases where cross-chargeability can create or enhance success:

**(a) Cross-charging from a non-eligible country to an eligible country.** Natives of certain countries with high numbers of immigrants to the U.S. are barred from entering the lottery. An applicant born in India (a non-eligible country) married to a Sri Lankan-born national can cross-charge to his/her spouse’s country.

**(b) Cross-charging from a lower allocation region to a higher allocation region.** The DV program has six separate regional lotteries:

## DV-2013 Allocation

	<u>Region</u>	<u>of Visa Numbers</u>
(i)	Africa	52,080
(ii)	Europe	33,088
(iii)	Asia	16,045
(iv)	S. America	2,208
(v)	Oceania	2,193
(vi)	N. America	16

An Argentine-born national (S. America) who cross-charges to South Africa automatically increases the prospect of selection by over 2,500%. Africa has 52,000 visas allocated as opposed to 2,002 (25 times as many visas). The statistic here is probably underestimated as South America almost certainly has more individuals applying.

**(c) Cross-charging to overcome per country limitations.** Each country is limited to 7% of the total, or 3,500 visas. By cross-charging out of an over-subscribed country, applicants can increase their chances of getting a visa. For example cross-charging out of Ethiopia or Uzbekistan (frequently over-subscribed countries) may avoid visa unavailability.

In order to understand the concepts of cross-chargeability you must also understand the concept of territory and nationality. The actual place of birth for DV purposes is the country border as recognized by the United States at the time of the lottery application. There are numerous instances of altered odds of winning based on country of birth.

Employment-based visa applicants can cross-charge at any time while processing to avoid visa unavailability but this may not be allowed for the DV program.

**d) Cross-charging to overcome rapid visa exhaustion.** For the DV-2013 Program, the State Department selected 105,630 “winning” tickets for only 55,000 green cards (reduced to 50,000 for fiscal 2014). If an applicant is eligible for participation in either the European or African lottery - it is better to apply in the African lottery as European lottery visas tend to be less available.

This is extremely important as at least twice as many “winners” are selected than there are available visas. Additionally, each eligible family member takes a visa number. With over 100,000 winners selected annually - each with a guesstimate of 2.5 average family members - as many as 250,000 people may be competing for only 50,000 visas. Out of status “winners” frequently lament, “I thought once I’d been selected I was sure to get a visa,” when they find themselves in deportation (or exclusion) hearings. Skillful use and a thorough understanding of the rules of cross-chargeability are often essential to successful DV processing.

#### **4. Meeting Eligibility Once Selected**

The basic requirements are relatively simple however; the State Department has published inadequate regulations. The act requires the equivalent of a U.S. high school diploma defined as, “a formal course of elementary and secondary education comparable to completion of twelve years’ elementary and secondary education in the United States.” (Note: a G.E.D. does NOT qualify). Winners can also qualify by proving two years of work experience in an occupation which requires at least two years of education, training or experience within the past five years. For freelancers, evidencing past work experience can prove prohibitive. The State Department has stated that the position must be assigned to Job

Zone 4 or higher in O\*NET. If any candidates do not meet the educational requirement, they must document qualifying work experience within the past five years.

There is considerable confusion in this area. The Labor Department regulations provide that a position at the highest level of the SVP 6 does allow a maximum of 2 years education. Unfortunately, the State Department regulations will not permit Job Zone 3 occupations with an SVP 6 to qualify. The DV regulations require the higher SVP 7 (with a minimum 2-4 years education, training or experience to qualify).

The State Department regulation is rigidly enforced, whereas the Department of Labor treats the regulations as mere guidelines. Accordingly, documenting and categorizing work experience based on the Department of Labor - Dictionary of Occupational Titles is critical to ensuring eligibility. Presentation of accurate detailed documentation and work experience is critical.

#### **5. Overcoming Potential Grounds of Excludability and Deportability - All of Which Apply to DV Winners**

Unlike the final two years of the prior AA-1 program which provided for visa fraud and J-1 exchange visitor waivers - the DV program subjects all applicants to the full grounds of excludability and deportability including:

**(a) Public charge.** Applicants must show an ability to avoid becoming a burden and must meet current poverty datum line guidelines.

**(b) Visa fraud.** Material misrepresentation on a visa application or entry to the U.S. can result in a ten-year bar from visa benefits. Lottery “winners” are often out of status and frequently misuse the visa waiver program or multiple entry visitor visas. Re-entering the U.S. on a tourist visa while working in the U.S. is usually sufficient to sustain visa fraud. Also tourists or students who start work shortly after arrival on visitor visas are excludable. Many lottery winners are oblivious to these issues.

**(c) Two-year home residence rule.** J-visa holders must first determine if they are subject to the home residence rule and then try and get expeditious waivers as they only have one year to complete the processing. Many successful “winners” are surprised to find that by the time they get waivers, the visas have become unavailable. Even worse consequences ensue when they discover that failure to expeditiously process the permanent immigrant visa - with a waiver - can result in an inability to revert back to temporary J-1 exchange visitor status. This can result in disruption of the academic program and the individual is in a worse position than if they had not won.

#### **6. Disruption of Current Non-immigrant Status or Undocumented Status Resulting in Deportation**

Many students or visitors who are selected for the lottery apply to adjust status in the U.S. or immigrant visa process abroad. Long delays in scheduling adjustment interviews at most District offices results in visa number exhaustion. When applicants finally attend their adjustment interviews, they are shocked to find that there are no visas left. These applicants are even more surprised to find themselves in deportation proceedings as their tourist visas have expired. Students are surprised to discover that their non-immigrant intent has been destroyed and they are unable to apply for new visas abroad because by applying for lottery green cards they have expressed an immigrant intent. This results in disruption of the student’s U.S. educational program.

#### **7. Impairment of Non-immigrant Visa Eligibility**

A lottery application has been deemed to be an “immigrant petition.” Failure to disclose such a petition on a visa application Form DS-160 could result in visa fraud. The State Department has opined that a lottery applicant must answer yes to the question: “Have you ever filed an immigrant visa petition?”

Unfortunately, answering “yes” - may, for some applicants, together with other factors, result in non-immigrant visa denial based on an inability to convince a Consul or Immigration Officer of an intent to return home at the completion of his/her stay in the U.S.

## **8. Strategizing in Relation to Adjusting Status in the U.S.**

The law allowing out-of-status individuals to adjust status in the U.S. provided they pay a fine does not include DV lottery winners. Lottery winners physically present in the U.S. may no longer apply for green cards through adjustment of status if they are out of status or if they worked without permission. They are required to apply for immigrant visas abroad.

As all DV visas expire on September 30th of any given fiscal year - delays can result in visa unavailability. Similarly, delays in scheduling adjustment interviews in the U.S. can also result in visa unavailability. Competent advice on the choice between adjusting status or immigrant visa processing is critical to enhancing successful processing. In some instances pursuing both options simultaneously may be advisable.

## **9. Three and Ten Year Bars**

Since out-of-state lottery winners cannot adjust in the U.S., their only option would be to immigrant visa process abroad. Unfortunately persons out of status for over 180 days since September 27, 1997 will trigger a 3-year (or 10 years if more than 1 year) to re-entry when they travel abroad. Very few winners will be able to qualify for waivers.

## **10. FBI Fingerprinting Checks**

Applicants at the 10 busiest countries worldwide who choose to immigrant visa process abroad appear twice, once for fingerprinting and several weeks later for the final interview. Delays in the fingerprint check can result in visa unavailability.

## **11. Document Preparation**

Submitting the appropriate documentation timely is important. Obtaining the correct documentation quickly is critical. Applicants are required to obtain original long form birth certificates, marriage certificates, divorce certificate, death certificates, police certificates for all resident countries, military clearances, evidence of financial support, evidence of prior visas, valid passports, photographs, medical exams, proof of education or work experience, public charge and other documentation. Missing documentation results in delays and possible visa unavailability.

## **12. After Getting a Green Card - What Happens!**

**(a)** Many “lucky winners” are shocked to discover that winning a green card means that they are now liable to pay capital gains and other U.S. income tax on income earned abroad. Applicants are often not aware of the need for pre-immigration tax planning. This can result in huge capital gains liability or inability to avoid double taxation.

**(b)** Some lottery “winners” are also surprised to discover that they actually have to live in the United States permanently, and they only have six months after the date of their interview to enter the U.S. Advice on the proper use of re-entry permits and maintaining eligibility for naturalization is frequently important.

## **Conclusion**

The pitfalls are endless. Hopefully the question, “Why do I need a lawyer?” has been answered. This question is well understood by the distraught individuals for whom winning the lottery turned into a nightmare. Failure to check for cross-chargeability, excludability, deport-ability, and impairment of current or other potential status is often malpractice. This firm’s intake is very detailed as it is necessary to check all relevant criteria.

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While you may not need a lawyer to submit the initial application, having a good one will help overcome technical issues. If you are one of the lucky 100,000 “winners”, you absolutely would be advised to seek professional immigration counsel to ensure your application meets eligibility criteria so you are one of the 50,000 that actually receives a green card. Should you wish to review your options, we invite you to contact us at [lotteryinfo@wolfsdorf.com](mailto:lotteryinfo@wolfsdorf.com) or call our office at (310)570-4088 or (212)899-5040 and ask for the Lottery Department.