

H-1B Cap and Employment-Based Visa Alternatives

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H-1B Headlines

Sen. Ted Cruz wants minimum H-1B wage of \$110,000

Bernie Sanders wants to raise wages of H-1B workers

'Against Trump': Enemy within attacks, says Trump clueless on H1B visas, 'will trample America underfoot'

Trump, Rubio Miss the Mark on H1-B Visas

Illegal aliens, H1B: Dems, GOP have no clue, but Trump does

Sens. Grassley, Durbin launch new H-1B fight

US Senators introduce legislation to cut H1B visas by 15,000

SENATORS SCHEME TO IMPORT MORE FOREIGN WORKERS

Top CEOs, mayors in secret meeting to push Rubio's 'job-crushing' legislation

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H-1B Professional Work Visa for Specialty Occupations

- Position offered must be one which normally requires a baccalaureate degree or higher
- The foreign national must possess a baccalaureate degree or its equivalent in a related subject
- The employer must attest that the employment of the H-1B worker will not negatively affect the workplace

Limitations of H-1B Status

- Only 65,000 H-1B visas issued each fiscal year
- Additional 20,000 for holders of U.S. advanced degrees
- Filing period for FY 2017 to begin on April 1, 2016
- H-1B status available as of October 1, 2016

Recent H-1B Cap History

H-1B cap by the numbers:

- FY 2014 met April 7
 - 124,000 applications (2/3 chance)
- FY 2015 met April 7
 - 172,500 applications (1/2 chance)
- FY 2016 met April 7
 - 233,000 applications (1/3 chance)



Applications received within the first 5 business days were subjected to a computer-generated random selection process to identify those included in the Cap.

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Exempt From the H-1B Cap

- Already in H-1B status and changing employers from Cap-Subject employer
- Institutions of higher learning and related non-profits
- Non-profit or government research organizations
- Foreign nationals out of H-1B status but who have held H-1B status in the past six years (but have not exhausted the 6 year limit)

Pre-Filing Considerations

- Assess your filing needs
- FEIN verification
- When to file the Labor Condition Application (LCA)
- Degree completion/evaluation/translation
- Document gathering
- When to submit
- Cap exempt?
- Multiple filings – different entities/same beneficiary

Pre-Filing Considerations (Cont.)

Filing Costs

- Form I-129 \$325
- Fraud Fee \$500
- Training Fee - \$750 (25 or under full time employees) or \$1,500 (over 25 full time employees)
- New: H-1B dependent employer - \$4,000
- Premium processing \$1,225 (*optional*)

I've Filed, Now What?

- If no lottery, wait on receipt notice
- If lottery, petitions received April 1 – April 7 will be subject to random selection
- Master's lottery conducted, followed by the Bachelor's lottery
- Selected petitions receive receipt notices
- Petitions not selected returned with filing fees

Employment-Based Visa Alternatives

So I didn't win the lottery . . . what's next?

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Criteria for Visa Choice

- Country of citizenship (TN, H-1B1, E-3)
- Nationality of U.S. petitioner (E-2)
- Time out of school (J-1)
- Impressive credentials (O-1)
- Marriage/family considerations (family-based green card)
- Financial resources (EB-5)

Non-Immigrant Visa Categories

- Each has specific eligibility criteria
- Some allow for spouse employment
- Different processing times
- Different validity periods

F-1 OPT Extension for STEM Grads/E-Verify

- Optional Practical Training (OPT)
 - work in field of study for up to 12 months after graduation

- Can extend OPT for an additional 17 months if:
 - STEM degree from U.S. school and
 - employer is enrolled in E-Verify

Cap Gap

- If OPT expires after April 1 but before October 1
- ***And*** FN is selected in H-1B cap
- FN can work during “gap” between OPT and H-1B
- If OPT expires *before* April 1, no cap gap option, so no work
 - BUT may be able to avoid leaving U.S.

TN for Mexicans and Canadians

- Certain professions only:
 - Accountant
 - Architect
 - *Computer Systems Analyst
 - Disaster Relief Insurance Claims Adjuster
 - Economist
 - Engineer
 - Forester
 - Graphic Designer
 - Hotel Manager
 - Industrial Designer
 - Interior Designer
 - Land Surveyor
 - Landscape Architect
 - Lawyer
 - Librarian
 - *Management Consultant
 - Mathematician
 - Range Manager/Range Conservationist
 - Research Assistant
 - Scientific Technician/Technologist
 - Social Worker
 - Sylviculturist
 - Technical Publications Writer
 - Urban Planner
 - Vocational Counselor
 - Several medical professions
 - Several scientist professions
 - Teacher

TN (cont.)

- Most professions require a degree
- Can renew indefinitely (unlike H-1B or L-1)
- Spouses can't work
- Temporary intent required
- Adjudications
 - Canadians apply at the border
 - Mexicans apply at a U.S. consulate
 - Inconsistent adjudications based on venue and nationality (consulates are more consistent)
 - Tough cases can be filed with USCIS

Other Country Specific Visas

- **Chile/Singapore – H-1B1**
 - Like H-1B without the cap-related issues
 - Spouses can't work

- **Australia – E-3**
 - Like H-1B without the cap-related issues
 - Spouses can work

L-1 for Intracompany Transferees

- U.S. employer and foreign employer must be related (parent/subsidiary, branch or affiliates) and both doing business
- Foreign national must have worked for 1 year of the previous 3 years as:
 - a manager or executive or
 - a specialized knowledge employee
- Foreign national must be coming to work in a position in one of these same categories
- Spouses can work
- Option: send foreign national abroad for 1 year

L-1 Blanket

- Establish company qualifications with USCIS
- Beneficiaries apply directly at consulate
 - No filing fees
 - Much more consistent adjudication



L-1 Blanket (Cont.)

- Requirements
 - Petitioner has U.S. office that has been doing business for at least 1 year
 - Petitioner has 3 or more domestic and foreign branches, subsidiaries, or affiliates
 - Petitioner and entities are engaged in commercial trade/services
 - Petitioner has EITHER:
 - Combined U.S. annual sales of \$25 million
 - U.S. workforce of 1,000
 - Received approval of at least 10 L petitions in last 12 months

E-2 for Investors or Essential Employees

- Bilateral investment treaty required
 - Mexico, Canada, most European countries
 - Notable exceptions: China, India, Brazil
 - Full list of E-2 countries:
<https://travel.state.gov/content/visas/en/fees/treaty.html>



E-2 for Investors or Essential Employees (Cont.)

- Available for BOTH
 - Investors AND
 - Essential employees
- Company established in U.S. and the foreign national must have the same nationality
- Substantial investment required
- Can extend indefinitely
- Spouses can work

O-1 for Extraordinary Ability

- Risen to the very top
- Proof of national/international acclaim
- O-1A: Everything but the arts
- O-1B: Arts
 - Lower standard
- No maximum stay
- Spouses can't work



J-1 Exchange Visitor Program – Interns/Trainees

- **Purpose: cultural exchange but can be a bridge to H-1B if lack other options**
- **Only available for certain fields**

Intern:

- Currently enrolled in full-time studies in a related field at a post-secondary academic institution located outside of the U.S. or
- Graduated from such an institution no more than 12 months before J-1 program start date

Trainee:

- Has degree/professional certificate from a non-U.S. post-secondary academic institution + at least 1 year of related work experience outside the U.S. or
- 5 years of related work experience outside the U.S.

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J-1 Exchange Visitor Program – Interns/Trainees (Cont.)

- Host employer generally selects an umbrella organization to sponsor the J-1 application
- Host employer prepares a intern/training plan (DS-7002) and supporting documentation
- Umbrella organization approves the application
- Applicant applies for the J-1 visa at a U.S. consulate abroad



Immigrant Visa Options

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Family-Based Green Card

- Immediate relatives of U.S. citizens
 - Spouses
 - Unmarried kids under 21
 - Parents if petitioner is at least 21
- Preference Immigrants
 - First – Unmarried sons/daughters age 21+ of USCs
 - Second
 - Spouses or children of LPRs
 - Unmarried sons/daughters age 21+ of LPRs
 - Third – Married sons/daughters age 21+ of USCs
 - Fourth – Siblings of USCs if petitioner is at least 21

Employment-Based First Preference (EB-1)

- Priority Workers
 - Extraordinary Ability
 - Sustained national/international acclaim
 - Must show foreign national will substantially benefit the U.S.
 - Outstanding Professors and Researchers
 - Must be internationally recognized as outstanding
 - 3 years experience in teaching/research
 - Research positions must be permanent (tenured/tenure-track)
 - Multinational executives and managers
 - Must have been executive/manager abroad + proposed position must be executive/managerial
 - U.S. employer must have been doing business at least 1 year

Employment-Based First Preference (EB-1) (Cont.)

- Job offer not required
- Can self-petition in certain cases
- Test of the job market (labor certification) not required
- Not subject to visa quotas

Employment-Based Second Preference (EB-2)

- Advanced degree holders (or equivalent) where job requires advanced degree (or equivalent)
- Workers with exceptional ability in the sciences, arts, athletics, or business
 - Degree of expertise significantly above the ordinary
- Job offer required unless national interest waiver (NIW)
- Labor certification required unless NIW
- Potentially strong case as H-1B alternative: foreign national with post-bachelor's work experience

Employment-Based Third Preference (EB-3)

- Skilled workers
 - Position requires a minimum of 2 years of training/experience
- Professionals
 - Foreign national must have a bachelor's degree
 - Petitioner must show a degree is the normal requirement for the occupation
- Other workers
 - Position requires less than 2 years of education/training/experience
- Labor certification required

Labor Certification/PERM

- Generally required for EB-2; required for EB-3
- Administered by Department of Labor
- Designed to determine:
 - Whether there is a shortage of able, willing, qualified, + available U.S. workers and
 - Whether the employment of the foreign national will adversely affect the wages and working conditions of U.S. workers
 - Prevailing wage determination
- Audits/Supervised Recruitment

Visa Bulletin

Employment-Based	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	01JAN13	01JUL09	C	C
3rd	01JAN16	01OCT13	01JUL05	01JAN16	01JAN10
Other Workers	01JAN16	01JAN07	01JUL05	01JAN16	01JAN10
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th Non-Regional Center (C5 and T5)	C	01MAY15	C	C	C
5th Regional Center (I5 and R5)	C	01MAY15	C	C	C

EB-5 Category for Immigrant Investors

- Must invest \$500k or \$1 million in a new commercial enterprise
 - Investment amount is \$500k if in a TEA
- Funds must be lawfully obtained
- Funds must be at risk
- Investment must create full-time jobs for at least 10 U.S. workers
- Green card is conditional
 - If project fails before conditions are removed, green card is lost unless capital can be redeployed

Takeaways: Assessing Your Cap-Subject H-1B Needs

- Identify
 - F-1s or J-1s (using Optional Practical Training)
 - TNs or H-1B1s who might want to apply for a green card
 - Expiring O-1s (renewable in only 1 year increments)
 - L-1Bs (intra-company transferees with specialized knowledge) who may be switched to H-1B to gain an additional year of U.S. work

Takeaways (Cont.)

- If cap-subject H-1B is best and only option, START NOW!
- Many foreign nationals will have other alternatives
- Evaluate options based on petitioning employer and beneficiary
 - Avoid discrimination and seek assistance

Questions?

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