



ALTERNATIVES TO THE H-1B

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Today's Presenter



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A joke about available options

So I got home late last night, and my wife says, "Would you like some supper?"

I said, "Oh, yes! What are the choices?"

She responded – The choices are "Yes, or no."

Agenda

- The H-1B cap overview and process – refresher
- Options for F-1 students
- Option for Canadian and Mexican nationals
- Option for Singapore and Chile nationals
- Option for Australian nationals
- Options for employees who have been working for the employer's entity outside the United States for more than a year
- O-1, Extraordinary Ability
- Dependents

H-1B cap (overview)

- **New** H-1B petitions are limited on a fiscal year (FY) basis; subject to a cap of 85,000
 - 65,000 H-1B visas (commonly known as the “regular cap”) or the advanced degree exemption. The advanced degree exemption is an exemption from the H-1B cap for beneficiaries who have earned a U.S. master’s degree or higher and is available until the number of beneficiaries who are exempt on this basis exceeds 20,000.
- **Not counted against the cap:**
 - H-1B extensions, amended petitions, sequential or concurrent H-1B employment petitions
 - Foreign nationals who have spent less than six years in H-1B status may return for the remainder of their H-1B time without being subject to the cap
 - H-1B petitions filed for employment at higher education institutions or their related or affiliated nonprofit research institutions, nonprofit research organizations or governmental research organizations


H-1B cap process

- In 2020, the USCIS changed the H-1B cap process to include an electronic registration
- In order to submit individuals into the cap lottery, employers must electronically register and pay an associated fee of \$10 for each prospective beneficiary
- Under this new process, employers (and authorized representatives) submit basic information (mostly taken from the biographic passport page) regarding the individual as well as details regarding the prospective employer
- Initial registration period is open for a minimum of 14 calendar days with specific dates announced by the USCIS (usually in February)
- Last year, the USCIS received 483,927 registrations and selected approximately 26% of individuals in the lottery. The USCIS received 57% more registrations compared to the previous year.
- If selected, the USCIS provides a notice through the electronic registration system. If selected, the employer has a deadline by which they must submit the H-1B petition to the USCIS
- **NOTE:** The cap registration window closes on March 17th!

Options for F-1 students

- F-1 students are eligible for work authorization called Optional Practical Training (OPT).
- Initially granted for 12 months
- If you have earned a degree in certain science, technology, engineering and math (STEM) fields, you may apply for a 24-month extension of your post-completion OPT employment authorization if you:
 - Are an F-1 student who received a STEM degree included on the STEM Designated Degree Program List (PDF);
 - Are employed by an employer who is enrolled in and is using E-Verify; and
 - Received an initial grant of post-completion OPT employment authorization based on your STEM degree.
- Cap gap extension: An F-1 student who is the beneficiary of a cap-subject H-1B petition and request for change of status that is filed on time may have their F-1 status and any current employment authorization extended until the first day of the new fiscal year.

The TN category for Canadian and Mexican Nationals

- The TN nonimmigrant classification permits qualified Canadian and Mexican citizens to seek temporary entry into the United States to engage in business activities at a professional level.
- The foreign national must be offered employment in one of the professional categories listed in Appendix 2 of the USMCA Chapter 16
- The offered position and employee's credentials must fall within one of the pre-defined professions – see attached document 
list of TN positions
- The TN applicant/petitioner must demonstrate that his/her stay in the U.S. will be “temporary,” i.e., without the intent to establish permanent residence
- Does not permit dual intent - At each entry on TN, applicant is attesting to nonimmigrant intent
- First application must be done at a port of entry – subsequent extensions can be filed with the USCIS

H-1B1 for Chile and Singapore Nationals

- The H-1B1 program provides for the temporary employment of nonimmigrant aliens in specialty occupations from Chile and Singapore, limited to 1,400 nationals of Chile and 5,400 nationals of Singapore.
- The H-1B1 program is governed by many of the rules that apply to the H-1B program.
- The period of employment in the U.S. must be temporary, so the foreign national must demonstrate non-immigrant intent. H1B1 visas are only valid in one-year increments, as opposed to 3 year validity periods in H-1B visa status.
- H-1B1 requirement: Employee must be employed in a “specialty occupation” which is defined as:
 - The position requires a Bachelor’s degree at a minimum
 - The job duties to be performed must be specialized
- Employee must hold a valid degree that is related to the offered position
- Labor Condition Application (LCA) requirement
- Can be filed directly with the consulate/embassy (does not have to be filed with the USCIS)

E-3 option for Australian nationals

- The E-3 classification applies only to nationals of Australia.
- You must be coming to the United States solely to perform services in a specialty occupation.
- The specialty occupation requires theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.
- Labor Condition Application (LCA) requirement
- Applied at the consulate or embassy
- Initially granted for 2 years with unlimited 2 year extensions available

Brief overview: L-1A



- **Definition**

- To qualify for L-1 classification in this category, the employer must:
 - Have a qualifying relationship with a foreign company (parent company, branch, subsidiary, or affiliate, collectively referred to as *qualifying organizations*); and
 - Currently be, or will be, *doing business* as an employer in the United States and in at least one other country directly or through a qualifying organization for the duration of the beneficiary's stay in the United States as an L-While the business must be viable, there is no requirement that it be engaged in international trade.
 - Generally have been working for a qualifying organization abroad for one continuous year within the three years immediately preceding his or her admission to the United States; and
 - Be seeking to enter the United States to provide service in an *executive* or *managerial capacity* for a branch of the same employer or one of its qualifying organizations.

- **Validity period**

- A total of seven (7) years (only physical presence in the U.S. counts)
 - Initially granted for three (3) years with the option to extend in two (2) year increments
 - NOTE: L-1A status cannot be extended beyond the 7 year limit (can recapture though)

Brief overview: L-1B

- **Definition**

- To qualify for L-1 classification in this category, the employer must:
 - Have a qualifying relationship with a foreign company (parent company, branch, subsidiary, or affiliate, collectively referred to as *qualifying organizations*); and
 - Currently be, or will be, *doing business* as an employer in the United States and in at least one other country directly or through a qualifying organization for the duration of the beneficiary's stay in the United States as an L-While the business must be viable, there is no requirement that it be engaged in international trade.
 - Generally have been working for a qualifying organization abroad for one continuous year within the three years immediately preceding his or her admission to the United States; and
 - Be seeking to enter the United States to provide service in a *specialized knowledge* for a branch of the same employer or one of its qualifying organizations.
 - ***Specialized knowledge*** means either special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures (See 8 CFR 214.2(l)(1)(ii)(D)).

- **Validity period**

- A total of five (5) years (only physical presence in the U.S. counts)
- Initially granted for three (3) years with the option to a two (2) year extension
- NOTE: L-1B status cannot be extended beyond the 5 year limit (can recapture though)

O-1 visa for extraordinary ability

- To qualify for an O-1 visa, you must demonstrate extraordinary ability by sustained national or international acclaim, or a record of extraordinary achievement in the motion picture and television industry, and must be coming temporarily to the United States to continue work in the area of extraordinary ability.
- The supporting documentation for an O-1A petition must include evidence that the beneficiary has received a major internationally recognized award (such as the Nobel Prize) or at least three of the following forms of evidence:
 - Documentation of the beneficiary's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
 - Documentation of the beneficiary's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
 - Published material in professional or major trade publications or major media about the beneficiary, relating to the beneficiary's work in the field for which classification is sought, which must include the title, date, and author of such published material, and any necessary translation;
 - Evidence of the beneficiary's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization for which classification is sought;
 - Evidence of the beneficiary's original scientific, scholarly, or business-related contributions of major significance in the field;
 - Evidence of the beneficiary's authorship of scholarly articles in the field, in professional journals, or other major media;
 - Evidence that the beneficiary has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation; or
 - Evidence that the beneficiary has either commanded a high salary or will command a high salary or other remuneration for services, as evidenced by contracts or other reliable evidence.

Dependents

- Spouses of L-1 holders are eligible for work authorization by filing an I-765 with the USCIS
- In certain situations, the spouse of an H-1B visa holder with an approved I-140 and subject to the visa bulletin backlog is entitled to work authorization by filing an I-765 with the USCIS
- E-3 spouses are entitled to work in the United States with a valid Employment Authorization Document (EAD).
- NOTE: On Nov. 12, 2021, USCIS issued a policy announcement to clarify that they will consider E and L spouses to be employment authorized based on their valid E or L nonimmigrant status. Since the November 2021 announcement, the Department of Homeland Security added new Class of Admission (COA) codes to distinguish between E and L spouses and children.

Q&A

You have

Questions

We have

Answers