

EXPLORING WORK VISA OPTIONS BEYOND THE H-1B CAPⁱ

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USCIS announced earlier that it has received 172,500 H-1B petitions for the fiscal year 2015 that will begin October 1, 2014. The lottery (also referred as “random selection process”) has been completed and USCIS has started sending receipt notices. With uncertainty looming large as to who may or may not cross the ‘threshold’ hurdle of H-1B visas, it is time that prospective H-1B visa beneficiaries start exploring other work visa options that may allow them to work and live in the United States on a temporary basis. This article seeks to provide readers with the snapshot of possible work visa options that may be available to prospective H-1B visa beneficiaries who do not make to the H-1B cap.

Cap-Exempt H-1B visas

There are certain categories of cap-exempt H-1B visas. One such category is for foreign nationals having (or hoping to have) an employment offer from an institution of higher education (or related or affiliated nonprofit entities), or from a nonprofit/government research organization.ⁱⁱ

To be classified as cap-exempt, it not mandatory that prospective H-1B employee should be employed by the institution of higher education (or related or affiliated nonprofit entities), or nonprofit/governmental research organization. Prospective H-1B employee, employed by *any employer*, who will perform the majority of his/her work at the qualifying institutions mentioned could qualify for the cap-exempt H-1B visa provided the work performed should ‘predominantly further’ the normal, primary, or essential purpose of the qualifying institution.

To illustrate, consider the case of an Information Technology (IT) company having a contract with a U.S universityⁱⁱⁱ for hiring and placing IT consultants for developing/customizing university software. Assuming that IT consultants hired by the consulting company will primarily work developing/customizing university’s software and that the work will benefit the university in reaching one of its stated primary or essential goals; such employees may be treated as H-1B cap-exempt even though they will not be employed directly by the university.

Other Professional Specialty Worker Visas: H-1B1, TN and E-3 Visas

There are three nonimmigrant visa categories quite similar to H-1B visas that are designated for temporary professional workers from specific countries. These visas are based upon specific trade agreements that foreign nations have signed with the United States.

The ‘H-1B1’ visa program is designed specifically for the nationals of Chile and Singapore. Up to 6,800 visas (1,400 visas for the nationals of Chile, and 5,400 visas for the nationals of Singapore) are set aside from the H-1B cap of 65,000 during each fiscal year for the H-1B1 program. H-1B1 can be obtained at the U.S. Consulate/Embassy abroad without ever submitting

a petition to the USCIS. Additionally, the Canadian and Mexican temporary professional workers may explore the option of TN classification. The regulations specify various categories of professions as well as the minimum qualifications for each profession that are covered by Appendix 1603.D.1 to Annex 1603 of North American Free Trade Agreement (NAFTA). Further, nationals of the Commonwealth of Australia may qualify for E-3 temporary work visas. Like the H-1B1, E-3 visas are subject to an annual cap of 10,500 per fiscal year.

Occupationally, H-1B1, TN and E-3 mirror the H-1B visa in that the foreign worker must be employed in a specialty occupation. While both H-1B1 and E-3 requires Labor Condition Application (LCA) attestation from the Department of Labor (DOL), TN visa does not impose this limitation. Unlike the H-1B, which is a “dual intent” visa, none of the above-mentioned categories recognize dual intent. In simple terms, while a foreign national employed in a valid H-1B status can pursue employed-based immigrant visa (commonly referred as employed-based “Green Card”), foreign nationals employed on H-1B1, TN or E-3 lack this advantage. However, foreign nationals employed in these categories can pursue their employment-based Green Card by changing their status to another nonimmigrant visa category such as H-1B, L-1, etc., which recognizes dual intent.

Treaty Trader/Investor Visa

A foreign national may qualify for an E visa depending on the type of agreement [Bilateral Investment Treaty (BIT), Free Trade Agreement (FTA), or Treaty of Friendship, Commerce and Navigation (FCN)] it has with the United States. There are two types of E visas: Treaty Trader visa (E-1) and Treaty Investor visa (E-2). Nationals of a foreign country having FTA may qualify for both an E-1 and E-2 visa, while BIT allows only for an E-2 visa.

For an E-1 visa, a foreign national entering the United States is required to carry on substantial trade which is international in scope, principally between U.S. and the foreign state. The E-2 visa, on the other hand, requires the foreign national develop and direct the operations of an enterprise in which the foreign national has invested, or is actively in the process of investing, a substantial amount of capital. The enterprise must be a *bona fide* enterprise. Further, a “key employee”, including the executives and supervisors, or persons whose services are “essential to the efficient operation of the enterprise” may qualify for an E-1/E-2 visa depending on the bilateral agreement between the foreign country and the United States.

Foreign Students Employed on Post-Completion OPT

There may be alternate visa option available to foreign graduates of U.S. Universities. If not selected for H-1B cap, F-1 students in Science, Technology, Engineering, and Mathematics (STEM) fields can apply for a special 17-month extension. To get the extension, the student should be employed by an employer enrolled in E-Verify, and should have received an initial grant of post-completion OPT related to such a degree. Regulations require that STEM subject must be in the major or dual-major of the student’s most recent degree received. This extension

of the OPT period for STEM degree holders gives U.S. employers two chances to recruit these highly desirable graduates through the H-1B process, as the extension is long enough to allow for H-1B petitions to be submitted in two successive fiscal years (two H-1B cycles).

Students who do not hold STEM degrees may choose the option of going back to school. For instance, a student who has completed a bachelor's degree from a U.S. institution may exercise the option of enrolling in another bachelor's or master's degree program. While enrolling in a bachelor's degree program may be a good idea to buy time in the United States with the hope of making it to the H-1B cap next fiscal year, the option of enrolling in a master's degree program should be exercised with caution. Before enrolling in a master's degree program, a student should check whether the U.S. university qualifies as an "institution of higher education" as defined by section 101(a) of the Higher Education Act of 1965 because *not* every master's degree from a U.S. educational institution will qualify an individual for the H-1B master's cap^{iv}.

L-1 Visa for Foreign Employees of Multinational Companies

Employees employed by companies with an offshore presence can explore the L-1 visa option. The L-1 visa program facilitates the temporary transfer of foreign nationals with management, professional, and specialized knowledge skills to the United States. Thus, even within the L category, important distinctions are drawn between the two types of L visas, the L-1A for executives and managers, and the L-1B for employees with specialized knowledge.

L-1A *executives* direct the management of an organization or a major component or function of an organization. Similarly, L-1A *managers* have the primary duty of directing an organization, or area of an organization, and supervision or control of the work of others, or management of an essential function at a senior level in the organization's hierarchy. Managers and executives need not supervise subordinates. Regulations allow for "functional management". To qualify for an L-1B visa, the employee should have the *specialized knowledge* of the company, its product and its application in international markets, or have an advanced level of knowledge of processes and procedures of the company.

O-1 Visa for Extraordinary Foreign Nationals

Like the L-1 nonimmigrant visa, there are two types of O-1 visa. Also, like the L-1 visa, O-1 visa is not subject an annual cap. O-1 visa category is divided into two categories: O-1A and O-1B. O-1A is for foreign nationals having "extraordinary *ability*" in the field of the science, art, education, business or athletics. If in motion picture or TV production, the person may qualify for O-1B visa provided s/he has demonstrated record of "extraordinary *achievement*." Thus, there are different standards under the O-1 visa.

It is important to know that O-1 is not limited to the above-mentioned categories. USCIS interprets the statute to encompass "any field of endeavor," including craftsmen and lecturers. Further, the term "arts" includes not only the principal creators and performers, but also essential

personnel such as directors, set designers, choreographers, orchestrators, coaches, arrangers, costume designers, make-up artists, stage technicians and animal trainers.

Based on the foregoing, it is safe to conclude that before packing bags to their respective home countries, prospective H-1B visa beneficiaries should carefully explore other work visa options that may be available to them in the United States. One may still qualify for a cap-exempt H-1B visa if s/he has an offer of employment from an institution of higher education (or related or affiliated nonprofit entities), or from a nonprofit/government research organization. Even employment with a third-party employer may qualify an individual for cap-exempt H-1B provided the beneficiary will perform the majority of work at the qualifying institutions and, if the work will benefit the primary or essential purpose of the qualifying institution.

Also, It would be prudent for the national of a foreign country to check on the type of trade agreement his/her country has in effect with the United States as this may qualify the individual for an H-1B1, TN, E-1, E-2 or an E-3 nonimmigrant classifications. Additionally, employees of companies with offices both in the United States and offshore could explore the option of L-1 visa. Moreover, individuals with the “extraordinary *ability*” in the field of the science, art, education, business or athletics may qualify for an O-1A visa while an O-1B may be appropriate for a foreign national with “extraordinary *achievement*” in motion picture or TV production. Last but not the least, F-1 STEM students should try to get the 17-month extension in order to make the cap next year. We want to reiterate and reemphasize that students choosing to enroll in the master’s degree program with the hope of having a better chance of making it to the H-1B cap next year should choose their master’s degree program very carefully as not all master’s degree programs qualify an individual for the master’s degree H-1B cap of additional 20,000 visas.

ⁱ This is part VII of an VIII part series – ABCs of H-1Bs

ⁱⁱ Previous articles in this series discussed in detail which educational institutions may or may not qualify as an institution of higher education, and how to determine whether a nonprofit institution is “related to or affiliated with” an institution of higher education.

ⁱⁱⁱ Assuming that the U.S. University will qualify as an “institution of higher education” as defined by section 101(a) of the Higher Education Act of 1965.

^{iv} Part V of this series discussed in detail which educational institutions may or may not qualify as an institution of higher education.