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So Your H-1B Petition Is Not Selected — What Now?

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U.S. law continues to cap the number of regular new H-1B visas per year at levels originally established in the 1990s — 65,000, with an additional 20,000 new H-1B visas available to workers with degrees from U.S. master's programs. The volume of visas available falls far short of minimum demand by U.S. companies, and has led to year-on-year shortages from the inception of the filing period. This year, U.S. Citizenship and Immigration Services is again preparing for U.S. employers to submit many more new H-1B visa petitions in the first week of April than the maximum number of visas available for Fiscal Year 2016, which begins on Oct. 1, 2015.

If, as expected, the number of H-1B petitions received by USCIS in the first five days of the annual filing period exceeds the visa cap, the agency will conduct a lottery system to randomly select the petitions required to fill the cap. If the master's cap is also reached during this period, a selection will be made from among the master's cap cases first and the unselected master's cap petitions will be included in the larger lottery group. If not, the agency will continue to accept master's cap cases until that cap is reached.

So the question for many employers becomes — what now? If an employer's H-1B petition is not selected, and the employer is attempting to retain an excellent professional candidate, there are other options to consider. We outline the primary options below.

Intracompany Transfer Visas (L-1)

Employers that operate in more than the United States, may wish to consider employing the candidate in one of its foreign offices to attain a year's tenure with the foreign office. At the conclusion of reaching 365 days work outside the United States, the employer may consider transferring the worker back to the United States from the related company abroad, in the L-1 visa category. This option is attractive to multinational employers who manage projects from multiple geographic hubs, in addition to those who consider global service in other countries a key aspect of career development for highly skilled professionals and executives.

The L-1 visa is available to a worker transferred to the United States as (i) a manager or executive, in the

L-1A category, or (ii) a specialized knowledge professional, in the L-1B category. To qualify for the L-1A or L-1B category, the candidate must have at least one continuous year of full-time employment abroad within the preceding three years for the petitioning company or a parent, affiliate or subsidiary thereof. Days spent in the United States do not count toward but also are not interruptive of the one-year qualifying period. The manager, executive or specialized knowledge worker must be coming to the United States to fill a position that is managerial or executive for the L-1A category, or that requires specialized knowledge for the L-1B category.

Employers considering this option should also investigate what visa and work permit requirements may be needed for the worker to serve in the host country for the one-year period, assuming the office is not in the worker's country of nationality.

F-1 Student Visa Status

Foreign students seeking to change status from student (F-1) status to H-1B whose petitions were not selected for visa processing often face the impending expiration of their post-completion optional practical training ("OPT") work authorization. Students studying in science, technology, engineering or mathematics ("STEM") fields, however, are eligible to receive a 17-month extension of post-graduate OPT so long as their employers agree to register for the E-Verify program, an electronic identification and employment authorization system administered by U.S. Department of Homeland Security and the Social Security Administration. These students should contact their designated school official to request extension of OPT to bridge their employment authorization until at least next year's cap, if not longer.

F-1 visa holders in OPT who are not STEM graduates, however, are not eligible for this extension. These students often face more difficult options for extending their work authorization in the United States following nonselection in the H-1B visa lottery. A relatively straightforward option for non-STEM F-1 students is to return to school for further studies. Completion of graduate studies will eventually qualify the student for the 20,000 H-1B visas available only to graduates of U.S. master's (or higher) programs.

Work with Cap-Exempt Employers

Federal regulations exempt from the H-1B cap petitions for workers employed at institutions of higher education, related nonprofits and government research organizations. An employer may file a cap-exempt H-1B petition where the sponsored worker will work "at" an exempt institution. Therefore, employers may claim exemption if the beneficiary will physically perform job duties at an exempt institution. The burden is on the employer to establish that there is a "logical nexus" between the work performed by the beneficiary and the normal work performed by the cap-exempt entity.

In addition, where a worker will perform concurrent employment with an exempt and non-exempt employer, the H-1B petition will not be counted against the cap. In either of the above scenarios, employers subject to the cap may seek to formalize such an arrangement with an exempt organization, such as a university engaged in research related to the business of the employer. However, should the H-1B worker cease work at/with the exempt entity, a subsequent petition by a commercial (non-exempt) employer will be subject to the cap.

Training Visas

J-1

The J-1 nonimmigrant visa allows foreign-exchange visitors to participate in work- and study-based exchange programs. J-1 programs may last for periods ranging from a few weeks to several years. In the corporate arena, a formal, structured training designed to assist the business in utilizing the trainee's skills abroad in the future is one type of J-1 that may be authorized. For employers who are not direct, certified J-1 sponsors, they may work with a variety of "umbrella organizations" designated by the Department of State to vet training programs and J-1 trainee applications, and utilize a J-1 training program for up to 18 months of training for a talented employee who may ultimately enrich the workforce of the company overseas.

Employers should be aware that certain J-1 exchange visitors will be required to return to their home country for a period of two years upon completion of their U.S. training. Generally, J-1 visa holders are subject to the two-year foreign residency requirement if their exchange program was financed in whole or in part, directly or indirectly, by the U.S. federal government or the government of their nationality of last residence. In addition, a country-by-country list of skills in short supply may subject some foreign nationals to the residency requirement.

H-3

The H-3 nonimmigrant visa is designed for foreign nationals coming to the United States for training that is not available in the trainee's home country, and which benefits the trainee's career abroad. H-3 trainees must restrict their work activities to training, and cannot engage in productive employment unless it is incidental and necessary to the training. The training must also have a purpose and value to the international arm of the organization.

Employers seeking to host trainees must develop a detailed training program. The H-3 visa applications normally address formal, classroom trainings. Applications may be denied where on-the-job training is a primary focus, regardless of whether they are described as incidental and necessary. The H-3 visa will be issued for a maximum of two years and cannot be extended, but this may allow sufficient time for the employer to re-apply for an H-1B visa on behalf of the trainee the following year.

Treaty-Based Visa Options

H-1B1

Qualified nationals of Chile and Singapore benefit from respective treaties with the United States that allocate 6,800 H-1B1 visas annually (Chile -1400/Singapore-5400) to these nationals specifically. The overall H-1B cap is reduced by the number of H-1B1 visas issued. H-1B1 visas and visa petitions are approved in one-year increments, but unlike H-1B there is no six-year maximum limitation on stays in H-1B 1 status.

TN

The TN "NAFTA" visa is a available to foreign professionals who are citizens of Canada and Mexico. The TN visa has requirements that are similar to H-1B, but is not subject to annual quotas and with a less time-consuming application process.

To qualify for TN status, a job offer must involve "business activities at a professional level" in one of the 63 occupational categories covered by NAFTA. Examples of the more commonly used professions

covered by NAFTA include: computer systems analyst, engineer, economist, lawyer, management consultant, biologist, chemist, industrial designer and accountant.

TN status may be granted for up to 3 years initially and then may be extended in three-year increments without limit on the number of extensions. Employers seeking to hire Canadian or Mexican professionals should strongly consider this visa category.

E-3

Nationals of Australia coming to the United States to perform services in a specialty occupation are eligible for the E-3 treaty exchange visa. Similar to the H-1B visa, applicants for the E-3 visa must have a legitimate offer of employment in a specialty occupation in the U.S. subject to certification by the Department of Labor, and must possess the necessary academic requirements. E-3 visas are granted for an initial period of two years, with unlimited extensions possible. Up to 10,500 primary E-3 visas will be issued annually. Less than 6,000 E-3 visa petitions were filed in 2014.

E-1/E-2

Nationals of countries with treaties with the United States designed to promote trade and investment may obtain E-1/E-2 visas to work in the U.S. to develop and direct their investments or trade. The visas are available in two types: the E-1 treaty trader visa for companies that trade a substantial level of goods and services, and the E-2 investor visa for individuals or enterprises that invest a substantial amount of funds in the United States with the prospect of job creation.

Nationals applying for the E-1 visa must be foreign businesspeople conducting substantial trade between the United States and their home country. Nationals applying for the E-2 visa must make a substantial capital investment in a U.S. business. No minimum value threshold is set for the investment, and the amount is measured in relation to the total cost of the U.S. business. E visa status is available to individual investors, as well as to employees coming to work in either a supervisory role or a position involving skills essential to the business.

Other Options

O-1

The O-1 visa category is reserved for individuals with extraordinary abilities who seek temporary entry into the United States to continue working in their field of endeavor. O-1 visa applicants must demonstrate that they are at “the very top of the field of endeavor.” Applicants who have received internationally recognized awards, such as a Nobel Prize or Academy Award, or other major recognition, easily qualify, but there are also senior executives and outstanding researchers that may qualify based on their record of contributions to the business area in which they work. Executives with a record of innovation in their field may be able to demonstrate that their career achievements distinguish them as singular leaders in their precise area.

Family-Based Employment Authorization

If the beneficiary of a rejected H-1B petition is the spouse, parent or child of a U.S. citizen, they may be eligible for family-based permanent residency. An application for permanent residency, accompanied by

an application for employment authorization, may grant these beneficiaries relatively rapid authorization to accept employment of their choosing in the United States.

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In closing, employers that filed H-1B petitions rejected in the H-1B visa lottery have several other options to fill critical positions. Until and unless our government expands the pool of visas in the H-1B category to more realistically serve the American economy, these alternatives will remain an important part of the visa menu for U.S. employers. Both the House and Senate indicated their support of an expansion of the H-1B category from the now 25-year-old quotas launched in the 1990 overhaul of the Immigration & Nationality Act, but until immigration reform is adopted, the U.S. business community will continue to face the H-1B limitations that a lottery epitomizes.

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