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H-1B visa demand leaves U.S. employers seeking alternatives

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JUNE 5, 2018

April 1 is an important day each year for many U.S. employers and their immigration counsel. It is the day U.S. Citizenship and Immigration Services begins accepting applications for about 85,000 H-1B visas the agency makes available Oct. 1, the start of the government's fiscal year.

The H-1B program allows employers to sponsor foreign professionals to work in the U.S. for up to six years.

With unemployment rates for college-educated professionals at record lows, the program is a vital lifeline for U.S. businesses who rely on access to an international talent pool to fill their information technology, legal, finance, health care, engineering and other staffing needs.

The employer is also free to roll the dice and sponsor the employee for an H-1B visa in a subsequent fiscal year with the hope that supply will exceed demand and/or the petition will be selected in the annual lottery.

But there's a catch: Congress has not provided USCIS with flexibility to adjust the annual quota when legitimate demand exceeds supply.

U.S. employers in April petitioned USCIS for roughly 190,000 professionals to fill jobs that require, at minimum, a four-year university degree or equivalent in a specialized course of study. During May and June, more than 60 percent of these petitions will be returned to the employer sponsors unadjudicated after USCIS conducts a random lottery to determine which petitions will be processed.

This will in turn lead to the annual scramble as employers seek alternatives to fill key roles.

Where alternative U.S. visas are not feasible, employers with offices outside the United States may consider employing some workers abroad. This option has become more viable because technological advances have made it easier to work remotely.

Depending on where the employer has operations, employees may be able to work from their home country or from another country where employment authorization is available.

The employer can then reassess the need to fill the role in the United States, permanently base the employee abroad and have the employee make short trips to the United States as a business visitor when necessary to collaborate with U.S.-based colleagues.

If the job must be filled in the United States, a period of employment with the company abroad may facilitate a subsequent transfer back to the United States.

Specifically, the L-1 visa program, for which there is no quota, permits multinational employers to transfer key managers and specialists to the United States once they have worked for the company — or an affiliate — abroad for at least one year.

Because L-1 visa applications are closely scrutinized, employers that intend to transfer an employee back to the United States should consult with immigration counsel well in advance to ensure the L-1 visa application stands the highest chance of success.

Of course, the employer is also free to roll the dice and sponsor the employee for an H-1B visa in a subsequent fiscal year with the hope that supply will exceed demand and/or the petition will be selected in the annual lottery.

In terms of immediate, U.S.-based options when H-1B visas are unavailable, employers should consider whether an employee is a citizen of a country with which the United States has an applicable free trade agreement.

The North American Free Trade Agreement permits U.S. employers to hire Canadian and Mexican professionals in specific occupations in "TN" status.

TN occupations, which include accountants, economists, lawyers, engineers, computer systems analysts and teachers, typically require the employee to hold at least a related bachelor's degree or equivalent Canadian or Mexican credential.

TN status may be granted in three-year increments and can be renewed indefinitely, provided the employee does not intend to reside in the United States permanently.

Whereas TN workers are subject to this temporariness limitation, H-1B workers can pursue permanent positions in the United States. For this reason, some employers file petitions to change a TN employee's status to H-1B.

The U.S. also has free trade agreements with Singapore and Chile, which permit 5,400 Singaporeans and 1,400 Chileans per year to hold H-1B1 visa status and work for U.S. employers in professional occupations.

Another free trade agreement with Australia permits up to 10,500 Australian citizens per year to hold E-3 visa status and work for sponsoring U.S. employers, also in professional occupations.

While H-1B1 and E-3 visas differ somewhat from H-1B visas (mostly in terms of the validity of the visas and periods of stay), they are nearly identical to H-1B visas in terms of substantive eligibility. Unlike H-1B visas, however, they remain available all year long.

U.S. employers commonly seek H-1B work authorization for foreign students who hold F-1 visas, have been granted permission by their schools, and have been issued employment authorization cards by USCIS to pursue professional, on-the-job training in the United States. Training is typically provided for one year following graduation.

Students who receive degrees in certain STEM fields may be able to extend this one-year period to three years.

Specifically, employers who participate in the U.S. government's E-Verify program may assist these graduates in submitting training plans to their schools and obtaining two additional years of on-the-job training.

By assisting an employee obtain another two years of professional training, the employer will have two additional opportunities/fiscal years in which to request an H-1B visa if a petition filed during the employee's first year of training is not successful.

Another potential option when H-1B visas are not available is the O-1 visa category, which permits U.S. employers to sponsor individuals of "extraordinary ability" for temporary employment in the United States.

There is no quota for O-1 visas, and the work permit, initially issued for up to three years, can be renewed indefinitely provided a U.S. employer is able to demonstrate its need for the employee's distinguished expertise.

While an O-1 visa is not feasible for junior staff, many employers and immigration counsel mistakenly believe that the category is reserved only for those whose skills are unique or widely recognized by the public, such as Olympic medalists or Nobel Prize winners.

Instead, the O-1 visa category requires only that a foreign national be a top professional in a particular field, specialization or sub-specialization. Evidence of extraordinary ability may include letters from peers as well as current and former employers attesting to an individual's reputation and contributions in the field, industry prizes or awards, media coverage, published works, or other documentation indicating accomplishments in the specific field.

Although this standard is high, when H-1B visas are unavailable, employers should nevertheless examine the feasibility of an O-1 visa for well-paid, experienced professionals they seek to hire into management or highly specialized roles.

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When considering H-1B sponsorship, keep in mind that some employers are exempt from the annual quota and some foreign nationals need not be counted toward it.

Exempt employers may sponsor as many qualified foreign professionals for H-1B visas as their organizations require throughout the year.

The law exempts most U.S. universities, as well as nonprofits related to or affiliated with U.S. universities. These include nonprofits owned, operated or controlled by a university and situations in which an affiliation agreement between a university and nonprofit contributes to the university's research or educational mission.

Also exempt from the annual H-1B quota are private and governmental nonprofit organizations that are primarily engaged in basic or applied research.

Finally, as businesses recruit foreign professionals to supplement their U.S. workforces, they should know when an H-1B candidate is not subject to the annual quota.

Perhaps most importantly, job candidates who are already working in the United States for another employer in H-1B visa status are not subject to the quota.

Once a foreign professional is successfully sponsored by an employer for H-1B visa status and counted against the annual quota, USCIS regulations allow each H-1B professional to work a full six years in the United States without limiting the number of employers each may have.

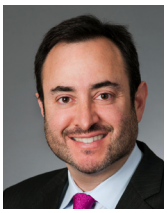
In some industries, such as the IT consulting industry, where the unemployment rate for U.S. workers is particularly low and the need for foreign professional talent is consequently

high, there can be fierce competition for existing, quota-exempt H-1B workers, especially those with advanced skill sets.

Employers across the United States are learning whether their requests for coveted H-1B visa numbers will be adjudicated or rejected in a lottery system. The unlucky should assess their staffing needs in keeping with the options outlined above and engage in workforce planning for next year's H-1B filing season as early as possible.

This article first appeared in the June 5, 2018, edition of Westlaw Journal Employment.

ABOUT THE AUTHOR



Andrew Greenfield is the managing partner of **Fragomen, Del Rey, Bernsen & Loewy**'s Washington office and is a member of the firm's executive committee. Greenfield advises U.S. and global organizations across industries on U.S. immigration and nationality law, regulation, policy and compliance. He counsels clients on visa/work permit matters and on the immigration consequences of mergers and acquisitions and other corporate reorganizations; I-9/E-Verify, H-1B/LCA and PERM compliance, including audit representation; and overall global immigration program management.