

Visa Alternatives To Consider When H-1B Isn't An Option

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The H-1B visa program permits U.S. employers to hire foreign professionals in the United States for up to six years and sometimes longer. The program is an invaluable means for employers seeking to complement their U.S. workforces with key foreign talent. Unfortunately, the program is inaccessible to many employers because the demand for visas far exceeds the annual quota of approximately 85,000. This article describes the quota and discusses the primary alternatives employers consider when they are unable to obtain the foreign professional resources they need.

A new allocation of H-1B visas becomes available on Oct. 1 of each year, which is the beginning of the U.S. government's fiscal year. On April 1, or six months before the new allotment of visas is released, [U.S. Citizenship and Immigration Services](#) begins accepting petitions from U.S. employers requesting one of these coveted visas for a foreign professional named in the petition. Employers generally sponsor employees for H-1B visas under the annual quota in two contexts.

- Existing U.S.-based employees who hold another temporary visa status, such as TN or F-1, and for whom the employer seeks a change of status to H-1B. Typically this involves employees initially hired for a limited duration or for training and who have developed skills the employer needs on a long-term basis.
- Foreign-based employees of multinational companies selected for transfer to the United States with an Oct. 1 start date.

A strong economy, coupled with a low unemployment rate for college-educated professionals, especially those in IT occupations, has resulted in U.S. employers having just over a 30 percent chance of having their H-1B petitions selected for adjudication in recent years. U.S. employers are therefore being denied access to roughly 70 percent of the professional H-1B resources they require to support and sustain their businesses, and thus seek alternatives.

Any discussion of H-1B quota alternatives would be incomplete without a review of those instances where H-1B sponsorship is not subject to the annual quota. Workforce planning should thus include a survey of potential resources where the H-1B quota will not apply. Among the most important of these includes job candidates who are already working in the United States for another employer in H-1B visa status. Once a foreign professional is successfully sponsored by an employer for H-1B visa status and counted against that year's annual quota, the law permits the worker to spend up to six years in the United States and does not limit the number of H-1B employers he or she may have during that six-year period. 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 skills sets.

An important alternative to the H-1B visa applies to foreign professionals whose ability to work in the United States stems from free trade agreements. 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, among many others, 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. Because of this temporariness limitation, some employers file petitions under the annual quota to change a TN employee’s status to H-1B, because the law explicitly permits H-1B workers to pursue permanent residence in the United States.

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, but unlike H-1B visas, remain available all year long.

Employers often seek H-1B visas for existing employees holding F-1 visa status and working pursuant to optional practical training (OPT), which is available to foreign students after completing their degree programs. OPT is typically granted for one year, but for students receiving degrees in certain STEM fields, OPT may be requested and granted for up to three years. The law requires employers to be actively involved in a STEM graduate’s request for an additional two years of OPT. For example, the employer must be enrolled in the government’s E-Verify program and must work with the student to complete and submit detailed forms and annual evaluations to the student’s college or university. In addition to the two additional years of employment authorization, by assisting an employee to obtain another two years of OPT, the employer should have two additional opportunities to request an H-1B visa for the student if the H-1B petition filed during the first year of OPT is not successful.

Another option when H-1B visas are not available may be 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 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, there is a misapprehension by many employers and immigration counsel that the category is reserved for those whose skills are unique or who have widespread recognition by the general public, such as Olympic medalists or Nobel Prize winners. Rather, the O-1 visa category requires a foreign national to be a top professional in his or her particular field, specialization or subspecialization. Evidence of extraordinary ability may include letters from peers and 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 applicable to

accomplishments in the specific field. While this standard is high, when H-1B visas are unavailable, employers should examine the feasibility of an O-1 visa for highly paid, highly experienced professionals they seek to hire into senior management or executive roles.

When efforts to secure an H-1B or alternative visa for a valued employee fail, employers, especially those with offices outside the United States, may have the option of asking the employee to work abroad. We have seen this option become increasingly viable as remote work through the use of technology is more prevalent. Depending on where the employer has operations, the employee may be able to work from his or her home country or from another country where the employee is able to work lawfully. For some employers, engaging the employee's services abroad may be a permanent option. But where the goal is eventually to have the employee based 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. As scrutiny of L-1 visa applications is high, where an employer intends to transfer an employee back to the United States in the future, it should consult with immigration counsel well in advance to ensure the eventual L-1 visa application stands the highest chance of success.

Finally, certain employers are exempt from the H-1B quota. They may sponsor as many qualified foreign professionals for H-1B visas as their organizations require throughout the year. Specifically, the law exempts most U.S. universities, as well as certain other nonprofits, from the annual quota. Generally exempt from the quota are two types of U.S. nonprofit organizations: research nonprofits, which include private and governmental organizations primarily engaged in basic or applied research; and nonprofits related to or affiliated with a U.S. university, such as a nonprofit owned, operated, or controlled by a university or where an affiliation agreement between a university and nonprofit contributes to the research or educational mission of the university.

As the new year approaches, now would be a good time for employers to assess their need for new, quota-subject H-1B sponsorship for the next fiscal year. It is also a good time to consider alternatives, as we expect demand will again exceed supply.