



### **Unlucky in the Lottery: H-1B Alternatives**

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U.S. Citizenship and Immigration Services (“USCIS”) recently completed its annual H-1B visa random selection process, more colloquially known as the “lottery.” The lottery process is mandatory for all H-1B petitions that are “cap-subject,” meaning that they do not qualify for any of the limited exemptions to the lottery.<sup>1</sup>

USCIS received 199,000 H-1B petitions during the Fiscal Year 2018 filing period. However, according to relevant statute, USCIS may only adjudicate a total of 85,000 H-1B petitions for Fiscal Year 2018, 20,000 of which are reserved for employees holding an advanced degree. As a result, upon the completion of this year’s lottery, a majority of H-1B petitions were returned to employers unselected. These employers, and employees alike, are left wondering: What are some non-immigrant<sup>2</sup> alternatives to H-1B for cap-subject employers<sup>3</sup>?

#### **Optional Practical Training**

Students in F-1 status are generally given 12 months of eligibility for Optional Practical Training (“OPT”). OPT may be used either while the student is still in school (“pre-completion OPT”) or after the student graduates (“post-completion OPT”). If the F-1 student engages in pre-completion OPT, his or her post-completion OPT period will be reduced by one month for every two months of part-time pre-completion OPT.<sup>4</sup> Additionally, students who graduate with a qualifying degree in a science, technology, engineering, or mathematics may be eligible for a 24-month extension of their post-completion OPT (“STEM OPT extension”).<sup>5</sup>

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<sup>1</sup> **Cap-exempt employers include institutions of higher education and related or affiliated nonprofit entities, nonprofit research organizations, and governmental research organizations.**

<sup>2</sup> **This article does not discuss possible immigrant visa options.**

<sup>3</sup> It should also be noted that if a non-immigrant alien is already in H-1B status, he or she may (1) begin work for a different employer, subject to approval of a separate application, or (2) extend authorization with the current employer, subject to approval, *without* being counted against the annual H-1B cap. This is because such individual has already been counted against the cap under which his or her original petition was originally approved. However, in this situation, the original H-1B employer must not have been a cap-exempt employer.

<sup>4</sup> **While on pre-completion OPT, students may work no more than 20 hours per week while school is in session but may work full-time during vacation periods.**

<sup>5</sup> **Employers must also comply with some additional regulations, such as participation in the e-Verify program and implementation of a formal training program.**

F-1 students with no remaining OPT may choose to enroll in a new degree program. Generally, if the new degree program is at a higher academic level (e.g., master's after bachelor's, PhD after master's), the student is granted a new 12-month period of OPT eligibility. This requirement also applies to a second STEM OPT extension.<sup>6</sup>

#### Student Considerations

F-1 students whose status would otherwise expire after the H-1B petition is filed but before the petition can be adjudicated may be able to take advantage of "Cap Gap" relief. Cap Gap relief allows certain students with timely filed H-1B petitions to remain in valid F-1 status until action is taken pursuant to the H-1B petition. If the student's H-1B petition is selected and approved, the student's F-1 status continues through September 30 (and the student's H-1B status would begin on October 1). If the student's H-1B petition is not selected or is denied, the student must depart the United States within 60 days of the later of (1) the student's scheduled program end date or (2) the date of the notice of denial (or petition return).

#### Nationals of Certain Countries

Some visa categories are reserved specifically for nationals of certain countries. For example, professional employees who are citizens of Canada or Mexico may be eligible for a TN visa. Additionally, Australian nationals seeking employment in a specialty occupation may be eligible for an E-3 visa, while Chilean and Singaporean nationals seeking employment in a specialty occupation may be eligible for an H-1B1 visa.

E-1/E-2 treaty trader/investor visas are also specific to nationals of certain countries, namely those with which the United States maintains a treaty of commerce and navigation. The E-1 visa is available for those engaged substantially and principally in trade between the United States and the treaty country, as well as their eligible executive, supervisory, or specially qualified employees. The E-2 visa is available for those investing a substantial amount of capital in a U.S. business and seeking to enter the United States to develop/direct the investment enterprise, as well as their eligible executive, supervisory, or specially qualified employees. It is important to note that both the employer and the employer must have the same nationality of a treaty country.

#### L-1 Visa

Employers with offices outside of the United States may be able to utilize the L-1 visa. L-1 visas allow for the intra-company transfer of certain employees from a foreign office to a U.S. parent,

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<sup>6</sup> Students are limited to two lifetime STEM OPT extensions.

affiliate, subsidiary, or branch of the foreign entity. Among other requirements, the foreign entity and related U.S. entity must share common ownership and control, and the employee must have worked in the foreign office for at least one of the preceding three years as an executive, manager, or in a position requiring specialized knowledge.

#### O-1 Visa

Employees with “extraordinary ability” in the sciences, education, business, or athletics may be eligible for an O-1 visa. In this context, “extraordinary ability” means that the person is one of the small percentage who has risen to the very top of his or her field of expertise.

#### Internship or Training Programs

Depending on the qualifications of the employee, the employee may be able to participate in a trainee or intern program that qualifies the employee for a J-1 or an H-3 visa. These visas may not be used for the regular and productive staffing of a business, as they are intended to provide on-the-job training and experience to the visa-holder.

If you have questions about any of the options discussed above, or the H-1B process generally, please contact one of BrownWinick’s immigration attorneys, Corrin Hatala or Elizabeth Coonan.

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