

NON-IMMIGRANT ALTERNATIVES TO H-1B PETITIONS

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Due to the failure of Congress to pass legislation increasing the numbers of new H-1B beneficiaries, human resources executives are unable to make firm plans for the hiring of highly skilled foreign nationals. For the past several years the demand for H-1B visas far exceeded the supply. For visa year 2009, which begins October 1, 2008 and ends on September 30, 2009, more than twice as many petitions were filed during the first week filing was permitted (six months prior to the start date, or April 1, 2008) than authorized by law. A lottery was held for both the 65,000 H-1B visas allocated for beneficiaries with bachelors degrees and the 20,000 visa numbers allotted to beneficiaries with advanced degrees earned in the United States. If your current or proposed new foreign national employee's petition was not selected, a new H-1B petition cannot be filed until April 1, 2009, and employment based on that petition may not commence until October 1, 2009. This article will explore alternative visas that may be able to be used to allow key foreign nationals to work for your company.

Students who graduate from either a four-year bachelors program or who have obtained an advanced degree at a U.S. educational institution can apply for and receive Optional Practical Training for one year. This will allow the graduate to work in his/her field for one year. Under a new regulation, students working in the fields of science, technology, engineering, or mathematics can get 17 months of practical training. This will allow their employer two years to file H-1B petitions, in the event the petition filed in the first year is not selected in the H-1B lottery.

If the prospective employees are from Canada, Mexico, Singapore, Chile, or Australia, there are special classes of non-immigrant visas available for them. Treaty North America (called TN) visas are available without numerical restriction for qualified applicants from Canada and Mexico. To qualify, the applicant must have a degree from the United States, Canada, or Mexico in an occupation listed in Appendix 16030.1 of NAFTA, and be coming to the United States to work as a full-time employee in his or her profession. Currently TN status is granted in one year increments, but under a recently proposed regulation, TN visa status will be granted for three years and extensions will be granted for three years as well.

Singapore and Chile have separate bi-lateral treaties with the United States that allow their citizens to obtain up to 7, 500 H-1B-1 visas under their own separate cap. Since these treaties took effect, the caps have not come close to being met.

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Australians can enter the United States in E-3 visa status. These visas are similar to H-1B visas in that they require Labor Condition Applications to be filed as a prerequisite to the issuance of the visa, but no petition to the USCIS needs to be filed, there is no limit on the number of years an employee can be in E-3 status, and 10,500 E-3 visas just for Australians can be issued each year.

Another short-term solution for hiring foreign nationals in a professional capacity is the J-1 visa-exchange visitor. This visa is available to those individuals who have obtained professional degrees abroad and are seeking training opportunities in the United States in their field of endeavor. J - 1 international practical training can be granted for up to 18 months, and there are no numerical limits on this type of visa.

H-3 visas are for individuals seeking temporary work in the United States to be trained in their field in a combination of classroom and on-the-job training, and who will be returning abroad to use the knowledge and experience gained in their training program to further their career. This is an ideal visa for multi-national corporations that wish to rotate young professional staff between overseas affiliates and U.S. offices. H - 3 visas can be issued for up to 18 months, and there are no numerical restrictions placed on the granting of these visas. A detailed training program must be submitted in support of the H - 3 petition, as well as a plan of how the H- 3 beneficiary will benefit from the training, once she returns to her country.

For those U.S. corporations that have offices abroad or that are the parent of a foreign subsidiary, the subsidiary of a foreign parent corporation, or an affiliate of a foreign corporation, the L-1A and L-1B visas may be utilized to temporarily employ professional foreign nationals. An affiliate is defined as two corporations in which the shareholders own shares in both corporations in the same percentages. To qualify for an L-1A visa, an international worker must have been working abroad as a manager or executive for at least one of the past three years and be coming to the United States to work in a managerial or executive capacity. L-1A visas can be issued for an initial period of three years and can be renewed twice in two-year increments for a total of seven years. L-1B visas are for individuals who have been employed abroad for at least one of the last three years in a position that requires specialized knowledge of the company's products or procedures and are coming to the United States to work in a similar capacity. These visas can also be issued initially for three years, but can only be granted for a total of five years. There are no numerical restrictions on either L-1 or L-1B visas.

This brief summary of the visa categories that human resources professionals may use to bring foreign nationals to the United States to work for their corporation is meant to give an overview of the visa possibilities and is not to be regarded as legal advice. A competent immigration attorney should be consulted before making a decision on the visa category to use and to prepare and file the required application with the USCIS.