

FAQ: Alternatives to Cap-Subject H-1B Petitions

While many foreign nationals might have to wait until next April for another chance at H-1B status, the following options should be considered for affected employees:

H-1B's that are Cap-Exempt

These include petitions for employment at an institution of higher education, or a related or affiliated nonprofit entity, nonprofit research organization, or governmental research organization and physicians on J-1 visas who receive H-1B status through the Conrad 30 program on the basis of agreeing to work in medically underserved areas for three years.

H-1B visas are also available for beneficiaries filing for amendments, extensions, and certain employment transfer.

STEM/OPT Extension and F-1/CPT

A 24-month optional practical training (OPT) for foreign nationals with advanced U.S. degrees in designated Science, Technology, Engineering or Math (STEM) fields. A 7-month OPT extension for those currently using the 17-month extension.

The new 24-month STEM OPT rule allows DHS to designate “related fields” on the STEM list. “In general, related fields will include fields involving research, innovation, or development of new technologies using engineering, mathematics, computer science, or natural sciences (including physical, biological, and agricultural sciences).”

To qualify for the STEM/OPT, employers must be enrolled in E-Verify and complete an individualized Form I-983 “Mentoring and Training Plan”. Students must work with their DSO to file for the STEM/OPT benefit.

Foreign students should also look in continuing in F-1 status and explore with their DSO internship opportunities under curricular practical training (CPT).

Visas for Professionals from Canada, Mexico, Australia, Chile and Singapore

Certain Canadian and Mexican professionals might qualify for a TN visa available under the NAFTA. To qualify, the foreign national must have the required nationality, be offered a temporary position by a U.S. employer in one of the professions specified in Appendix 1603.D.1 of NAFTA and possess the degree or credentials required under NAFTA for the position.

Nationals of Australia should consider the E-3 visa and nationals of Chile and Singapore should consider the H-1B1 visa.

Other Work Visa Categories

The L-1 visa, intra-company transferee, is available to certain employees who have worked for a parent, branch, subsidiary or affiliate of the U.S. employer outside of the U.S. To qualify, the immigrant must have worked for at least one consecutive year full time in the prior three

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years. The employer must seek to transfer the employee to the U.S. to work as a manager/executive or specialized knowledge professional.

The O-1A is available to individuals who can demonstrate extraordinary ability in the sciences, education, business or athletics. The evidence must show that the candidate is among the small percentage of people who have risen to the very top of their field of endeavor, as demonstrated by sustained international or national recognition for their achievements in the field.

The E-1 or E-2 is available to principals and employees of companies whose country of majority ownership has a treaty of commerce with the U.S. E-1 treaty trader status is available to businesspersons who seek to engage in substantial trade in goods or services. The E-2 treaty investor status is available to individuals who seek to develop and direct the operations of a business in which the foreign national or his/her employer has invested or is in the process of investing a substantial amount of capital.

Conclusion

Unfortunately, the currently insufficient number of H-1B visas for highly skilled temporary workers and limited number of alternatives is creating significant challenges for U.S. employers that rely on foreign workers, particularly in the high technology and health care industries. Early planning, creativity and flexibility are critical.

We will continue to monitor and provide updates on further developments in immigration law, including any potential changes to the H-1B program and visa availability.

To begin assisting you, we recommend that you review the many free resources available on our immigration site [here](#). To Schedule an analysis, please email ImmigrationGroup@marksgray.com.

For more information about your Marks Gray Immigration team led by **Giselle Carson** may assist you today, please visit our [website](#).