

FAQ: Not Selected Under the H-1B Cap – What Options to Consider?

Many foreign nationals have to wait until March of next year for another chance at H-1B status. In the meantime, they and their employers are looking for options for work authorization.

The following is a summary of options:

1. STEM OPT extension

For those who qualify, this is one of the best options. The STEM OPT extension is a 24-month period of post-completion optional practical training (OPT) for certain F-1 students who receive a science, technology, engineering, or mathematics (STEM) degree in a designated STEM field.

To qualify, the student must have been granted OPT, be in a valid period of OPT and the employer must be enrolled in E-Verify.

STEM OPT extensions are generally filed when the student is in the last 90 days of their valid OPT period.

2. CPT (Curricular Practical Training)

Allows for off-campus work permission for F-1 students. CPT is intended to be an academic experience, and not intended for regular ongoing off-campus work. Thus, this option should be explored and used carefully.

While there are no hard limitations on part-time CPT, high CPT usage can cause increased scrutiny in future OPT and H-1B applications.

Additionally, the student must evaluate schools' options carefully. Several institutions offering CPT have been found to be sham programs to attract foreigners looking for a way to work in the US.

3. Concurrent employment with an H-1B Cap-Exempt employer

H-1B visa workers may be employed by more than one employer and this is considered concurrent employment. Certain institutions are H-1B cap-exempt.

The situation would include the filing and approval of two H-1B petitions. One cap-exempt H-1B petition for employment at an institution of higher education, or a related or affiliated nonprofit entity, nonprofit research organization, or governmental research organization.

***This material is not intended to substitute as legal advice.**

Last updated: June 2020

A second petition requesting concurrent employment with a cap-subject employer. This option needs to be explored carefully as they are many additional requirements that need to be fulfilled.

4. Marriage to a US Citizen

Some foreigners are engaged to be married to a US citizen when they learn that they were not selected under the H-1B lottery. Although they may not have intended to get married at this time, the situation prompts them to consider marriage as an option and to shorten the wedding waiting period.

Marrying a US citizen might provide the immigration benefit desired but this option must be considered carefully. The marriage should not occur for the sole purpose of obtaining an immigration benefit.

5. Working Overseas

Working for the petitioning employer at an overseas office or remotely from abroad could be an option to consider while awaiting for another opportunity. Depending on the corporate structure, employment outside the US might also create the possibility for an L-1 visa (see more about this option below).

6. Spouse Visa Status

If the foreign national is married, the visa status of the spouse should be considered. The derivative spouse to a J-1, L-1, E-1 or E-2 and certain H-1B can apply to obtain an employment authorization document (EAD).

7. Returning to the Home Country

This is an option that some foreigners take after considering other options. Foreign students typically have a 60-day grace period following the OPT expiration date to leave the U.S.

Other options which require additional time, strategy, and requirements include

8. O-1 Visas for Individuals with Extraordinary Ability

This is a good option for individuals who can show extraordinary ability in the sciences, arts, education, sports, or business, or distinguished ability in the arts or entertainment. 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.

9. L Visas for Intra-company Transferees

Executives and managers and individuals with specialized knowledge who have worked for a foreign entity related to a US company for at least one year can apply for an L visa. This could also include

***This material is not intended to substitute as legal advice.**

Last updated: June 2020

exploring overseas employment for one year with a qualifying entity in a qualifying capacity for a future L-1.

10. H-1B1 Visas for Citizens of Singapore and Chile

Citizens of Singapore or Chile can apply for one of the 6,800 H-1B1 visas available under the US-Chile and US-Singapore Free Trade Agreements. This cap has not been reached since it was created. This visa is very similar to the type H-1B visa.

11. E-3 Visas for Citizens of Australia

Citizens of Australia can apply for an E-3 visa. The requirements of the E-3 visa are similar to the ones for the H-1B visa.

12. TN Visas for Canadian and Mexican Citizens

Canadian and Mexican citizens can apply for TN status under NAFTA. TN status is limited to the forty-eight professional occupations listed under NAFTA.

13. H-3 Visas for Trainees

Those coming to the United States to engage in a training program that is not available in their country can apply for an H-3 Visa. The training must assist the employee to qualify for employment outside the United States.

14. E-1 or E-2 for Treaty Investors

E-1 treaty trader status is available to businesspersons seeking to engage in substantial trade in goods or services. The E-2 treaty investor status is available to individuals seeking to develop and direct the operations of a business in which the foreign national or his/her employer has invested a substantial amount of capital.

15. Green Cards in Extraordinary Ability or National Interest Waiver (NIW) Categories

Foreign candidates may be eligible for an employment-based, first-preference visa if they have extraordinary talent and ability or a second-preference visa if their work can be considered in the national interest. These two categories have very specific and high-level requirements.

16. Green Cards under the PERM Track

PERM is the process for obtaining labor certification, the first step of the green card process for many foreign nationals seeking permanent residence through their employment. During this process, the employer must engage in DOL-approved recruitment and show that they were unsuccessful in recruiting a qualified US worker for the position. This green card path also involves the filing of an I-140 Immigrant Petition for Alien Worker and the I-485 to apply for US Permanent Residence.

***This material is not intended to substitute as legal advice.**

Last updated: June 2020