



H-1Bs and Beyond: 8 Tips for Employers to Hire Foreign Nationals During a Labor Shortage

Insights

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Employers around the country are finding it difficult to fill their workforce needs for a variety of reasons. Workers may be reluctant to return to the office after pandemic-related closures – or they may have moved to other fields or jobs – which has prompted employers to explore creative ways to meet their hiring needs. While immigration laws do not make things easy for employers, looking towards a foreign workforce may be an option to ensure business operations can continue. Here are eight options that may be available if you are looking into the talent pool of foreign nationals.

1. Look for a Second Chance in the Current Year’s H-1B Lottery

A limited number of H-1B visas are available each year for foreign nationals in specialty occupations who meet certain requirements, and U.S. Citizenship and Immigration Services (USCIS) receives more H-1B registrations than it can approve. But registrants who were not selected in the FY23 cap lottery in March may have a second chance at an H-1B filing this year. In the past two years, USCIS has conducted a second lottery to fill in any remaining H-1B visas for the annual allotment of 85,000. H-1B cap registrations for which an H-1B petition is not filed by the deadline will be reallocated among the wait-listed registrations. While USCIS accepted a higher number of cap registrations than in past years – causing some uncertainty about whether there will still be visas to fill – it is possible that an H-1B registration not selected in the initial March lottery could still be selected later in the year.

No action is required by an existing H-1B cap registrant to be considered under the “second chance” lottery. This will happen automatically if it happens at all. If a second lottery selection does not occur, employees should consider putting the person in the next year’s lottery registration opening in March 2023.

2. Transfer a Valid H-1B

Each person in H-1B status is eligible for at least six years of H-1B time, which includes only time spent in the U.S. This six-year period can be used at one or numerous employers. Therefore, if someone is in the U.S. and working in H-1B status, another employer can file to employ that person in H-1B status for the remaining time left towards the six-year maximum. A big benefit of this H-1B “portability” is that the person can start working as soon as the H-1B

change of employer petition has been filed with USCIS. An approval is not necessary, which can be a big savings in time and money.

3. **Note that Some Organizations are Exempt from the H-1B Cap**

Most companies are subject to the annual H-1B cap lottery for people who have not previously been approved for H-1B status. However, some companies have a special status as H-1B cap-exempt employers, which allows them to file for an H-1B throughout the year and outside the cap lottery. This cap exemption applies to organizations that are:

- Higher education institutions;
- Non-profit entities related to or affiliated with a higher education institution; and
- Non-profit or government research organizations.

These organizations are not subject to the annual lottery, and cap-subject employers may be able to benefit if they are able to concurrently hire someone working for such an organization. That is, if a foreign national is employed in H-1B status with a cap-exempt employer, even part-time, they may be eligible to work concurrently for a cap-subject H-1B employer. However, the foreign national must maintain employment with the cap-exempt employer at all times while working for the cap-subject employer.

4. **Explore Options for Obtaining a Higher Degree**

Certain student-based visas allow for temporary employment related to the recipient's studies. Foreign nationals who were not selected in the H-1B lottery and who are approaching the end of their F-1 optional practical training (OPT) or the two-year STEM OPT extension may consider returning to school for another program of study.

Enrolling in a higher degree of study will allow the student to stay in the U.S. and potentially receive curricular practical training (CPT) work authorization. CPT allows students to work for credits, so some students may be able to continue working after their OPT expiration if they are enrolled in a new program of study and have been granted by the school CPT authorization. There are potential issues that could limit future ability to obtain future OPT authorization or may require the student to depart the U.S. before obtaining H-1B status, so this option should be reviewed carefully with the school and legal counsel.

5. **Review Available Visas for Citizens of Certain Countries**

Depending on which country your target is from, there may be other visa options available.

E-3 for nationals of Australia

E-3 visas are available only to citizens of Australia. The requirements are like an H-1B, although there is no cap for this visa category. Therefore, if an employer is looking to hire an Australian national in a position that requires a bachelor's degree or higher in a specialized field (identical

national in a position that requires a bachelor's degree or higher in a specialized field (identical to the H-1B), they may be able to obtain E-3 status for the foreign national, either through USCIS if they are in the U.S. or at a U.S. consulate if they are in Australia. E-3 approvals are issued in 2-year increments and can be filed for at any time and renewed as needed. Spouses of E-2 visa holders are also able to work so this is a great option with hiring incentives.

H-1B1 for nationals of Singapore and Chile

Citizens of Singapore or Chile may be eligible for the H-1B1 visa, which is very similar to the H-1B visa in terms of requirements. These visas are not subject to the same cap as an H-1B visa and can be applied for through USCIS if in the U.S. or at a U.S. consulate if they are in Singapore or Chile.

TN Visas for Canadian and Mexican Professional Workers

Citizens of Canada and Mexico, in certain occupations, can qualify for the TN visa classification. The TN visa is not subject to a cap.

6. Hire Dependents of Employment-Based Visa Holders

Most visas do not grant dependents work authorization. However, there are a few that allow the spouses of visa holders to work in any capacity they like while they are in the U.S. with their visa-holding spouse.

E/L dependent status

Immigration regulations permit spouses of E and L visa/status to work while in the U.S. with their spouse who is working for a U.S. company. USCIS' reading of the regulations was quite narrow, requiring these spouses to apply for employment authorization after they were in the U.S. in dependent status (such as E3 or L2). These EAD cards, however, are currently taking a year or longer to be issued, minimizing this benefit substantially. However, earlier this year USCIS corrected its overly stringent reading of the immigration regulations and clarified that E and L spouses are eligible to work in the U.S. solely based on their status. This was a big win for these spouses, as they could work when they were admitted to the U.S. in L2 status as a spouse, receiving an entry designation of E2S, E3S, or L2S. This status alone allows these individuals to work in the U.S. for any employer and in any capacity if their spouse maintains their principal E or L status.

H-4 dependent status

If a foreign national is married to an H-1B visa holder who has an approved I-140 petition but is unable to file his or her Adjustment of Status Application due to per country limits, then the foreign national, if in H-4 dependent status, is eligible for an EAD card.

7. Explore Eligibility for O-1 Extraordinary Ability Visas

O-1 visas are available to individuals who have extraordinary or unique ability in the sciences, arts, education, business, or athletics. These are available for people who are at the top of their field and have ample documentation to substantiate that claim. O-1s are approved in 2-year increments and can be renewed as needed.

8. **Note that Certain Visas Are Available for Current Employees of Global Companies**

L-1A and L-1B visas allow multinational companies to transfer certain employees (executives and managers or employees with specialized knowledge) from their overseas offices to their U.S. offices.

Foreign nationals must have worked abroad as an executive or manager for the foreign company for at least one consecutive year within the last three years immediately preceding the admission to the United States to be eligible to become an L-1 intracompany transferee. As such, foreign nationals who are currently in the U.S. generally will not qualify for an L-1 visa. However, this is a great tool for bringing foreign nationals employed at multinational companies to the U.S. Not only do they fill the hiring needs, but they also have internal company knowledge and experience that benefits the U.S. company.

Conclusion

Fisher Phillips stands ready to assist you as you navigate your options to hire foreign nationals. If you have questions, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Immigration Practice Group](#). We will continue to monitor further developments and provide updates, so make sure you are subscribed to [Fisher Phillips' Insight system](#) to gather the most up-to-date information.

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