

DIDN'T MAKE THE H-1B CAP? PLANNING, NOT PRACTICE, MAKES PERFECT: 8 MORE WAYS TO EMPLOY FOREIGN NATIONALS

Insights
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If you employ foreign nationals, you likely know that the federal government already reached the H-1B visa cap for the fiscal year and informed registrants who were not selected. Although employers expected the August 23 announcement from the U.S. Citizenship and Immigration Services (USCIS) signaling the end of the H-1B cap season, the “done deal” reality inevitably leaves a number of employers and foreign national employees disappointed and wondering what to do next. While the most common and effective reactions focus on short-term or immediate alternatives, you should also be aware of some lesser-known and more long-term solutions that may ensure foreign national employment in the future through patience, perseverance – and most importantly – *planning*. What are your options for employing foreign nationals who were not chosen under FY 2023 H-1B cap?

1. Consider Additional H-1B Options

H-1B visas are available to foreign nationals with at least a bachelor’s degree (or its equivalent) working in a role deemed to be a “specialty occupation” by USCIS. The annual H-1B cap allows for 65,000 “regular” visas and 20,000 visas for workers with a U.S. master’s degree or higher.

Additionally, you should note that H-1B1s are available for nationals from Chile and Singapore, and while there is an annual cap for these visas, it’s not reached as quickly. Furthermore, some organizations are exempt from the H-1B cap, including certain non-profit organizations and

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Elissa Noujaim Pinto

Of Counsel

[248.540.7046](tel:248.540.7046)

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education institutions. This can include a U.S. employer that is not itself classified as non-profit or an education institution but will concurrently employ a foreign national who currently works in H-1B status for a qualifying non-profit or education institution.

Notably, the H-1B visa is portable. So, you may be able to hire a foreign national who is already in H-1B status working for another U.S. employer. An additional step may be required if you're seeking to hire a foreign national who has already been counted against the H-1B cap (by changing status to H-1B or by obtaining an H-1B visa abroad) but is not currently employed in H-1B status. In that situation, the foreign national would not be able to change status in the U.S. but could be the beneficiary of an H-1B petition filed for consular notification, where securing an H-1B visa at a U.S. Consulate abroad would be necessary before being admitted into the U.S. in H-1B status.

2. Temporary Business Visitors

Instead of an H-1B, B-1 visas may be available to some foreign nationals. Workers may be eligible for a B-1 visa if, for example, they are traveling to the U.S. to consult with business associates, negotiate a contract, participate in short-term training, or attend a conference that is scientific, educational, professional, or business related.

3. Transfers within Multinational Companies

L-1 visas are available to foreign nationals who work for multinational companies full-time for at least one year in the last three years and will transfer to the U.S. to work for a related entity in a position that is executive or managerial or requires specialized knowledge, as long as the foreign position was also either executive or managerial or involved specialized knowledge.

4. Country-Specific Visas

E-2, E-3, and TN visas are available to foreign nationals from certain countries that have treaties with the U.S. Professionals who are citizens of Canada and Mexico can secure TN status to work in certain professional positions (such as accountants, engineers, scientific technicians/technologist, management consultants, etc.). Citizens of Australia may be eligible for an E-3 visa to work in the U.S. in professional positions (similar to an H-1B). The E-2 classification may be available to citizens of certain treaty countries who are "managers" or "essential

employees” and will work for a U.S. employer that is owned by an organization that holds the same nationality – such as a French national working in the U.S. for a French-owned company – without any prior foreign employment with that company’s foreign entity.

5. Alternate Employment Authorization

Some foreign nationals are eligible to apply for an Employment Authorization Document (EAD). You may be able to hire a foreign national who is already working pursuant to an EAD or who is eligible for an EAD obtained through a student-based F-1 optional practical training. Additionally, foreign nationals who graduated from a STEM (science, technology, engineering, and math) program and are working in a field related to their major may be eligible for a STEM EAD prior to the expiration of their current EAD.

Employment authorization that may or may not require an EAD may also be available to foreign nationals who are eligible for work authorization through a spouse who holds certain status – such as E-1/E-2 status or L-1 status in the U.S. – or if their spouse is in H-1B status and has an approved Immigration Petition for Alien Worker (I-140). Foreign nationals who are the derivative/dependent beneficiaries of a family member’s Adjustment of Status to Lawful Permanent Residence process (I-485/green card application) may also secure an EAD while awaiting the approval of the green card.

6. Extraordinary Ability

O-1 visas are available to foreign nationals with an extraordinary ability in the sciences, arts, education, business, or athletics – or extraordinary achievement in motion picture or television industry. While these visas do not have a cap, the threshold is very high and requires substantial supporting documentation and is extremely scrutinized by the USCIS.

7. Interns and Trainees

A J-1 intern/trainee or H-3 trainee visa is available for entry level positions that involve significant hands-on training and a structured training program. These visas may require proving why the training is not available in the home country and how the foreign national will utilize the skills gained in the U.S. in future employment in the home country.

8. Think About Long-Term Solutions

A temporary short term-solution from the above list may be effective in place of or in conjunction with more long-term solutions described further below. Considering that it will be another year until the FY 2024 H-1B recipients can begin employment on October 1, 2023 (assuming they are selected under next year's cap), perhaps consider taking the following actions now to set up a great future opportunity for foreign national employment that doesn't rely entirely on next year's H-1B cap:

- **Future L-1.** If a U.S. employer has one or more foreign qualifying entities, consider hiring the foreign national abroad and strategically placing that individual in either a managerial position or a position that requires or gains specialized knowledge and skills (specific criteria for both should be discussed with a qualified immigration attorney) to set up future eligibility for the L-1 intracompany transferee. Once the foreign national has been employed with a qualifying entity for at least one year, the U.S. employer can file an L-1 petition and the H-1B is no longer needed. Similarly, a U.S. employer may be able to re-hire a foreign national who is currently not working for the global organization but still qualifies for L-1 status based the "one year in the last three years" regulatory requirement – these foreign nationals may be abroad or in the S. in another status and may not realize (or the U.S. employer might not realize) that the foreign nationals can still qualify for L-1 status even if not currently employed with the foreign qualifying entity.
- **Remote work from home country.** What triggers the need for U.S. work authorization? Physical presence in the U.S. So, if the nature of the job permits remote work, consider hiring a foreign national who will remain in the home country. Note that temporary visits to the U.S. under the non-work-authorized status of B-1 business visitor may be possible as long as the time spent in the U.S. does not involve productive work and is limited to permissible business visitor activities, such as meetings with management and colleagues, conferences, and related activities. Be aware that this strategy may also trigger unintended international tax or employment consequences (these subjects should be discussed with a qualified employment attorney).
- **Green card sponsorship.** Although this strategy would involve more cost, time, and commitment, most U.S.

employers end up sponsoring foreign nationals for green cards soon after H-1B employment begins anyway, in order to ensure the foreign national's ability to continue working beyond the 6-year maximum for H-1B status. Sponsoring an employment-based green card for the foreign national employee could take up to two years under the Labor Department's PERM Labor Certification process and would likely require the foreign national to apply for an immigrant visa at a U.S. Consulate in their home country at the end of the process. Especially if it takes multiple attempts at the H-1B lottery, the PERM labor certification process may be a quicker route to securing work authorization for a foreign national than the H-1B route (assuming the U.S. employer is willing to offer a more permanent employment situation once the green card is issued, rather than nonimmigrant temporary employment). Either way, most states allow for "at-will" employment offers, so green card sponsorship can be a useful long-term option while preserving your right (and the employee's right) to end the employment relationship.

Conclusion

When the H-1B cap is not an immediate option, and may not ever be an option, it's not necessarily practice that makes perfect, but rather planning ahead that makes for a perfect outcome. 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.