# USCIS Reaches H-1B Cap: Consider These Alternatives for Hiring Foreign Nationals

Insights
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Federal immigration officials announced on December 13 that the H-1B cap has been reached for FY 2024. Although you most likely expected the announcement, the finality inevitably leaves many employers and foreign national employees disappointed and wondering what to do next. While you're likely reviewing your options for quick fixes, it is also smart to consider some not-so-obvious, long-lasting solutions. By staying patient and planning strategically, you just might succeed in opening up employment opportunities for foreign nationals down the road. So, what's the scoop on hiring those who were not selected under the FY 2024 H-1B cap? Here are eight alternatives to explore.

**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 U.S. Citizenship and Immigration Services (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. But you may have a few additional options.

**H-1B1:** Beyond the H-1B cap lottery, H-1B1 visas are available for nationals from Chile and Singapore, and while there is an annual cap for these visas, it is not filled as quickly.

**Cap-exempt employers:** Some organizations are exempt from the H-1B cap, including certain non-profit organizations and education institutions. This can even 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 works in H-1B status for another qualifying non-profit or education institution.

**H-1B portability:** What if your candidate was previously approved for an H-1B visa? 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.

**2. Temporary Business Visitors**

If your candidate will only need to be in the U.S. for a short period of time, B-1 visas may be available to some. 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 accessible to foreign national employees who have been employed on a full-time basis by multinational companies for at least one year in the last three years and intend to 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 cater to individuals from specific countries with established treaties with the United States and provide distinct opportunities. Professionals hailing from Canada and Mexico may leverage the TN status for roles that involve accountancy, engineering, scientific technology, and management consulting. Additionally, Australian citizens are eligible for the E-3 visa, designed to facilitate their engagement in professional positions akin to those covered by the H-1B category.

Notably, individuals pursuing E-2 classification must hold citizenship in designated treaty countries and serve in managerial or essential roles for a U.S. employer owned by an organization sharing the same nationality.

**5. Alternate Employment Authorization**

Some candidates are eligible to apply for an Employment Authorization Document (EAD). You may consider hiring individuals who are already employed under an EAD or those eligible for an EAD obtained through F-1 optional practical training as students. Additionally, individuals who have completed a STEM (science, technology, engineering, and math) program and are working in a field related to their major might qualify for a STEM EAD before their current EAD expires.

Furthermore, some foreign nationals may be eligible for employment authorization, with or without an EAD, through their spouse's specific immigration status—such as E-1/E-2 or L-1 status in the U.S. If their spouse holds H-1B status with an approved Immigration Petition for Alien Worker (I-140), they may also qualify. Moreover, foreign nationals who are dependents in the process of Adjustment of Status to Lawful Permanent Residence (I-485/green card application) through a family member may obtain an EAD while awaiting green card approval.

**6. Extraordinary Ability**

Foreign nationals demonstrating extraordinary ability in sciences, arts, education, business, or athletics — or extraordinary achievement in the motion picture or television industry — can apply for O-1 visas. Unlike certain visas, O-1 visas don't have a numerical limit, but obtaining one is a formidable challenge. Applicants must be prepared to meet a high threshold, supply substantial supporting documentation, and face rigorous scrutiny by USCIS.

**7. Interns and Trainees**

For entry-level roles featuring substantial hands-on training and a structured training program, individuals may consider applying for a J-1 intern/trainee or H-3 trainee visa. To secure these visas, there is a need to demonstrate why the training isn't readily accessible in the home country and articulate how the skills acquired in the U.S. will be applied in future employment back home.

**8. Long-Term Solutions**

A temporary and immediate solution from the above options might prove effective either as a stand-alone measure or in tandem with the more enduring solutions detailed below. H-1B recipients can commence employment on October 1, 2024 (provided they are chosen under the upcoming year's cap). Given the timeline until FY 2025, you should consider taking proactive steps now to set up a 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 them in a managerial role or a position requiring specialized knowledge and skills. (It is crucial to discuss the specific criteria for both positions with a qualified immigration attorney.) This move lays the groundwork for future eligibility for an L-1 intracompany transfer.

  After the foreign national has worked with a qualifying entity for at least one year, the U.S. employer can initiate the L-1 petition, rendering the H-1B unnecessary. Additionally, a U.S. employer might have the opportunity to rehire a foreign national who is currently not part of the global organization but still qualifies for L-1 status based on the regulatory requirement of "one year in the last three years." These foreign nationals might be overseas or in the U.S. under another status, and they or the U.S. employer may not be aware that they can still meet the qualifications 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. Therefore, if the job allows for remote work, consider the option of hiring a foreign national who will work from their home country. It's worth noting that temporary visits to the U.S. under the non-work-authorized status of a B-1 business visitor may be feasible, provided the time spent in the U.S. doesn't involve productive work and is restricted to allowable business visitor activities like meetings, conferences, and related engagements with management and colleagues. However, be mindful that this approach might inadvertently lead to

management and colleagues. However, be mindful that this approach might inadvertently lead to international tax or employment implications (issues that should be thoroughly discussed with a qualified employment attorney).

- **Green card sponsorship**: While this approach involves greater costs, time commitments, and dedication, many U.S. employers ultimately opt to sponsor foreign nationals for green cards shortly after initiating H-1B employment. This is done to secure the foreign national's eligibility to continue working beyond the six-year maximum for H-1B status. Sponsoring an employment-based green card for the foreign national may take up to two years under the Labor Department's PERM Labor Certification process. Towards the end of this process, it is likely that the foreign national will need to apply for an immigrant visa at a U.S. Consulate in their home country.

  When multiple attempts at the H-1B lottery are necessary, the PERM labor certification process might offer a faster route to obtaining work authorization for a foreign national. This assumes, of course, that the U.S. employer is willing to provide a more permanent employment arrangement once the green card is issued, rather than a nonimmigrant temporary employment situation. In any case, most states permit "at-will" employment offers, making green card sponsorship a viable long-term option while preserving the right for both the employer and the employee to terminate the employment relationship.

**Conclusion**

While the H-1B cap has closed for FY 2024, Fisher Phillips stands ready to assist you as you navigate next year's H-1B selection process and alternative solutions. 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 on this process, so make sure you are subscribed to Fisher Phillips' Insight System to gather the most up-to-date information.

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