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H-1B FILING STRATEGIES, EXEMPTIONS AND ALTERNATIVES

Each year, U.S. Citizenship and Immigration Services (“CIS”) exhausts the full quota of 65,000 “bachelor’s degree” H-1Bs and the additional 20,000 quota for U.S. advanced degree holders. These quotas are exhausted quickly each year. As a result, many foreign students and employers seek alternatives to the H-1B. In addition, some employers qualify for an exemption from the H-1B quota.

The following is a summary of “exempt” employers, and alternatives to the H-1B, which may allow a foreign graduate to remain and work in the United States after graduation.

H-1B filing strategies

Before addressing exempt organizations and alternatives to the H-1B, the following is a summary of common issues regarding the H-1B quota:

- The 20,000 “advanced degree” quota is only available for individuals who possess an advanced degree from a US university at the time of filing. If you are in an advanced degree program, but have not yet completed the program at the time of filing, you do not qualify for the 20,000 quota. However, you still qualify to file in the 65,000 quota, if your undergraduate degree is related to the H-1B job.
- You can file an H-1B petition even if a diploma has not yet been issued for your current degree program, but **ONLY** if you have confirmation from the university official at your school who is responsible for conferring degrees that you have completed all requirements for the degree. It is not sufficient to get a letter that you “will” complete the degree after the H-1B petition is filed. The individual who confers degrees is typically the provost, or similar official, not a department chair.
- You can file H-1B petitions through multiple employers, but you cannot file multiple H-1B petitions with the same employer.
- Filing the H-1B petition using “premium processing” (15 day processing) does not give you a better chance of being selected in the quota. The only advantage of filing using premium processing is that you will know more quickly if you have been selected in the quota. When CIS is selecting cases in the H-1B lottery process, they gather all cases filed (premium and non-premium), and select the 85,000 cases for processing from the total

pool of applications. Once the cases are selected, CIS will send out receipt notices for the cases selected for processing. Premium processing cases will get the receipt notices by email, while “regular” processing cases will be notified by mail. Once the cases are selected in the lottery, and the receipt notices are sent, then CIS will adjudicate the case to approve the H-1B or deny it.

For individuals who are not selected in the H-1B quota, the following is a summary of employers who are “exempt” from the quota, and alternatives to the H-1B.

Organizations exempt from the H-1B quota

Certain organizations are exempt from the H-1B quota. Exempt organizations can file H-1B applications at any time, regardless of the quota. Exempt organizations include:

- Universities
- Non-profit organizations affiliated with universities (such as research facilities or hospitals)
- Non-profit research organizations, engaged primarily in basic or applied research
- Governmental research organizations (federal, state, or local government)

Note that there is no blanket exemption for “non-profits.” To be exempt from the quota, the non-profit either must be affiliated with a university, or must be a non-profit “research organization.”

Alternatives to the H-1B

Here are alternative visa categories that may allow work in the US:

1. **Optional Practical Training.** F-1 students can work in the U.S. for up to 12 months using Optional Practical Training (OPT). They can stay in the U.S. for 60 days after expiration of their OPT, but cannot work during that time.
2. **STEM Extension.** F-1 graduates in “STEM” degree programs (Science, Technology, Engineering, Mathematics) can obtain an additional 24 months of OPT (for a total of 36 months) if they are employed by an employer which registers for the federal “E-verify” program. E-verify is an electronic program to verify the employment authorization of employees in the U.S. The employer and the student must also develop a detailed “training” program with measurable training objectives, and mechanisms for monitoring progress towards those objectives.
3. **TN status (Canadians and Mexicans).** Under the NAFTA treaty, citizens of Canada and Mexico can work in the U.S. in TN status in certain designated jobs or professions listed in the treaty. Common TN occupations include engineer, architect, computer systems analyst, management consultant, hotel manager,

registered nurse, social worker, librarian, dentist, statistician, and physical therapist. Individuals who qualify for TN status can work in the U.S. in three year increments, renewable indefinitely.

4. **H-1B1 (Chileans and Singaporeans).** There is a special quota of 6,800 “H-1B1” visas available to citizens of Chile and Singapore. Like the H-1B, H-1B1 status requires that the applicant possess a bachelor’s degree or the equivalent, and the job must require at least a bachelor’s degree as a minimum entry level requirement. H-1B1 status is granted in one year increments. Unlike H-1B, individuals in H-1B1 status must have an unabandoned foreign residence to which they intend to return.
5. **E-3 for Australians.** Under a treaty of trade with Australia, the United States allows the citizens of Australia to qualify for E-3 status. Like H-1B, the applicant must possess a bachelor’s degree or the equivalent, and must work in a job that requires a bachelor’s degree. E-3 status is issued in two year increments, renewable indefinitely. There is a quota of 10,500 E-3 visas available. It is unlikely this quota will ever be exhausted.
6. **E-1 and E-2 status.** Certain countries have treaties of trade or commerce with the United States. Citizens of countries that have a treaty of trade or commerce with the United States can qualify for E-1 or E-2 status. E-1 allows an individual of a treaty country to start his/her own business in the U.S. to engage in trade with their home country (at least 50% of the trade must be with the individual’s country of citizenship). The individual can also work for a company which is majority owned by citizens of the individual’s country of citizenship, also engaged in substantial trade between the U.S. and the country of citizenship. E-2 status allows an individual from a treaty country to start his/her own business in the United States, provided that the business requires substantial “investment” in the United States. The individual can also work with a company in the U.S. owned at least 50% by nationals of the individual’s country of citizenship, provided that the business represents a substantial investment in the United States. These are very complicated visas but can be excellent options in appropriate circumstances. For example, a citizen of France could open up his/her own financial consulting business, or work for a French-owned financial consulting organization in the U.S. Notable countries which do not have treaties of trade or commerce with the U.S. include China and India. A listing of eligible countries is attached.
7. **L-1 Visa.** L-1 visas are for individuals who have worked for a company outside of the U.S. for at least one year, who will now work in the U.S. for a parent, branch, subsidiary or affiliate of the same company. L-1 visas are available to allow individuals to work in managerial or executive positions, or positions which require “specialized knowledge” of the company’s operations, technology, etc.
8. **O Visas.** O visas are available for individuals with extraordinary ability in their particular field of expertise. This can be shown by significant contributions to a particular field of expertise, peer-reviewed publications, presentations at

important conferences, national or international prizes or awards, serving as a judge of the work of others, and other objective evidence of the individual's reputation as a leader in a particular field of expertise.

9. **J-1 visas are for “trainees” or “interns”** who have earned degrees **outside the U.S.** and/or who have certain work experience **outside the U.S.** Eligibility requirements for these programs are as follows:

J-1 Intern

Students and recent graduates may qualify to participate in a J-1 “intern” program, but only if they:

- Are currently enrolled in and pursuing studies at a post-secondary academic institution outside the U.S.; or
- Have graduated from a post-secondary academic institution outside the U.S. no more than 12 months prior to their J-1 program start date.

J-1 Trainee

As an alternative, foreign nationals may participate in a J-1 “trainee” program if they:

- Have a degree or professional certificate from a post-secondary academic institution outside the U.S. **and** at least one year of prior related work experience outside the U.S. in the occupational field in which they are seeking training; or
- Have five years of work experience outside the U.S. in the occupational field in which they are seeking training.

If you satisfy these factors, and you have a company willing to host you for a training program, this may be an option.

10. **Green Card.** Pursuing a permanent resident green card may provide a basis for continued work in the U.S. Although this is of limited use for citizens of China and India because of quotas, a green card for citizens of other countries may be a useful option, especially for students eligible for STEM OPT. There may also be family-based options for permanent residence.
11. **Work Outside the U.S.** A foreign graduate can work for an employer outside the U.S. without a U.S. work visa.
12. **Return to School.** Many foreign graduates re-enroll in school in F-1 status if they miss the H-1B quota.

Eligible Countries for E-2

Albania	Croatia	Kyrgyzstan	Serbia
Argentina	Czech Republic	Latvia	Singapore
Armenia	Denmark	Liberia	Slovak Republic
Australia	Egypt	Lithuania	Slovenia
Austria	Estonia	Luxembourg	Spain
Azerbaijan	Ethiopia	Macedonia	Sri Lanka
Bahrain	Finland	Mexico	Suriname
Bangladesh	France	Moldova	Sweden
Belgium	Georgia	Mongolia	Switzerland
Bolivia	Germany	Montenegro	Taiwan
Bosnia & Herzegovina	Grenada	Morocco	Thailand
Bulgaria	Honduras	Netherlands	Togo
Cameroon	Iran	Norway	Trinidad & Tobago
Canada	Ireland	Oman	Tunisia
Chile	Italy	Pakistan	Turkey
Colombia	Jamaica	Panama	Ukraine
Congo (Brazzaville and Kinshaha)	Japan	Paraguay	United Kingdom
Costa Rica	Jordan	Philippines	Yugoslavia
	Kazakhstan	Poland	
	Korea (South)	Romania	
	Kosovo	Senegal	

Eligible Countries for E-1

Argentina	Ethiopia	Liberia	Spain
Australia	Finland	Luxembourg	Suriname
Austria	France	Macedonia	Sweden
Belgium	Germany	Mexico	Switzerland
Bolivia	Greece	Montenegro	Taiwan
Bosnia & Herzegovina	Honduras	Netherlands	Thailand
Brunei	Iran	Norway	Togo
Canada	Ireland	Oman	Turkey
Chile	Israel	Pakistan	United Kingdom
Colombia	Italy	Paraguay	Yugoslavia
Costa Rica	Japan	Philippines	
Croatia	Jordan	Poland	
Denmark	Korea (South)	Serbia	
Estonia	Kosovo	Singapore	
	Latvia	Slovenia	

