

## Summary of Non-immigrant Visa Options

Temporary work visas typically require some form of employer sponsorship for work permission on behalf of an employee that is temporary in nature and associated with a specific purpose. There are numerous types of non-immigrant work visas designated by combinations of numbers and letters, many of which are associated with professional positions that often require the minimum of a bachelor's degree.

### H-1B Temporary Work Visas

The H-1B is a commonly utilized work visa that permits a foreign national to work for an employer in the U.S. in a "specialty occupation" requiring at least a bachelor's in specialized area (or its equivalent) as a minimum for entry into the occupation in the United States. Examples: physician, software engineer, chemist, etc.

One can work for up to six years in H-1B status, or longer, under certain conditions. An employer can petition for H-1B work authorization on behalf of a foreign national for up to three years at a time, subject to the individual's six year limitation in H-1B status. These petitions are filed within the U.S. with the immigration service.

### H-1B Quotas/Caps

The government has a "basic quota" or numerical cap of only 65,000 new H-1B visas per fiscal year (with some limited exceptions). In addition to the basic H-1B quota, up to 20,000 exemptions from the H-1B quota per fiscal year are available for individuals who have earned a master's degree or higher from a U.S. university ("Master's Quota"). An employer may petition for a new H-1B visa as early as six months in advance of the expected start date. In recent years, this has meant applications could be filed on April 1<sup>st</sup>, i.e., six months before October 1<sup>st</sup>, the beginning of the federal government's fiscal year.

As indicated below, over the last four years, H-1B quotas have been reached earlier and earlier each year.

<b>Year</b>	<b>Basic Quota Reached</b>	<b>Master's Quota Reached</b>
2007	April 3, 2007	April 30, 2007
2006	May 26, 2006	August 1, 2006
2005	August 12, 2005	January 19, 2006
2004	October 1, 2004	N/A

In April 2007, the immigration service received approximately 119,000 applications for the 65,000 slots within the first two days petitions could be filed. The odds of making next year's quota will be no better.

If an employer desires to hire a candidate who requires new, cap-subject H-1B sponsorship, the odds of making next year's quota depend upon the educational background of the candidate. If the candidate holds at least a U.S. master's degree or higher, he or she has a decent chance of making the quota within the first week of April 2008. **However, if the person is only eligible for the basic quota, filing a petition on the first day does not guarantee a visa number.**

### H-1B Quota Exemptions

*Quota Exempt Individual* -The primary H-1B quota exempt group most employers will likely encounter is individuals who have been granted H-1B status and have been counted against a previous quota. **It is important to keep in mind that not all H-1B's have been counted against the quota. It is possible that you might have a candidate who**

**worked at a university or a qualifying non-profit employer and was never subjected to the cap. In order to change from a cap-exempt employer to a cap-subject employer, there must be an H-1B visa number available. Therefore, it is important to determine whether or not an existing H-1B candidate has been subjected to the quota.**

The law permits an existing H-1B employee to start with a new H-1B employer upon the new company's filing of its own petition with the immigration service. It is best to wait and receive confirmation that the petition is on file. The immigration service will issue a Receipt Notice within 2 to 3 weeks of receiving a petition. At that point, the employee could begin work with the new employer. It is possible to expedite the process by paying an additional \$1,000 for Premium Processing service of the petition, and such service may be highly advisable in certain situations.

*Cap Exempt Employers* – The following types of employers are exempt from the H-1B visa quotas:

- Institutions of higher education
- Non-profit entities related to or affiliated with an institution of higher education
- Non-profit research organizations
- Governmental research organizations
- Employees of for-profit entities employed at cap exempt entities

Any claims based upon relationships or affiliations with qualifying institutions or organizations are subject to review independent of other cases. It is possible that an examiner might, under the current rules, erroneously reject a cap exemption claim. It is also possible that the current rules or, more importantly, the interpretation of those rules, may change. If either occurs and no visas are otherwise available, an employer may not be permitted to employ the sponsored individual. Similarly, any claims for a cap exemption based upon employment "at" (as opposed to "for") a cap exempt entity may face similar scrutiny. Given the lack of H-1B visa numbers under the quota, the ability of an employer to qualify as cap exempt can be a significant recruitment tool.

#### L-1 Intra-Company Transferees

U.S. employers that have qualifying relationships with an international parent, branch, affiliate or subsidiary may petition for L-1 visas on behalf of qualifying employees to work in the U.S. Some employers may even qualify to petition for what is referred to as a "blanket L-1 petition," which can expedite the processing and transfer of potential L-1 employees.

There are two classifications of L-1 visas, the L-1A, for executives and managers, and the L-1B, for specialized knowledge workers. In order to qualify for L-1A status, a person must have worked for an affiliated entity for one of the immediately preceding three years outside of the U.S. in an executive or management position, to include high-level functional (i.e., non-supervisory) managers. To qualify for an L-1B, a person must have worked for the affiliated entity for one of the immediately preceding three years outside of the U.S. in a qualifying position. It is critical that an L-1B visa applicant prove that he or she has "specialized knowledge" of the company's products or processes relevant to the position in the U.S.

Unlike the H-1B visa, there are no numerical quotas or strict degree requirements on L-1 visas. Additionally, many of the H-1B requirements and filing fees are not applicable. While there is no hard prevailing wage requirement, it is important to use a "rule of reason" when

setting L-1 workers' pay for work in the U.S., to reflect a managerial or specialized knowledge status for the worker.

#### Candidates with Extraordinary Ability

A select number of candidates may be eligible for an O-1 visa, if they possess extraordinary ability in sciences, arts, education, business, or athletics. An O-1 visa can be issued for up to 3 years with the ability to extend the visa in 1 year increments. An O-1 visa holder is able to pursue permanent resident status. These visas are extremely difficult to obtain because they require an extraordinary amount of work and involve an extraordinary amount of subjective judgment on behalf of the immigration service. These cases are filed within the U.S. with the immigration service. If the H-1B visa or other treaty-based visa is available, those routes are preferable in most cases.

#### J-1 Waivers for Physicians

All foreign medical graduates in residencies or fellowships on a J-1 visa are subject to a two year home residence requirement. It is possible to obtain a waiver of this requirement and employ a physician in H-1B status. An option exists for Veterans Affairs' facilities to petition for a J-1 waiver on behalf of a physician. Another popular option is to request that a state act as an "interested government agency" and recommend a waiver for the physician. Waivers are available for up to thirty physicians per year under the Conrad program. A physician has to agree to be employed, and an employer must commit to employ the physician, in a medically underserved area on a full-time basis for a period of three years to qualify for a waiver. States have wide discretion in granting requests for a waiver recommendation, but counsel can make a fair assessment of such a case prior to initiation.

#### Treaty-based Options

There are other employment visa options to consider for candidates from certain countries. Many employers have utilized the TN visa for professionals from Canada and Mexico, pursuant to NAFTA. More recent additions to the "alphabet soup" of employment visas include H-1B1, for citizens of Chile or Singapore, and the E-3 visa for Australians. If the option is available, however, the basic H-1B might be preferable to these other categories for a variety of reasons. If a candidate requires employer sponsorship and a required H-1B visa is not available, an employer may ask whether a candidate is a citizen of Canada, Australia, Chile or Singapore. If so, then one of these visas might be applicable.

The following is an overview of these Treaty-Based Options:

TN Visas – Commonly used work visa for qualified citizens of Canada and Mexico in specified occupations. These visas are valid for one (1) year and can be renewed indefinitely, but one cannot normally pursue permanent resident status while in TN status. A TN application can be made at the Canadian border, the Mexican consulate, or in the U.S. with the immigration service.

H-1B1 - Pursuant to agreements between the U.S. and Chile and Singapore, a total of 6,800 (1,400 Chile/5,400 Singapore) visas are available for citizens in "H-1B qualifying positions" from these two countries. These visas are valid for one (1) year periods and can be renewed indefinitely, but one cannot pursue permanent resident status as an H-1B1 visa holder. An H-1B1 application can be made at a consulate office in Chile or Singapore, or in the U.S. with the immigration service.

E-3 Visas – Pursuant to an agreement between the U.S. and Australia, there are 10,500 visas available for Australian citizens in "H-1B qualifying positions." These visas are

valid for two (2) year periods and can be renewed indefinitely, but one cannot pursue permanent resident status as an E-3 visa holder. An E-3 application can be made at a consulate office in Australia, at select consulates in Canada, or in the U.S. with the immigration service.

#### Visa Options for Non-Degreed Positions

There are two temporary commonly used visa classifications available for positions that do not require higher education. An employer in need of temporary agricultural workers may petition for H-2A visas. Employers with a need for employees that qualify as a one-time occurrence, seasonal, peakload, or an intermittent need may petition for H-2B visas. Both programs are designed to fill temporary needs and are not available for year-round occupations. Additionally, both entail a recruitment requirement for U.S. workers and require an employer to comply with certain conditions of employment. Although there is no quota on H-2A visas, there is an annual quota of 66,000 for H-2B visas. In past years Congress has granted some limited relief for H-2B employers that is set to expire. The prospect of future relief is uncertain and the quota of 66,000 visas may be exhausted by early 2008, leaving many H-2B employers in a very difficult situation.