

## Immigration Lottery Ticket Not Selected? 6 Options in Lieu of H-1B

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On April 7, 2016, the **U.S. Citizenship and Immigration Service (USCIS)** announced that it had received “enough” H-1B petitions to reach the statutory cap – 236,000 for the combined 65,000 visas for fiscal year 2017 and the 20,000 additional petitions filed under the advanced degree exemption. On April 9, the lottery process – the computer-generated random selection system – selected the 85,000 and receipts are now being received for those petitions selected.

**The statistics are stark: there were, once again, more than three times the number of H-1B petitions submitted than will be selected.** Multiple employers in nearly every professional field are waiting to find out if their lottery ticket is a winner: if their engineer, healthcare analyst, accountant, winemaker, international financial analyst, IT genius, etc. that they need for their business can be hired. Over two thirds will be very disappointed. While there is no perfect solution, there are 6 visa options that, depending on the facts, may be at least a temporary solution.

**1. Cap Exempt H-1Bs/“At” Exemption/Concurrent H.** Certain entities and certain foreign nationals are exempt from the H-1B caps and may provide a way to avoid the cap. These examples are:

- employees of institutions of higher education;
- employees of nonprofit affiliates of institutions of higher education ( including some hospitals);
- employees of government or non-profit research organizations;
- employees who are employed by a for-profit entity or a non-profit non-affiliated entity, but who are placed “at” an exempt entity, such as an affiliated hospital, university or research facility, to perform work “directly and predominately to further the essential purposes of the qualifying exempt institution;”
- employees who have an H-1B for part-time work for an exempt entity may also work for a non-exempt employer who has filed a concurrent H petition for the employee; that concurrent H-1B petition is exempt from the cap;
- an employee who was counted against the H-1B cap for a job in the last 6 years and has not been outside the U.S. for one year.

**2. F-1 Optional Practical Training (OPT).** Graduates from U.S. universities qualify for one year of work on their student visa in their field on OPT. Those who have a STEM degree may work in their field for an additional 17 months if the employer is enrolled in E-Verify. Effective in May, those with a STEM degree may work an additional 24 months; those on a current 17 month STEM extension may have it increased to 24 months if they still have 5 months remaining on the original extension. More employers may benefit not only due to the extension, but also because prior degrees may be considered, not just the most current degree. This may enable a STEM extension for a foreign national with, for example, an MBA (not a STEM), and a prior STEM (engineering) bachelor’s degree.



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**3. NAFTA Visa (“TN”).** A TN is an excellent option for a Canadian or Mexican professional. Jobs that qualify are listed in Appendix 1603.D.1 to NAFTA and include most jobs that are typical for H-1Bs. A TN is good for 3 years, is renewable and is an economical, efficient solution for these nationals.

**4. O-1A Visa:** Extraordinary Ability. Certain foreign nationals who qualify for an H-1B specialty occupation may qualify for the O-1A if they have “extraordinary ability or achievement” in science, arts, education, business, athletics or the motion picture/television industry. There is no quota for Os and if your candidate has an advanced degree and national or international recognition, an O can be a viable alternative and is worth exploring.

**5. J-1 Visa for Intern or Trainee.** Foreign national employees on a J visa are typically brought in through an umbrella organization that serves as the sponsor and the employer is the host company. While these are short-term visas (12 months for an intern, 18 for trainee), and typically require a training program, some employers have found them very useful, particularly if the specific J does not require the person to return to their home country for two years.

**6. Country Specific Visas: E-3/H-1B1.** An E-3 visa is available to Australian nationals for work in a specialty occupation, just like those for an H-1B. While there is a quota, it almost never fills. The H-1B1 visa is available for professionals from Chile (1,400 annually) and Singapore (5,400 annually).

In addition to these 6 options, there may be others, such as Curricular Practical Training for part-time work if your proposed employee can enroll in a new degree program as an F-1; an L visa, if the desired employee is employed by an affiliate of your company overseas; or even an E-2 investor or trader visa.

All of the visa options are fact-specific and the utility and efficacy of each is driven by the needs of the employer and the country and abilities of the foreign national. The key for the employer is to make that evaluation with an immigration lawyer, exploring all options before deciding to give up on hiring a very desirable employee.

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