

# Contingency Planning for the Upcoming H-1B Season

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Initial H-1B petitions are counted against the annual H-1B “cap.” This limit, administered by U.S. Citizenship and Immigration Services (USCIS), is currently set at 65,000 visas per year, plus an additional 20,000 visas per year reserved for those who hold an advanced degree from a U.S. college or university.

The need for H-1B nonimmigrant workers in the United States continues to grow without a corresponding increase in the number of visas available. The rapidly increasing demand for H-1B visas combined with the short supply of available visas means that with each passing year, hopeful H-1B beneficiaries are placed in a lottery system. Unfortunately, the odds of any particular petition being selected to receive a visa become commensurately lower as more visa petitions are filed. In last year’s H-1B cap season, over 233,000 H-1B cap petitions were filed with USCIS—resulting in an approximately one-in-three chance of an H-1B cap petition being selected for processing and adjudication.

International students who will work for a college or university do not have to worry about H1-B caps because H-1B petitions filed by colleges and universities are cap-exempt, (that is, H-1B visas are always available to employees of these institutions). However, if an international student’s path takes him or her beyond academia; it is worthwhile considering other visa categories as viable contingencies.

## **Optional Practical Training and STEM Extension**

One option for foreign employees who are working pursuant to an Optional Practical Training (OPT) Employment Authorization Document (EAD) is a 17-month work authorization extension for graduates with

degrees in Science, Technology, Engineering, and Math (STEM). This option is available if: (1) an employer has enrolled in the E-verify program, (2) the OPT EAD employee works at a location where employees are E-verified, and (3) the employee has a STEM degree (the [U.S. Immigration and Customs Enforcement website](#) lists USCIS-recognized STEM degrees). If all of these facts apply to an employer and foreign worker, then the employee should be able to benefit from a 17-month extension of work authorization.

There is much uncertainty about the future of the STEM OPT extension. On October 16, 2015, the [Department of Homeland Security \(DHS\)](#) published proposed new rules for STEM extensions. The proposed rule addresses many of the issues that were subject to a contentious litigation. We anticipate the following outcome in the next few months:

1. Reauthorization of the STEM OPT program;
2. An increased STEM OPT extension period from 17 months to 24 months; and
3. Clearer definitions of STEM fields of study and additional degree programs eligible for STEM OPT extension.

### **Options for Citizens of Certain Countries**

Another factor to consider is the student's country of citizenship as there are several visa categories set aside for citizens of specific countries.

For example, citizens of Singapore and Chile are eligible to pursue H-1B1 nonimmigrant status under the terms of legislation implementing the United States-Chile Free Trade Agreement and the United States-Singapore Free Trade Agreement. That legislation set aside up to 6,800 H-1B1 visas total from the H-1B cap for citizens of Singapore and Chile. To date, the maximum of 6,800 visas has never been reached.

Australian citizens are eligible for E-3 visas as an option for ongoing work authorization. Like the Chile and Singapore H-1B1, the E-3 visa is the result of a treaty between the United States and Australia.

The eligibility criteria for the H-1B1 and E-3 nonimmigrant categories are similar to those for H-1B nonimmigrant status.

Canadian and Mexican citizens are eligible to pursue TN nonimmigrant status. TN nonimmigrant status requires an employee to work in a TN-designated professional occupation. The website of NAFSA: Association of International Educators lists the TN professional positions.

### **Visa Options for Foreign Nationals of Extraordinary Ability**

The O-1 nonimmigrant visa category is for foreign nationals who have extraordinary ability and recognition in their area of expertise. To qualify for an O-1 visa, the visa beneficiary must demonstrate “extraordinary ability” by sustained national or international acclaim.

This is a fairly high standard that can be demonstrated through extensive documentation. Some of the documentation required includes:

- A recognized award, such as a Nobel Prize; or in lieu of a recognized award, at least three of the following:
  - A lesser recognized national or international prize or award;
  - Membership in an association that requires outstanding achievement as a criterion for membership, as judged by recognized national or international experts;
  - Published material about the individual in professional or major trade publications or other major media;
  - Evidence of the individual’s participation on a panel or, individually, as a judge of the work of others;
  - Evidence of original scientific, scholarly, artistic, athletic, or business-related contributions of major significance;
  - Evidence of the individual’s authorship of scholarly articles in the field, in professional journals, or other major media;
  - Evidence that the individual has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation; or
  - Evidence that the individual has either commanded a high salary or will command a high salary or other remuneration for services, as evidenced by contracts or other reliable evidence.

## **Conclusion**

As shown above, if an employer’s H-1B petition is not selected under the cap, there are still several ways in which a foreign student in conjunction with his or her employer can remain in the United States

## **TOPICS**

Higher Education, Immigration