

*U.S. Immigration Options for Graduating Students  
and Other Professionals – A Smorgasbord of Choices*®

By Bernard P. Wolfsdorf and Naveen R. Bhora

While the H-1B specialty occupation visa is the best known temporary work visa, the reduction in the number of visas available requires that foreign graduating students and other professionals carefully explore the full range of options available and plan ahead. This year, the quota was exhausted in the first two days of applications and approximately half the cases filed under the bachelor's degree quota were rejected.

***I. What is the H-1B?***

The H-1B specialty occupation visa program is critical for foreign graduating students, exchange visitors and professionals seeking to work in the United States. Competition for these visas has intensified with the permanent reduction of the H-1B quota from 195,000 to 65,000 (referred to as "the cap") starting on October 1, 2003. The scarcity of these visas has made it increasingly difficult for U.S. employers to hire qualified foreign professionals. In an effort to alleviate the crisis, the following year President Bush signed an Act to permanently exempt an additional 20,000 H-1B visas from the cap for graduates holding advanced degrees from U.S. institutions.

Nevertheless, the situation has become chronic with H-1B visas running out at an increasingly accelerated pace each year. Applicants and employers have become increasingly aware of the significant consequences of being caught in the cap and rush to apply on the very first day, April 1, or as close to that date as possible. As a result, this year, the USCIS conducted a lottery to select 85,000 petitions from the 163,000 petitions received during the filing period ending on April 7, 2008. USCIS first randomly selected 20,000 petitions under the advanced degree exemption. Those petitions not selected under the advanced degree category joined the random selection process for the cap-subject 65,000 limit.

Now that the cap has been reached, no H-1B petitions will be accepted for adjudication, except for a limited category of exemptions discussed below. All other potential H-1B candidates will have to wait until April 1, 2009 to file their H-1B petitions. Even if these petitions were to be approved, such H-1B classification would only provide work authorization starting in October 1, 2009.

***II. My client obtained an H-1B but it does not start until October 1.***

If your client is able to secure an H-1B, you should consider how to maintain his or her

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legal status in the U.S. until the H-1B starts on October 1. Maintaining work authorization or legal status during the crucial period between the expiration of a previous status and the actual H-1B start date is what has become known as the problem of the “gap in the cap”.

### ***H-1B “Cap-Gap” Relief***

USCIS is authorized to extend the status of F-1 students caught in a “cap-gap” between the end of the student’s optional practical training (“OPT”) and the start date of an approved H-1B petition. This cap-gap extension automatically becomes effective when the H-1B cap has been reached and the student has an H-1B petition filed on his/her behalf during the acceptance period.

- The interim rule automatically extends the F-1 status and employment authorization of an F-1 student who has filed an H-1B petition that has been granted by, or remains pending with USCIS. This means that:
  - If an H-1B petition is filed and pending, the F-1 student’s status and employment authorization is automatically extended while the petition is pending.
  - If the H-1B petition filed on behalf of the student is selected as a “cap case,” the F-1 student may remain in the United States and continue working until the October 1 start date indicated on the petition.
  - Once USCIS rejects, denies or revokes a pending H-1B petition, the automatic status and employment authorization ends. The F-1 student has the standard 60-day grace period (from notification of the denial, rejection or revocation of the petition) before he or she is required to depart the United States.

Students do not automatically receive notification when they have a cap-gap extension. Students should request a new I-20 from their school.

### ***Timing and Eligibility:***

- Unlike the extension of OPT, which is limited to F-1 students who have obtained degrees in the science, technology, engineering or mathematics (STEM), the extension of status for F-1 students in a cap-gap situation applies to all F-1 students with pending H-1B petitions.
- The “cap-gap” relief only applies to F-1 students who apply for “change-of-status” petitions and not to those who elect consular processing.
- A student must be in valid OPT status for the cap-gap extension of status and employment authorization provision to apply. If the student’s OPT has already expired before the H-1B acceptance period, the student is not eligible for “cap-gap” relief.

- A student may apply for STEM OPT extension while the student is in the extended period of cap-gap OPT, but the H-1B employer will have to withdraw the H-1B petition before the change-of-status occurs on October 1, assuming the student does not wish to pursue the H-1B.

***Travel During Cap-Gap Extension Period:***

An F-1 student who travels outside of the United States during a cap-gap extension will not be able to return to the United States in F-1 status. The F-1 student must be prepared to apply for an H-1B visa at a consular post prior to returning and must therefore wait until the start date of October 1.

***Practice Pointer:*** An H-1B applicant may enter the United States up to 10 days prior to the start date, i.e. September 20.

***Periods of Unemployment During OPT***

- F-1 students on regular OPT (12 months) may have up to 90 days of unemployment
- F-1 students who have an approved 17-month OPT period are entitled to an additional 30 days of unemployment, for a total of 120 days over their entire OPT period.
- The 90-day limitation on unemployment applies to F-1 students during the cap-gap extension.

Students who exceed the period of unemployment are considered to have violated their status.

***What Counts as “Unemployed” Time?***

Each day during the period when OPT authorization begins and ends that the student does not have qualifying employment counts as a day of unemployment. The only exception is that periods of up to 10 days between the end of one job and the beginning of the next job will not be included in the calculation for time-spent unemployed.

***What Type of Employment is Allowed For Students on OPT?***

The employment must be in a job that is related to the student’s degree program. This employment may include:

- **Paid employment** – students may work part-time (at least 20 hours per week) or full-time
  - **Multiple Employers:** students may work for more than one employer, but all employment must be related to the student’s degree program

- Short-term multiple employers (performing artists): students, such as musicians and other performing artists may work for multiple short-term employers (gigs). If a student has a variable schedule, it should average out to 20 hours/week within a month. The student should maintain a list of all gigs, the dates and duration.
  - Work for hire: commonly referred to as 1099 employment where an individual performs a service based on a contractual relationship rather than an employment relationship.
  - Self-employed business owner: students on OPT may start a business and be self-employed. In this situation, the student must work full-time. The student must be able to prove that s/he has the proper business license and is actively engaged in a business related to the student's degree program.
  - Employment through an agency: students must be able to provide evidence showing they worked an average of at least 20 hours per week while employed by an agency.
- **Unpaid employment**: students may work as volunteers or unpaid interns, where this work does not violate labor laws. The work must be at least 20 hours per week and be related to their field of study.

***What Type of Employment is Allowed For Students During An OPT STEM Extension?***

- Students granted an OPT STEM extension must work at least 20 hours per week for an E-Verify-enrolled employer in a position directly related to the student's STEM degree.
- STEM students may work multiple jobs related to their STEM degree, but all the employers must be enrolled in E-Verify.
- Students on an OPT STEM extension are allowed to volunteer, incidental to their status. This means that volunteer work is allowed but does not count as employment for the purpose of maintaining F-1 status

***How does travel outside the United States impact the period of unemployment?***

- If a student whose approved period of OPT has started, travels outside of the United States while unemployed, the time spent outside the United States will count as unemployment against the 90/120-day limits.
- If a student travels while employed (either during a period of leave authorized by an employer or as part of their employment), the time spent outside the United States will not count as unemployment.

***III. Who are exempt from the H-1B cap?***

Individuals who were previously granted an H-1B visa in the last six years, had changed status (e.g. F-1) and have not left the U.S. for more than 5 months, may be cap-exempt.

The following employers are also cap exempt:

- Colleges and Universities
- Non-profit employers who are affiliated with colleges and universities
- Non-profit research organizations
- Government research organizations

#### ***IV. H-1B Portability (Changing Employers)***

An H-1B worker may “port” or “transfer” his/her H-1B upon filing of a new H-1B petition with USCIS. The H-1B worker does not have to wait for the approval of the new H-1B petition to commence employment for the new employer. To qualify for H-1B portability, the H-1B worker must have been lawfully admitted into the United States, previously been issued an H-1B visa, and must not have worked without USCIS authorization. Such an H-1B worker is not subject to the H-1B cap because the H-1B worker has previously been “counted” towards the H-1B cap.

***Practice Pointer:*** H-1B workers who are employed by cap-exempt organizations, such as universities cannot “port” to a private employer unless they have previously been “counted” towards the cap. Such H-1B workers may have to wait and file a new H-1B under the next fiscal year.

#### ***V. Remainder Options For Individuals Who Have Previously Held H-1B Status:***

Individuals who have previously held H-1B status, but who did not use the full six-year period, may apply for an H-1B for the remaining unused time from the six-year period. Individuals in this situation are not subject to the H-1B cap because they have already been “counted.” For example, someone who works for three years on an H-1B decides to go back to school as an F-1 student to obtain an MBA. After graduation, this person can apply for an H-1B for the remaining three years and is not subject to the cap.

***Practice Pointer:*** In certain situations, if an individual on an H-1B leaves the United States and is physically abroad for at least one year, that person can either apply for a “new” cap-subject H-1B to obtain a “new” six-year period, or that person can choose to apply for the “remainder” of unused time without being subject to the H-1B cap.

#### ***VI. What are the alternatives to the H-1B visa?***

##### **A Visas:**

A visas are issued to diplomats, officials and other employees of foreign governments recognized by the U.S. who are coming on official business.

**B-1 Visa in Lieu of H-1B:**

Certain kinds of business related travel is permitted using a B-1 visa or the Visa Waiver Pilot Program for eligible foreign nationals. The term business is generally limited to contract negotiations, participation in professional conferences, conventions or seminars or business meetings with associates. However, B-1 can also be used in lieu of an H-1B visa to provide services to a host U.S. company if the foreign national is employed by a foreign company; the foreign national stay on the foreign company's payroll; the foreign company maintains control over working conditions, hours, assignments, etc.; and the foreign national does not receive any salary or remuneration from the U.S. company other than an expense allowance or reimbursement incidental to the stay in the U.S.

**E-1/E-2 Visa:**

Nationals of many countries are eligible to obtain Treaty Trader or Treaty Investor visas. The E-1 Treaty Trader visa requires that at least 51% of the company's trade be between the treaty country and the United States. The E-2 Treaty Investor visa requires a substantial investment in a U.S. business which must be controlled by treaty nationals. No fixed amount is required and "substantial" varies depending on the nature of the business. E visas may also be issued to managers, executives and essential employees of the same nationality who work for the U.S. branch office. The visas may, depending on each treaty, be granted for an initial period of up to five years. However, the person's stay is authorized by the Immigration Service in two-year increments granted upon each entry to the United States. The easiest way to extend E status while the visa is valid is to travel abroad and re-enter. This can only be done during the validity of the visa. The E visa can be extended as long as there is a need for the investor to direct and control the U.S. enterprise. Essential employee E's are expected to be replaced by U.S. trained personnel. Spouses of E visa holders are also allowed to request work authorization.

**E-3 Visa:**

The E-3 visa is for Australian professionals coming to the United States to perform services in a specialty occupation, i.e. an occupation that usually requires a Bachelor's degree as a minimum for entry into that occupation. The existing H-1B regulations are used as a basis to determine what constitutes a "specialty occupation." The E-3 visa is issued in two-year increments and may be renewed indefinitely. The E-3 is limited to 10,500 visas per year. Spouses of E-3 visa holders are also allowed to obtain work authorization.

**F-1 or M-1 Student Visas:**

As noted above, one could enroll for further studies, thus extending his/her F-1 status, if eligible. This is generally a sound strategy, if the new course of study credibly follows from previous studies undertaken. For instance, pursuing a doctorate degree after a master's degree is a credible course of study, while returning to school to complete a semester of unrelated courses may not be credible. The M-1 visa is given for study at vocational or non-academic institutions.

**G Visa:**

G visas are issued to employees, representatives and staff of international organizations such as IMF, World Bank, UN, NATO, OAS and OAU.

**Free-Trade Agreement H-1B1 Visas:**

The Free-Trade Agreement H-1B1 visa is available to professionals from Chile and Singapore. There are 1,400 H-1B1 visas for Chileans and 5,400 H-1B1 visas set aside for Singaporeans. Free-Trade Agreement H-1B1 visas are issued for 18 months and are renewable. Spouses and minor children are eligible for H-4 dependent status, which does not grant employment authorization

**H-3 Visa:**

The H-3 trainee visa is available for up to two years for persons participating in an established training program. Requirements for the trainee visa include limitations on productive employment, which must be incidental to the training. Trainees are also restricted from later changing to H-1B specialty occupation status without returning home for six months.

**I Visa:**

The I visa is issued to representatives of the foreign press, radio, television or foreign information media. The foreign correspondent must be employed by a media foreign entity that is headquartered outside the U.S. The foreign correspondent should be credentialed by a professional journalistic association.

**J-1 Visa:**

The J-1 Exchange Visitor Program is aimed at promoting cultural exchange and may be an option for students, researchers, specialists, visiting faculty, physicians, trainees, camp counselors and au pairs. The most common categories used by private industry employers are the intern and trainee categories.

The intern category is available to individuals who are currently enrolled in and pursuing studies at a degree or certificate-granting post-secondary institution outside the United States, or to those who have graduated from such an institution no more than twelve-months prior to the exchange-visitor program start date. The intern must be participating in a structured and guided work-based internship program in his/her specific academic field. The intern category is available for a one-year period.

To qualify under the trainee category, the individual must either have a degree or professional certificate from a foreign post-secondary academic institution and at least one year of prior related work experience in his/her occupational field, or five years of work experience outside the United States in the occupational field. Trainees must enter the United States to participate in a structured and guided work-based training program in the specific occupational field. Therefore, the trainee category is suitable for certain

individuals who may not have university degrees. This visa may be granted for an eighteen-month period.

Both J-1 interns and trainees must not be engaged in productive employment, unless such employment is incidental and necessary to the training or internship.

J-1 visa holders may be exempt from certain taxes. Spouses may also obtain discretionary employment authorization in certain instances.

### **L Visa:**

The L-1 intracompany transferee visa is particularly useful for managers, executives and persons holding specialized knowledge who own or are employed by a business abroad. If the company has a U.S. branch office or affiliate, and they have a common ownership relationship, it is possible to obtain an L-1 intracompany transferee visa. The maximum period of admission for managers and executives is seven years, with a five-year limit for the specialized knowledge category.

If the U.S. branch office is new, the L-1 is only approved for one year. Extensions are not routine and usually require proof of employees and substantial business activity. Large sales revenue as well as several layers of employees are key to the extension. If the extension is obtained, and the overseas company continues to operate, it is usually possible to apply for permanent resident status as a first preference multinational manager. This can usually be accomplished relatively quickly.

Spouses of L-1 visa holders are also allowed to obtain work authorization.

### **O & P Visas:**

The O and P visas are for individuals in the entertainment industry and athletics but also include persons of extraordinary ability in the arts, business, education, science or athletics, certain accompanying employees, and their family members. The law requires consultations with the relevant U.S. labor unions, peer and management organizations. These groups must provide advisory opinions as to whether the applicant shows “extraordinary ability” or “extraordinary achievement” in the field, and whether the position requires such high qualifications. The O visa may be granted for up to three years, depending on the period of the event, but may be extended indefinitely. The eligibility criteria for businessmen, educators, scientists and athletes are high, but they are less rigorous for persons in the arts, as well as in the motion picture or television industries.

The P Visa is for entertainers who perform as a group and for athletes. It requires consultation with unions regarding the nature of the work and the artists’ qualifications. The eligibility standards for P-1 classification give preference to established groups. Admission of P applicants is limited to the period of the “event”.

**P-3 Visa:**

The P-3 visa is for performing artists who have not achieved international acclaim, but are culturally unique. They also require union and peer group advisories and may be approved for up to one year, which can be extended annually.

**Q Visa:**

Individuals coming to participate in a cultural exchange who are over the age of eighteen may obtain a fifteen-month cultural exchange visa. This is non-extendible. No dependent visas are available under this category.

**R-1 Visa:**

The R-1 religious worker category has generous standards for persons affiliated with Internal Revenue Service-recognized tax-exempt religious organizations. This visa allows qualified religious workers to enter the United States for an initial period of admission of three years, but this visa may be extended for up to five years.

**TN:**

The North American Free Trade Agreement provides for work visas for certain Canadian and Mexican professionals with U.S. job offers. The TN status for Canadians is issued for one-year periods and can be renewed annually. Mexican TN visas can be issued for up to three years although an authorized stay of one year is approved upon each admission to the U.S. Spouses and minor children are eligible for T.D. (Treaty Dependent) visas, which do not allow employment authorization.

To discuss any immigration-related issues, including nonimmigrant or immigrant visa options or employment eligibility verification issues, we invite you to contact **Bernard Wolfsdorf** at **Bernard@Wolfsdorf.com** or **Naveen Bhora** at **NBhora@Wolfsdorf.com** or call 1-800-VISA-LAW. We look forward to the privilege of serving you.

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**Bernie Wolfsdorf**, the National President-Elect of American Immigration Lawyers Association (AILA) is a California State Bar-Certified Specialist in Immigration and Nationality Law. Mr. Wolfsdorf is listed in The International Who's Who of Corporate Immigration Lawyers as one of the "most highly regarded individuals" practicing in California. The 2008 Edition of Who's Who of Corporate Immigration Lawyers highlighted Mr. Wolfsdorf as "the leading light for visa applications between Canada and Mexico." The Chambers Global World's Leading Lawyers for Business guide noted Mr. Wolfsdorf's "outstanding consular law practice" and called him a "cutting-edge thinker."

Mr. Wolfsdorf has authored numerous publications on immigration law and frequently lectures on visa matters. He is renowned for his knowledge of immigration law and his ability to successfully navigate complex immigration matters. Mr. Wolfsdorf's leadership positions, vast experience and national prominence have been vital to keeping the firm up-to-date with the latest developments facilitating the effective resolution of cases. Mr. Wolfsdorf is listed in the International and California Editions of the 2008 Who's Who of Corporate Immigration Lawyers, Best Lawyers in America 2008, Martindale Hubbell's Pre-eminent Specialist Directory, Southern California Super Lawyers 2008 (the only Los Angeles immigration lawyer listed in the Top 100 Lawyers in Southern California), Chambers USA 2008 and the Chambers Global World's Leading Lawyers for Business 2008.

**Naveen Rahman Bhora** serves on AILA's **Vermont Service Center Liaison Committee** and is the **former Treasurer of the Southern California Chapter of AILA**. She handles a variety of immigration cases, including researchers and scientists, family-based petitions, naturalization, diversity visa lottery, and visas for healthcare professionals. She is a frequent speaker at conferences and has authored articles in the field.