

Help! I have foreign national employees who were not selected in the H-1B registration lottery, what are their options?

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The H-1B Electronic Registration Selection Process debuted in March 2020 for fiscal year 2021 H-1B cap-subject petitions. The barrier to entry dropped significantly with the introduction of the electronic registration selection process. Since then, we have seen an exponential increase in those vying for a coveted H-1B lottery selection. The odds for selection have decreased significantly. As such, it is imperative that employers incorporate back up options to maintain their talent pool of foreign nationals.

1. Are there any options for immediate work authorization for foreign national employees who are still on student visas?

Many foreign national students who graduate from a university in the United States are eligible to participate in twelve months of Optional Practical Training (OPT). Further, if the foreign national student has graduated with a qualifying STEM degree and their employer is registered with E-verify they could be eligible for an additional twenty-four months of STEM OPT. Day 1 CPT (Curricular Practical Training) is also an option that foreign nationals explore when they have run out of OPT and the alternative options below are not applicable.

2. What about foreign national employees whose work authorization based on their student status is expiring?

The US immigration system provides for several options to establish work authorization if certain criteria are met. It is important to evaluate the foreign national's citizenship or nationality, intracompany transferees, extraordinary ability, and trainees, as set out below.

Foreign National Citizenship or Nationality

The H-1B1 is available to citizens of Chile and Singapore. The E-3 is available to citizens of Australia. The TN is available to citizens of Canada and Mexico. The commonality between the H-1B1, E-3, and TN revolves around the type of work being performed by

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the foreign national. These are visa classifications intended for professionals.

Further, if the employing entity is owned by a foreign national it could be worth exploring whether an E-1 or E-2 is available. These classifications allow for traders (E-1) or investors (E-2) to register a company, if their country of nationality has a treaty with the United States that allows this, and they can demonstrate several other criteria. If so, they would be allowed to transfer certain employees to the US entity that share the nationality of the foreign national owner of the entity.

Intracompany Transferee

The L-1A nonimmigrant classification enables a U.S. employer to transfer an executive or manager from one of its affiliated foreign offices to one of its offices in the United States. The L-1B nonimmigrant classification enables a U.S. employer to transfer a professional employee with specialized knowledge relating to the organization's interests from one of its affiliated foreign offices to one of its offices in the United States.

Extraordinary Ability

The O-1 visa classification is for individuals of extraordinary ability. The classification is split into the O-1A classification, which is intended for those with extraordinary ability in science, business, education, or athletics, and the O-1B classification intended for those with extraordinary ability in the arts. These visa classifications are often viewed as reserved for the best talent, but are more attainable than may be initially perceived.

Trainees

The J-1 program allows for a cultural exchange for certain foreign nationals with a degree or professional certificate and at least one year of work experience. This requires coordination with a third party sponsoring organization and the Department of State.

3. Can we begin pursuing a green card for these employees?

Yes, there are a variety of different green card paths available to employees, which include: PERM, National Interest Waiver, outstanding researcher or professor, extraordinary ability, and more. Employers must strongly consider the likelihood of securing nonimmigrant (or alternative) work authorization to bridge the gap for foreign nationals until they receive their green card. This is a complex landscape to navigate given the difficulty of assessing visa priority dates.

Further, the underlying nonimmigrant status can affect the green card path. Not all nonimmigrant statuses are created equal. Some allow for "dual intent" which essentially allows the foreign national to intend to become a permanent resident without violating their nonimmigrant status.

We understand that employers feel the pressures of competitive labor markets. Having a plan for foreign nationals is essential to attracting and retaining top global talent. As employers navigate the alternative options for employees who were not selected in this

year's lottery, members of Dorsey's Immigration Group are prepared and ready to answer questions and provide advice.