

Twenty-five (Or More) Strategies for the Capped-Out H-1B

By H. Ronald Klasko*

The perfect H-1B case walks into your office. Unfortunately, he walks in during the majority of the months of the year when there are no H-1B numbers available. What do you do?

- (a) Tell him there is nothing you can do;
- (b) Give him the phone number and email of your favorite Canadian immigration lawyer;
- (c) Tell his employer to leave the job open for another year; or
- (d) Ask a lot of questions, with the goal of finding a creative -- even if more difficult-- solution.

If you chose options (a) to (c), you do not need to read the rest of this article; and you can take the rest of the day off because business will be light. If, however, you chose option (d), the author hopes that the following list of options (while none is particularly unique) will prove helpful as a desk reference for asking the right questions and, hopefully in many cases, coming up with the right solutions. (In addition, as an added bonus, many of these options are also the answers to the dilemma of what to do with the H-1B who has reached the six year limit).

The options to be considered include:

I. Avoiding H-1B Cap

1. Proving Cap Exemption

Although beyond the scope of this article, there are many arguments that can be made successfully to prove that an employment relationship that is seemingly subject to the H-1B quota really is not. One example is to prove that the foreign national will be “employed at” a cap-exempt institution. Another example would be to have the foreign national enter into or continue in an employment relationship with a cap-exempt institution while at the same time filing for concurrent H-1B status with a cap-subject employer. Since the statute (8 U.S.C. §214(g)(6)) references that a foreign national is subject to the H-1B cap if he “ceases to be employed” by a cap-exempt institution, concurrent employment with a cap-exempt and a cap-subject employer does not involve “ceasing employment” and therefore arguably renders the foreign national exempt from the H-1B cap.

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2. Prior H-1B

It is critical in the consultation process to ascertain whether the foreign national was ever in the U.S. in H-1B status and therefore already counted against the H-1B quota. Even if there is an intervening period of another status (such as F-1), once the foreign national has been counted against the H-1B quotas, he is no longer subject to the quota with a new H-1B employer (unless he has left the U.S. for one year).

II. Options based on alien's history

3. Asylum

There are many issues, both legal and personal, involved in an application for asylum. However, if the foreign national has a colorable asylum claim, such an application should be explored. The filing of such an application may result in the foreign national obtaining asylee status or, if there is a delay in adjudication, employment authorization pending the adjudication.

4. Claim to U.S. Citizenship

It is always critical as part of the consultation process to determine whether the foreign national -- even though unbeknownst to her -- has a claim to U.S. citizenship. Many foreign nationals born overseas may have acquired U.S. citizenship at birth without even knowing it.

5. Dual Nationality

It is always critical to ask the foreign national whether he is or has been a citizen of more than one country. Dual or multiple nationality may lead to other options, such as E status.

6. Portability

An H-1B foreign national working at a cap-exempt institution now seeks to be employed at a cap-subject institution. Although some practitioners may disagree, this author believes that a foreign national can commence employment with the cap-subject employer under H-1B portability. This strategy has limited utility, however, because portability ends upon the approval of the H-1B petition with the new employer, which presumably would have an effective date of October 1, leaving a gap in employability -- and status -- of the client.

III. Changing plans

7. Student Status

Any potential H-1Bs who find themselves capped-out may choose to return to school even if that was not originally in their plans. Either retaining or going back to F-1 status may provide enough time until H-1B numbers again become available (assuming, of course, the same or a different position with the same or a different employer may still be available to the foreign national many months later at the conclusion of the client's studies). Going for an advanced degree, in addition to its educational advantages, and in addition to buying time until H-1B numbers are available, adds various benefits under the immigration laws. The advanced degree obtained in the U.S. makes the foreign national eligible for a separate quota of advanced-degree H-1B numbers. In addition, assuming the foreign national finds a position that requires the advanced degree, the

alien becomes eligible for EB-2 immigrant preference status, which can result in obtaining permanent residence many years quicker through a labor certification application because of the extensive quota backlog in the EB-3 (Bachelor's degree) preference category.

8. Working Overseas

Although the U.S. employer may prefer to have the foreign national work in the U.S. in H-1B status, working for a period of time outside the U.S. while awaiting H-1B quota availability may be an option. More and more jobs can be done remotely, including in another country. Employment outside the U.S., even though for a U.S. employer and on a U.S. payroll, does not trigger the need for U.S. visa status.

9. Subcontract Employment

Sometimes it is worth exploring whether a private employer has, or could develop, a relationship with a cap-exempt employer (such as a university) whereby the university is the employer of the foreign national and the private employer enters into a subcontract relationship with the university for the foreign national's services. This can be a temporary arrangement until an H-1B number is available to the private employer.

IV. Country-specific options

10. E-1/E-2

If the potential employer shares the same nationality as the foreign national employee, and if that nationality is a country which has a qualifying treaty with the U.S., either E-1 treaty trader or E-2 treaty investor is worth exploring. If the U.S. employer already has qualified as a treaty trader or treaty investor company, the process is relatively straightforward regarding proof that the position offered to the employee is one that requires "essential skills" or is of a "supervisory or managerial" nature. If not, then the employer will have to be willing to undertake a more extensive commitment to establish substantial investment (E-2) or substantial trade principally between the U.S. and the country of nationality (E-1).

11. E-3

If your client is lucky enough to be a national of Australia, the E-3 visa immediately becomes an option. The E-3 visa is not subject to a quota. However, as with other H-1B alternatives, it is not subject to some of the benefits of the H-1B, such as portability and ability to travel during the pendency of adjustment of status.

12. Singaporeans and Chileans

Nationals of Singapore and Chile have their own H-1B quota numbers available under respective treaties between those countries and the U.S. The numbers available under those treaties are likely to be exhausted never.

13. TN-1

Many Canadian and Mexican citizens who seek H-1Bs can obtain immediate TN-1s and then subsequent H-1Bs when the quota becomes available. Of course, this does not apply to all possible Canadian and Mexican H-1Bs, since the profession must be included within the list of

TN-1 professions in NAFTA. Again, it is important to remember that TN-1 is not a good long-term solution, since it does not have any of the attributes of dual intent.

14. Temporary Protected Status (TPS)

Nationals of certain countries are eligible for temporary protected status. If the foreign national is from one of those countries, he may be able to obtain employment authorization as part of the TPS process.

V. Occupation-specific options

15. J-1

Some H-1Bs could be J-1s. Good examples include researchers and doctors. Some training programs available to college graduates may also qualify. Since most employers do not have approved exchange visitor programs, in many cases a third party program sponsor must be found. Of course, it is always necessary as part of the advice regarding the J-1 option to explore whether the acquisition of the J-1 status will trigger a two-year home residence requirement.

16. R-1

If the nature of the employment is a religious vocation, the R-1 religious worker visa becomes a readily available, non-capped option.

17. P Visas

If the nature of the employment is of an artistic or entertainment nature, one of the P visa categories may be an option.

18. I Visa

The I visa is available for foreign nationals working for a foreign information media outlet -- press, radio, film or other -- in the U.S. Any of these positions might well be H-1Bs but for the cap.

VI. Other visa options

19. O-1

The author has found that a surprising number of foreign nationals who qualify for H-1B may also qualify for O-1. The key is ascertaining some extremely specific specialty or sub-specialty field in which the foreign national has some accomplishments that may set him apart from others in the field. Reference letters are critical. Ask a lot of questions: "What is your most important accomplishment?" "What has made you the most proud in your career?" "Was there anything that you have done that has attracted attention outside of your school or your employer?" "Is there anything that you have done that most others in your field have not done?"

20. L-1

If your consultation with the foreign national reveals that she has worked for a related company outside the U.S. for at least one year, the L-1 visa becomes an option. It is important to note that

the time outside of the U.S. working for the company might have preceded the acquisition of another status in the U.S. for the last several years, such as F-1. In some cases, the qualifying relationship can be established now by having the U.S. employer acquire the overseas employer for which the foreign national last worked (especially if the overseas employer was a rather small company). If such a qualifying relationship exists, the key issue then becomes establishing the requisite “specialized knowledge” or “managerial or executive” positions both in the U.S. and outside of the U.S.

21. H-2B

Many practitioners assume that the H-2B has to be for lower-skilled positions and thus positions that are not appropriate for H-1B professions. That is not the case. As long as the requisite “temporariness” of the position can be established, and as long as a shortage of qualified U.S. workers can be established through the requisite recruitment, H-2B becomes an option. However, it is important to emphasize that the requisite temporariness can be difficult to prove. The position must qualify as seasonal, peak-load, intermittent or one-time occurrence. For example, if it can be proven that the foreign national is needed to work on a specific project with a specific end date, the H-2B may be a viable option. However, unlike the other options, the H-2B has quota problems of its own, although there are certainly times of the year when the H-1B quota is exhausted and the H-2B may still be available.

22. B-1 in Lieu of H-1B

If a foreign national is coming to work in an H-1B-eligible position in the U.S., but the source of the H-1B’s salary will be overseas, a B-1 in lieu of H-1B option should be explored. This option is most appropriate for foreign nationals who have an overseas employer which requires a foreign national to provide professional services for the benefit of the overseas employer in the U.S. It is important to consult both the provisions of the Foreign Affairs Manual as well as the policies of the consulate in which the B-1 application will be made. Of course, if the foreign national already has a long-term multiple entry B-1/B-2 visa, or if the foreign national is eligible to enter the U.S. as a B-1 without a visa, the step of convincing the U.S. consulate can be avoided. However, this is certainly a risky option since the ultimate adjudication will not be made until the foreign national arrives at the port of entry in the U.S.

23. H-3

Although, at first glance, H-3 trainee status is inconsistent with the H-1B “specialty occupation” status, in practice the line may be a thin one. Many entry level H-1Bs go through a training program as the first step of their H-1B employment. The training program may be formal enough to qualify the foreign national for H-3 status. However, various aspects of the H-3 can be problematic, including proof that any productive employment will be incidental to the training, proof of unavailability of the training in the foreign country and proof that the training will qualify the foreign national for employment outside of the U.S.

24. Q-1

This rarely-used visa status is worth exploring in a scenario where the foreign national’s proposed employment in the U.S. is in some way related to exhibiting to the general public some aspect of the culture and traditions of the foreign national’s home country.

25. Optional Practical Training

The F-1 student may be entitled to one year of optional practical training, and the J-1 student may be entitled to 18 months of practical training. Especially with the F-1 student, the usage or non-usage of the practical training period is intricately tied into the timing and availability of H-1B numbers. If a student decides to utilize the entire practical training period, at the end of the period there may be no H-1B numbers available. Therefore, while the employment authorization granted through practical training may be helpful in filling the gap until an H-1B number is available, the H-1B petition should be filed on the earliest possible date.

26. Spouse Visa Status

It is important to determine if the foreign national is married. If so, the next inquiry is whether the spouse is, or could be, either a J-1, an L-1 or an E-1 or E-2. The derivative spouse visa in each of those categories enables the foreign national to obtain an employment authorization document. Assuming the derivative spouse's status is in one of these categories, it has the added advantage of not requiring any petition by any employer and allowing the foreign national to work for any one or more employers as he chooses.

VII. Adjustment options

27. DV-1

If a foreign national was selected in the DV-1 lottery, she may be able to file for adjustment of status and obtain employment authorization.

28. Employment-based or Marriage-based Adjustment

A foreign national who is eligible to file for adjustment of status in any employment-based or family-based category for which the quota is current, or for which there is no quota, should be able to obtain an employment authorization document within three months. If the foreign national's legal status expires in the interim, the foreign national may still be eligible to obtain an employment authorization document. If the application is based on an employment category, Section 245(k) allows for the filing of the adjustment application and the application for employment authorization as long as the period out of status does not exceed 180 days. If the adjustment application is based upon marriage to a U.S. citizen, there is no limit to the period in which the foreign national may be out of status and still qualify for adjustment and employment authorization.

While there may certainly be foreign nationals who cannot benefit from any of these options, the author has utilized many, if not most, of these options to assist foreign nationals in achieving their employment goals. The unrealistic H-1B quota is clearly problematic; however, for the astute and creative practitioner, it is merely an obstacle and not a roadblock.