

David E. Gluckman

Direct Dial: 804.775.3826

Facsimile: 804.249.9595

E-Mail: dgluckman@lawmh.com



Jonathan L. Moore

Direct Dial: 804.775.7227

Facsimile: 804.249.9595

E-Mail: jmoore@lawmh.com

Practice Limited to Federal Immigration Law

H-1B EXEMPTIONS AND ALTERNATIVES

Each year, USCIS exhausts the full quota of 65,000 “bachelor’s degree” H-1Bs and the additional 20,000 quota for U.S. advanced degree holders. As a result, many foreign students and employers seek alternatives to the H-1B. In addition, some employers qualify for an exemption from the H-1B quota. The following is a summary of exempt employers and alternatives to the H-1B, which may allow a foreign graduate to remain and work in the United States after graduation.

Organizations exempt from the H-1B quota

Certain organizations are exempt from the H-1B quota. Exempt organizations can file H-1B petitions at any time, regardless of the quota. Exempt organizations include:

- Universities
- Non-profit organizations affiliated with universities (such as research facilities or hospitals)
- Non-profit research organizations, engaged primarily in basic or applied research
- Governmental research organizations (federal, state, and local government)

Note that there is no blanket exemption for “non-profits.” To be exempt from the quota, the non-profit either must be affiliated with a university, or must be a non-profit “research organization.”

Alternatives to the H-1B

1. **Optional Practical Training.** F-1 students can work in the U.S. for up to 12 months using Optional Practical Training (OPT). They can stay in the U.S. for 60 days after expiration of their OPT, but cannot work during that time.
2. **STEM OPT Extension.** F-1 graduates in “STEM” degree programs (Science, Technology, Engineering, Mathematics) can obtain an additional 24 months of OPT (for a total of 36 months). They must be employed by an employer that registers with the federal “E-Verify” program (an electronic program to verify the employment authorization of employees in the U.S.) The student and employer must also submit an acceptable training plan to the school before the student will be allowed to apply for STEM OPT. Graduates with prior U.S. degrees in STEM fields may be able to use these degrees as a basis for the STEM OPT extension.
3. **TN status (Canadians and Mexicans).** Under the USMCA/NAFTA treaty, citizens of Canada and Mexico can work in the U.S. in TN status in certain designated jobs or professions listed in the treaty. Common TN occupations include engineer, architect, computer systems analyst, hotel manager, registered nurse, social worker, librarian, dentist, statistician, and physical therapist. Individuals who qualify for TN status can work in the U.S. in three-year increments, renewable indefinitely.
4. **H-1B1 (Chileans and Singaporeans).** There is a special quota of 6,800 “H-1B1” visas available to citizens of Chile and Singapore. Like the H-1B, H-1B1 status requires that the applicant possess a bachelor’s degree or the equivalent, and the job must require at least a bachelor’s degree as a minimum entry level requirement.

H-1B1 status is granted in one-year increments. Unlike H-1B, individuals in H-1B1 status must have an unabandoned foreign residence to which they intend to return.

5. **E-3 for Australians.** Under a treaty of trade with Australia, the United States allows the citizens of Australia to qualify for E-3 status. Like H-1B, the applicant must possess a bachelor's degree or the equivalent, and must work in a job that requires a bachelor's degree. E-3 status is issued in two-year increments, renewable indefinitely. There is a quota of 10,500 E-3 visas available. It is unlikely this quota will ever be exhausted.

6. **E-1 and E-2 status.** Certain countries have treaties of trade or commerce with the United States. Citizens of countries that have a treaty of trade or commerce with the United States can qualify for E-1 or E-2 status. E-1 allows an individual of a treaty country to start his/her own business in the U.S. to engage in trade with their home country (at least 50% of the trade must be with the individual's country of citizenship). The individual can also work for a company which is majority owned by citizens of the individual's country of citizenship, also engaged in substantial trade between the U.S. and the country of citizenship. E-2 status allows an individual from a treaty country to start his/her own business in the United States, provided that the business requires substantial "investment" in the United States. The individual can also work with a company in the U.S. owned at least 50% by nationals of the individual's country of citizenship, provided that the business represents a substantial investment in the United States. These are very complicated visas, but can be excellent options in appropriate circumstances. For

example, a citizen of France could open up his/her own financial consulting business, or work for a French-owned financial consulting organization in the U.S. Notable countries which do not have treaties of trade or commerce with the U.S. include China and India. A listing of eligible countries is attached.

7. **L-1 Visa.** L-1 visas are for individuals who have worked for a company outside of the U.S. for at least one year who will now work in the U.S. for a parent, branch, subsidiary or affiliate of the same company. L-1 visas are available to allow individuals to work in managerial or executive positions, or positions which require “specialized knowledge” of the company’s operations, technology, etc.
8. **O Visas.** O visas are available for individuals with extraordinary ability in their particular field of expertise. This can be shown by significant contributions to a particular field of expertise, peer-reviewed publications, presentations at important conferences, national or international prizes or awards, serving as a judge of the work of others, and other objective evidence of the individual’s reputation as a leader in a particular field of expertise.
9. J-1 visas are for “trainees” or “interns” who have earned degrees **outside the U.S.** and/or who have certain work experience **outside the U.S.** Eligibility requirements for these programs are as follows:

J-1 Intern

Students and recent graduates may qualify to participate in a J-1 “intern” program, but only if they:

- Are currently enrolled in and pursuing studies at a post-secondary academic institution outside the U.S.; or
- Have graduated from a post-secondary academic institution outside the U.S. no more than 12 months prior to their J-1 program start date.

J-1 Trainee

As an alternative, foreign nationals may participate in a J-1 “trainee” program if they:

- Have a degree or professional certificate from a post-secondary academic institution outside the U.S. and at least one year of prior related work experience outside the U.S. in the occupational field in which they are seeking training; or
- Have five years of work experience outside the U.S. in the occupational field in which they are seeking training.

If you satisfy these factors, and you have a company willing to host you for a training program, this may be an option.

10. **Green Card.** For certain individuals, pursuing a permanent resident green card through employment may provide a basis for continued work in the U.S. Although the full green card process will take much longer than the one-year duration of OPT, these individuals may be far enough along in the process to file for “adjustment of status” and obtain a work authorization card in connection with their green card application, prior to expiration of the 12-month (or 36-month) OPT. There may also be family-based options for permanent residence.
11. **Work Outside the U.S.** A foreign graduate can work for an employer outside the U.S. without a U.S. work visa.
12. **Return to School.** Many foreign graduates re-enroll in school in F-1 status if they miss the H-1B quota.

Eligible Countries for E-2

Albania	Czech Republic	Latvia	Serbia
Argentina	Denmark	Liberia	Singapore
Armenia	Egypt	Lithuania	Slovak Republic
Australia	Estonia	Luxembourg	Slovenia
Austria	Ethiopia	Macedonia	Spain
Azerbaijan	Finland	Mexico	Sri Lanka
Bahrain	France	Moldova	Suriname
Bangladesh	Georgia	Mongolia	Sweden
Belgium	Germany	Montenegro	Switzerland
Bolivia	Grenada	Morocco	Taiwan
Bosnia & Herzegovina	Honduras	Netherlands	Thailand
Bulgaria	Ireland	New Zealand	Togo
Cameroon	Israel	Norway	Trinidad and Tobago
Canada	Italy	Oman	Tunisia
Chile	Jamaica	Pakistan	Turkey
Colombia	Japan	Panama	Ukraine
Congo (Brazzaville and Kinshasa)	Jordan	Paraguay	United Kingdom
Costa Rica	Kazakhstan	Philippines	Yugoslavia
Croatia	Korea (South)	Poland	
	Kosovo	Romania	
	Kyrgyzstan	Senegal	

Eligible Countries for E-1

Argentina	Estonia	Latvia	Serbia
Australia	Ethiopia	Liberia	Singapore
Austria	Finland	Luxembourg	Slovenia
Belgium	France	Macedonia	Spain
Bolivia	Germany	Mexico	Suriname
Bosnia & Herzegovina	Greece	Montenegro	Sweden
Brunei	Honduras	Netherlands	Switzerland
Canada	Ireland	New Zealand	Taiwan
Chile	Israel	Norway	Thailand
Colombia	Italy	Oman	Togo
Costa Rica	Japan	Pakistan	Turkey
Croatia	Jordan	Paraguay	United Kingdom
Denmark	Korea (South)	Philippines	Yugoslavia
	Kosovo	Poland	