

How to Retain Your Foreign National Trainees After You Have Invested in Them

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How many times have you had a foreign national trainee walk into your Talent and Culture office indicating that their "visa expires soon" and wondering if you can help them get an "extension?"

While many U.S. hotels employ foreign nationals as trainees, often times they are just learning the ropes and are in line for promotion to an entry-level management position, their visa statuses are about to expire. Let's talk about your options to extend those work authorizations.

It is important to familiarize yourself with some basic terms and time frames (of trainee visas) before you can accurately answer such questions. There are two primary visa statuses that trainees

use for employment in the U.S: F-1 student status and its related work authorization and J-1 Cultural Exchange status.

F-1 Student Status

The F-1 non-immigrant status allows individuals to enter the United States as a full-time student at an accredited college or university. Although F-1 students cannot work off-campus during their first academic term, they are allowed to engage in three types of off-campus employment: Curricular Practical Training (CPT), Optional Practical Training (OPT), and Science, Technology, Engineering and Mathematics (STEM) Optional Practical Training Extension.

CPT allows for students enrolled in a program that requires participation in an internship or practicum to seek such an experience with off-campus employment. To obtain CPT, a student must complete two full-time academic semesters and secure an internship directly related to the student's field of study.

OPT is a temporary employment authorization directly related to a student's field of study. Students are eligible to participate in OPT for up to 12 months through either pre-completion or post-completion OPT. Students seeking pre-completion OPT are eligible to apply after they have been enrolled on a full-time basis for one full academic year at a college or university certified by U.S. Immigration and Customs Enforcement (ICE) Student and Exchange Visitor Program (SEVP).

As the name suggests, students seeking post-completion OPT are eligible for participation following the conclusion of their studies. If a student takes advantage of pre-employment OPT on a part time basis, he or she is only entitled to 6 months of post-completion OPT at the same education level. If the individual exercised one-year of full-time employment pursuant to pre-completion OPT, post-completion OPT is not available.

STEM OPT Extension

Employees who have exhausted work authorization available under OPT may be eligible for an additional 24-month extension if their degree is in certain science, technology, engineering and math (STEM) fields identified by the Department of Homeland Security (DHS). Although one may think that hotel industry employees do not hold STEM positions, there are several degree programs that may qualify. These fields include: computer systems, information technology management, engineering, financial mathematics, and business analytics, among others. These work well with your IT and Finance Department trainees and may be your first opportunity to say "yes" to the extension question!

J-1 Cultural Exchange Status

The J-1 visa is another commonly used visa type within the hotel industry. The J-1 visa authorizes exchange visitors to participate in either a training or internship program. To qualify as a Trainee, the foreign national must have a degree or professional certificate from a foreign post-secondary academic institution and at least one year of prior work experience in his or her occupational field outside of the United States; or have five years of work experience outside of the United States in the occupational field in which they are seeking training.

To qualify as an Intern, the foreign national must be currently enrolled in and pursuing studies at a foreign degree or certificate-granting post-secondary academic institution outside the United States; or, have graduated from such an institution no more than 12 months prior to the start date of the exchange visitor program.



Two-Year Home Residence Requirement

Because the J-1 visa is intended to be an exchange program, some visitors are subject to a two-year home country physical presence requirement. When reviewing options for employees, it is important that the individuals within your hotel's Talent and Culture department identify whether the employee is subject to the "Section 212(e)" requirement. An individual's obligation with respect to the home-country physical presence requirement is most-commonly annotated on the visa, or Certificate of Eligibility for Exchange Visitor (DS-2019). If for some reason an individual cannot return home for two years, he or she must apply for, and receive approval of, a waiver prior to changing nonimmigrant status. This process should be in consultation with an experienced immigration attorney.

H-1B Process

If your employee is not eligible for any additional work authorization as an F-1 or J-1 visitor, it may be time to consider whether it is appropriate to apply for an H-1B non-immigrant classification. However, given the timing associated with the H-1B process, it is important to evaluate your employees' upcoming expirations with your immigration counsel in a timely manner to ensure they are properly positioned for an H-1B registration. In fact, given that the upcoming H-1B registration begins in March 2024, it would be wise to start that discussion now.

Each fiscal year, there are only of 85,000 H-1B visas available (65,000 "capped" visas for individuals with a U.S. bachelor's degree or equivalent, and 20,000 "master's cap" visas for individuals who have a graduate degree from a U.S. educational institution) for open-market professional jobs in the United States. The H-1B registration lottery occurs annually in March and, if selected, the petitioner then proceeds to file an H-1B petition with USCIS on behalf of the selected applicant.

If the petition is approved, the beneficiary of the petition cannot begin working for his or her employer in H-1B status until October 1 of that same year, which is the beginning of the U.S. government's fiscal year. While it may seem problematic to have a four-month gap between the end of OPT work authorization and the beginning of the H-1B (October 1), we will discuss a solution later in this article.

Specialty Occupation Positions

An H-1B visa is reserved for "specialty occupation" positions which are those that typically require a bachelor's degree as a minimum requirement. In addition, the employee must possess the equivalent of a U.S. bachelor's degree in that specialty field. Under the regulations, "specialty occupation," is defined as follows: (1) a bachelor's degree or higher, or its equivalent, is normally the minimum

requirement for entry into the particular position; (2) the degree requirement is common to the industry in parallel positions among similar organizations, or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree; (3) the employer normally requires a degree or its equivalent for the position; or (4) the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a bachelor's degree or higher.

Therefore, not every position offered to your newly minted Trainee graduate will result in a slam dunk H-1B petition. In our experience, positions that may work well for H-1B petitions in the hospitality industry include Talent and Culture Managers, IT Directors or Managers, and Revenue Managers or Revenue Analysts. However, just because your specific position is not listed here does not mean that you cannot proceed with the H-1B. In addition, keep in mind that the October 1 start date for the H-1B will give you extra time to "promote" the trainee to a more professional position over the summer. Always connect with your immigration services provider regarding potential positions you would like to utilize the H-1B for prospective candidates.

CAP-Gap Employment Authorization

Although the H-1B is run on a lottery system, with the odds not necessarily in an employer's favor, there are significant benefits for individuals who are selected in the H-1B lottery. Depending on when an F-1 trainee's work authorization expires, selection in the H-1B lottery and a timely filed petition may prove critical to maintaining and elongating their work authorization. Under the regulations, the earliest an H-1B cap-subject petition can be filed is April 1, and the earliest date employment can begin is October 1. However, most OPT employment authorizations will expire prior to the H-1B start date in October.

As a result, USCIS recognizes a "cap-gap" period of employment whereby an employee with expiring OPT is eligible to continue working so long as the H-1B cap petition is filed prior to the OPT expiration and the employee does not travel internationally during the cap-gap period. Under the current regulations, the "cap-gap" employment authorization expires on September 30. Thus, if the H-1B petition is not approved prior to October 1, the employee would need to be removed from payroll until the H-1B petition is approved, or the hotel would need to make the difficult decision of spending an additional \$2,500 in government filing fees to expedite processing of the petition, if available.

However, USCIS has issued a Notice of Proposed Rule-Making with the intent of elongating the "cap-gap" period to April 1 of the following year. Although not finalized, this would provide a significant benefit to the employee and hotel as it would maintain work authorization while the H-1B change of status petition is pending, especially if it runs into government delays. Even if an individual is eligible for the 24-month STEM extension noted above, we suggest that the hotel consider registering the student-employee in the H-1B lottery at the time of applying for the STEM extension, as this will provide the employee two opportunities to be selected in the H-1B lottery in each successive year.

Green Card Options

Hotels who seek a more permanent option for their students would also benefit from entering their employees in the H-1B lottery. Unlike the F-1 or J-1 visas, the H-1B visa permits an individual to retain "dual intent" or become a U.S. permanent resident. In addition, the H-1B allows for a 6-year period of stay, with additional extensions available if certain conditions are met under the American Competitiveness in the Twenty-First Century Act of 2000 "AC(21)." The provisions within AC21 that provide for additional H-1B extensions may prove critical for hotels who traditionally employ foreign nationals from countries in which there is significant backlog in the availability of immigrant visas, most notably for foreign nationals from India and China.

So when asked "can you help me with extending my visa status," hopefully you will be better equipped to walk your trainee through their visa options.



Ms. Hetland

This article was co-authored by Carly Hetland. Ms. Hetland is an immigration attorney with a focus on business immigration. Her practice focuses on guiding guide employers through the various stages of the immigration process from non-immigrant initial transfers through permanent residence. She is mainly focused on multinational intra-company transfers (L-1), specialty occupation (E-3 and H-1B), TN USMCA professionals labor certification and priority worker permanent residence. Carly received her Bachelor's Degree in Political Science from South Dakota State University in 2018 and her Juris Doctorate from Marquette University in 2021. Carly is admitted to practice in Wisconsin and is a member of the Wisconsin State Bar and the American Immigration Lawyers Association.



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[Extended Biography](#)

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