

Manufacturing Workforce Shortage: Strategies to Overcome the Skills Gap, H-1B Visa Shortage

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Years ago, people employed in manufacturing were seen as bit players in an industrial machine, but no longer. Many manufacturing jobs today require high-level STEM (science, technology, engineering, and math) skills.

Despite encouraging U.S. students, veterans, and those in underrepresented communities to pursue careers in manufacturing, not enough prospective employees are available.

Manufacturers have their eyes on foreign national students and others from abroad who have the necessary skills notwithstanding the difficulties of this route. Indeed, it is becoming more difficult because some U.S. immigration law is as outmoded as the idea that employees in manufacturing are easily found in the U.S. labor pool. Any manufacturer looking to employ foreign talent must understand the H-1B visa and its alternatives.

H-1B Visa

The H-1B visa is the workhorse of business immigration visas. With an H-1B visa, an individual can work in the United States for up to six years (longer, if the individual is being sponsored for a green card).

To qualify for an H-1B, the job in question must require at least a bachelor's degree (or its equivalent) in a specific field and the individual must have a bachelor's degree (or its equivalent) in that field or a related field.

The problem with the H-1B visa is that there are only 85,000 available each year (to individuals who have not been in H-1B status in the previous five years). This limit is known as the "H-1B Cap." Demand has exceeded availability every year since 2013, and the U.S. Citizenship and Immigration Services (USCIS) has conducted a lottery to fill the available spots. In 2013, employers filed 124,000 applications to fill the 85,000 slots and the figures have steadily grown. By 2020, there were 275,000 applications, and in 2020, the number jumped to 483,927. This year, the number of applications increased dramatically, to 780,884, and the chances of selection were only about 11 percent.

Some of that increase resulted from the USCIS' attempt to streamline the process by introducing the Cap H-1B Registration process. Previously, employers had to file full petitions to enter the lottery. Starting in 2019, employers needed only to submit short registration statements at a cost of \$10 each. The lottery would be conducted based upon the registrations and employers would be told if their case was selected. Only if the case was selected would the employer file a full petition. Employers cannot submit duplicate registrations to increase their chances.

This process has led to the rise of a cottage industry. Hoping to increase their chances, foreign nationals are searching for more than one employer (sometimes, through

agents) to file a registration on their behalf. While this in and of itself is not contrary to the regulations, it can be fraudulent if employers do not have a bona fide job to offer or if they conspire with affiliated companies or non-affiliated companies to increase the chance of selection. The USCIS believes that fraud may account for the huge increase in registrations this year, and it is initiating investigations.

Alternatives: F-1, TN, L-1, E-1/E-2, O-1, Others

Other temporary work visa options employers and prospective employees can consider include:

1. F-1 students may be eligible for up to three years of Optional Practical Training if their degrees are in STEM fields. During those years, the employer and employee will have more chances to win the H-1B lottery.
2. Citizens of Canada and Mexico may be eligible for TN visas. Citizens of Chile and Singapore may be eligible for H-1B1 visas. Finally, citizens of Australia E-3 visas. These are all treaty-based visas that are similar to H-1Bs, but they are without numerical limitations or caps.
3. Foreign nationals who have worked for a parent, subsidiary, or affiliate of a U.S. company abroad for at least one year in a managerial or executive capacity or in specialized knowledge capacity may be eligible for L-1 visas that would allow them to work in the United States for five-to-seven years. Employers may even consider hiring an individual to work abroad for the company for a year and then apply for a transfer.
4. E-1/E-2 visas are another treaty visa option that might be possible if the potential employee has the same nationality as the U.S. company. A company's nationality is determined based upon ownership.
5. O-1 visas are available for individuals who have extraordinary ability in a particular field. To qualify for an O-1 visa, an individual must be able to show they are at the very top of their field based on outstanding achievements. While this may not be an option for someone in the early stages of their career, it might be available to highly specialized workers.
6. H-3 Trainee visas or participation in a J-1 exchange program may provide a prospective employee a training experience that could lead to a more typical employment visa in the future.
7. Concurrent employment could be an option for a key employee. An individual who works part-time for a company that is exempt from the H-1B Cap (such as an institution of higher education) could get an H-1B visa and then file for second H-1B to work for a company that is cap-subject for as long as they continue to work for the cap-exempt company.
8. Using digital nomads may be a possibility in some manufacturing processes. If an employee can do the work remotely, a company could off-shore the work and reapply for a Cap H-1B or another type of visa for which the employee might become eligible.

While the competition for an H-1B visa is stiff, there are strategies and options a company can consider to make up for the shortage of highly skilled workers in the manufacturing arena.

Please contact a Jackson Lewis attorney with any questions.

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