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Immigration Law: Faculty and Staff Issues

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MARK B. RHOADS
HELEN L. KONRAD

National Association of College and University Attorneys

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Mark B. Rhoads is a Partner in the Immigration Practice Group at the law firm of McCandlish Holton. He provides immigration advice and visa processing services to universities hiring international personnel, including researchers, professors, and university professional staff and advises on foreign student issues. Mr. Rhoads has extensive expertise in all temporary visa and permanent resident categories specific to university settings and regularly lectures across the country on immigration and employment law topics to attorneys, and business and university groups. In addition, he brings to his immigration practice a broad employment law background. Mr. Rhoads is a graduate of The College of William & Mary in Virginia and received his law degree from the University of Richmond in 1985, where he was an associate editor of the Law Review. He is co-author of *A Practical Guide to Employment-Based Immigration*, published in the *Washington & Lee Law School Race & Ethnic Ancestry Law Digest* (Vol. 3, 1997), and is a member of the American Immigration Lawyers Association.

Helen L. Konrad is a Partner in the Immigration Practice Group of McCandlish Holton. Her practice focuses on advising universities and employers across the United States regarding immigration options for professional and highly skilled employees, including professors, researchers, physicians, and others. Ms. Konrad provides critical expertise specific to J visas, including J-1 Waivers. She also regularly speaks on immigration issues to business and university groups all over the U.S., including NACUA, the National Association of Student Employment Administrators, and the National Association of Colleges and Employers. Ms. Konrad received a B.A. from Hamilton College in 1984, an M.B.A. from New York University in 1988, and a J.D. with honors from Washington and Lee University in 1991. She is co-author of *A Practical Guide to Employment-Based Immigration*, published in the *Washington & Lee Law School Race & Ethnic Ancestry Law Digest* (Vol. 3, 1997), and is also an active member of the American Immigration Lawyers Association.

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Immigration Law: Faculty and Staff Issues

Colleges and universities increasingly rely on talented international personnel to fill faculty, research, and staff positions. This monograph is designed to assist higher education attorneys and administrators understand some of the basic issues and options for employing foreign nationals, including both short- and long-term employment options. Student immigration issues are discussed only as they relate to employment of foreign students at the institution. Basic terms and definitions pertaining to immigration are described below. Following that, Section I discusses the types of non-immigrant (temporary) visas commonly held by individuals employed at U.S. colleges and universities; Section II summarizes the processes by which such workers may seek permanent residency in the U.S.; and Section III addresses some issues regarding the employment of unauthorized aliens.

Although citations are provided for general reference, this monograph cannot provide an exhaustive treatment of all immigration issues; therefore, additional research or consultation with an immigration expert should be undertaken prior to making any final decisions regarding the employment of foreign nationals.

Basic Terms and Definitions[1]

Before reviewing the specific rules governing the employment of foreign nationals (or "aliens") in the United States, a brief overview of immigration terms, and the governmental agencies charged with enforcing immigration laws, may be useful.

An "alien" for immigration purposes is defined generally as any individual in the U.S. who is not a U.S. citizen or permanent resident. Legal aliens in the U.S. can be divided into two basic groups: "immigrants" and "non-immigrants." An immigrant is an individual who is permitted to reside permanently in the U.S. A non-immigrant is an individual who is permitted to enter the U.S. for a temporary period of time (which, depending on the visa status, can range from a few months to seven years or more) and for a specific purpose. Entering the U.S. as an immigrant involves a lengthy and time-consuming process, often taking many months or years for those who qualify. As a result, most aliens who come to the U.S. for business, employment, or tourism enter initially as "non-immigrants" on temporary non-immigrant visas. There are more than 20 non-immigrant visa categories, each with specific rules regarding the length of stay and the activities the alien may undertake while in the U.S. As a general rule, an alien applying for a non-immigrant visa must establish that he or she has a permanent residence abroad to which he or she intends to return. This is called "non-immigrant intent."[2]

1. A general glossary of some of the terms used throughout this pamphlet can be found on page 31.

2. One common non-immigrant visa for university faculty and researchers, called the H-1B visa, is an exception to the rule requiring non-immigrant intent. This visa is discussed in detail beginning on page 6.

The admission of aliens into the United States is governed by two different departments of the U.S. government: the Department of Homeland Security (DHS) and the Department of State (DOS). The Department of Homeland Security assumed all functions of the former Immigration and Naturalization Service as of March 1, 2003. Within the DHS, the U.S. Citizenship and Immigration Services (CIS) reviews petitions and applications requesting immigration benefits from individuals and organizations within the U.S., and determines whether a particular visa status is appropriate for an individual. DHS officers also interview applicants at ports of entry into the U.S. (airports, land borders, or seaports) to determine whether to admit them and how long they may remain.

The Department of State, through U.S. Consulates outside the U.S., reviews applications for visas from individuals who wish to enter the U.S. For some types of non-immigrant status, such as H-1B and O, an individual must have approval from CIS before applying at a U.S. Consulate for a visa. For other types, such as B, F-1, or J-1, it is possible for an individual to apply directly at a U.S. Consulate for a visa, without first applying to CIS.

To understand how these two Departments work together, one must know the difference between a "visa" and an "immigration status." A visa is issued by a U.S. Consulate and is physically placed into the holder's passport. It enables an alien to apply to a Department of Homeland Security official at a port of entry for admission to the U.S. A visa includes a photograph of the holder, and also identifies the visa *status* of the person entering (i.e., B-1, H-1B, etc.) and the duration of the visa status. In most cases, an alien must have a visa to enter the U.S.[3]

A person's immigration status in the U.S. is conferred by a DHS official upon the alien's entry into the U.S., and is evidenced by a Form I-94 (Admission/Departure record). This form (a card that usually is stapled into the individual's passport) indicates the date of entry, the holder's name, country of citizenship, date of birth, the status in which the person was admitted, and the dates during which the individual is authorized to remain in the U.S. If the person extends his or her status, or changes to another visa status, while in the U.S., he or she will receive a new I-94 document from CIS. If an application to change or extend a visa status is filed in the U.S. before the person's current status expires, he or she does not have to travel outside the U.S. to obtain the new visa. The new I-94 issued by the CIS will authorize the person to remain lawfully in the U.S. The I-94 will indicate that he or she is authorized to be in the country and to engage in whatever specific activities are allowed for his or her particular status, even if the visa used to enter the U.S. has expired.

3. There are some exceptions. For example, Canadians are exempt from this requirement in most situations. Also, under the "visa waiver" program, citizens of about 20 countries with a low incidence of visa fraud and abuse are permitted to enter the U.S. as visitors for business or pleasure for 90 days without first obtaining a visa. 8 C.F.R. § 217.1 - 217.2.

I. Non-Immigrant Visas

TYPES OF NON-IMMIGRANT CATEGORIES TYPICALLY USED BY FACULTY AND STAFF

There are a variety of non-immigrant categories, ranging through the letters of the alphabet from A (an ambassador or diplomatic official) to V (a spouse or child of a lawful permanent resident of the United States who applied for an immigration benefit before a certain date). Only a few of these categories are potential options for aliens who wish to enter the U.S. to work for or at a U.S. college or university. This section describes the most common categories for university employees, and provides additional information about the possibilities – and limitations – inherent in each category.

B-1/B-2 Visas for Short-Term Business, Tourism, or Academic Activities 8 U.S.C.S. § 1101(a)(15)(B); 8 C.F.R. § 214.2(b)

The B-1/B-2 visa is issued to aliens seeking to enter the U.S. temporarily, either for short-term business (B-1) or as a tourist (B-2). B-1/B-2 visas generally are issued for a validity period of one year or more (sometimes for as long as 10 years) by the U.S. Consulate, but the person usually is permitted to stay in the U.S. (upon inspection by the Department of Homeland Security) for a maximum of six months in any one visit. At the time of entry, the Department of Homeland Security inspector determines whether the primary purpose of the visit is business travel or personal leisure, and issues an I-94 for the appropriate status (B-1 or B-2, respectively). The B-1/B-2 visa is unique in that a single visa is issued to cover two potential status types in the U.S.

B-1 Status

Business visitors who hold B-1 status are authorized to engage in activities promoting international trade or commerce (e.g., meetings with colleagues, job interviews, negotiations of contracts, and the like); they may not engage in productive employment or receive compensation from any U.S. source. With one important exception noted below, a person cannot work as a university faculty member, lecturer, or researcher if he or she holds B-1/B-2 status.

Honoraria Exception 8 U.S.C. § 1182(q)

A B-1 visitor who enters the U.S. to engage in "usual academic activity" may be paid honoraria and associated incidental expenses, as long as he or she complies with the following rules:

- He or she must be engaged in usual academic activities, such as lecturing, guest teaching, sharing knowledge, and/or attending meetings of the university boards or committees.
- The visitor's event may not last more than nine days at a single institution (college or university).
- During a six-month period, the visitor may accept honoraria and expenses from not more than five organizations.

The honoraria exception applies to visitors admitted in B-1 status and to visitors admitted for business purposes under the "visa waiver" program described below. Visitors should not enter in B-2 (tourist) status if they know they will be accepting honoraria for engaging in academic activities.

Visitors intending to take advantage of the honoraria exception should present their letter of invitation from the university upon entry into the U.S., and secure either B-1 status or "visa waiver for business" status ("WB" status). Universities should not use the B-1 honoraria exception to "short cut" the normal petition process necessary to employ an alien professor or researcher. That is, a university or faculty member should not be tempted to use a B-1 or visa waiver to enter the U.S. to assume full-time faculty functions. The B-1 is appropriate only for brief visits and limited activities that are distinct from more general employment that normally would require J-1, H-1B, or other visas.

B-2 Status

Entry in B-2 status is appropriate only for a visitor engaging in tourist activities and visits for pleasure, such as vacations, trips to see family or friends, and the like. No employment or business activities are permitted.

Visa Waiver Program for Short-Term Business, Tourism, or Academic Activities 8 C.F.R. § 217.1 - 217.2

Citizens of certain countries identified as having low rates of visa fraud and visa overstay are allowed to enter the U.S. as visitors for business (WB) or tourism (WT) without first obtaining a B-1 or B-2 visa. Their entries are limited to 90 days, but are similar to the B-1 and B-2 in all other respects. Citizens of the following countries are currently eligible for this program (as of May 2007):

Andorra	France	Luxembourg	Singapore
Australia	Germany	Monaco	Slovenia
Austria	Iceland	Netherlands	Spain
Belgium	Ireland	New Zealand	Sweden
Brunei	Italy	Norway	Switzerland
Denmark	Japan	Portugal	United Kingdom
Finland	Liechtenstein	San Marino	

As with the B-1 visa noted above, individuals entering on visa waiver cannot work in the U.S., except in limited circumstances; nor may they receive compensation from a U.S. source. The same "honoraria exception" applies to visa waiver visitors.

F-1 Visas for Students 8 U.S.C.§ 1101(a)(15)(F); 8 C.F.R. § 214.2(f)

Aliens pursuing a full course of study at an institution of higher education approved by the Department of Homeland Security may be eligible for F-1 student status. F-1 status is for individuals in the U.S. only to attend a college, university, or another educational institution full time.[4] F-1 students are required to demonstrate that they have an unabandoned foreign residence and are entering the U.S. solely to pursue a full course of study at an approved college or university. All F-1 students must be entered into the Student and Exchange Visitor Information System (SEVIS). Each school approved by the Department of Homeland Security has a designated school official (DSO) who is responsible for making changes to student records within SEVIS.

4. Students holding a variety of other visa statuses may attend university in the U.S., including individuals who are dependents of parents holding a non-immigrant work visa such as H-1B, L-1 or E. These students are not permitted to work in any circumstance. The rules for F-1 student employment apply only to F-1 students.

F-1 students may be eligible for employment in certain situations, the most common of which are described as follows:

On-Campus Employment 8 C.F.R. § 214.2(f)(9)(i)

F-1 students who are maintaining their status may work on campus for up to 20 hours per week while school is in session and full time during school vacations, including summer. No specific authorization is required for this employment. Under these provisions, a student could work as a teaching or research assistant, or in any number of positions in the school library, cafeteria, or administrative offices.

The immigration regulations do not place specific restrictions on the types of on-campus employment appropriate for F-1 students. However, the school itself may wish to craft policies addressing this issue.

Practical Training 8 C.F.R. § 214.2(f)(10)

There are two types of employment authorization for the purpose of gaining practical experience in the student's field of study: curricular practical training (CPT) and optional practical training (OPT). A student authorized for either of these is eligible for employment by the university, or outside the university. To obtain either CPT or OPT, a student must:

- be enrolled in a college, university, conservatory, or seminary (in a program other than English language training) approved by the Department of Homeland Security; and
- have been enrolled full time in such a school for one full academic year.[5]

Additional requirements specific to the type of practical training are discussed below.

Curricular Practical Training (CPT)

F-1 students must be approved by a school's designated school official (DSO) to work for a specific employer for a specific time period using CPT. To qualify for CPT, the work must be an integral part of the established curriculum in the student's course of study. CPT can be approved for part-time (20 or fewer hours per week) or full-time employment (for example, in a co-operative situation). DSO approval, and notation of that approval on the student's SEVIS record and Form I-20, are required prior to beginning CPT. No CIS approval is necessary. CPT often is used for students working off campus, for example, in supervised fieldwork for a degree in social work or education.

Tips on CPT:

- Because CPT must be part of the student's established curriculum, it may not be available for all F-1 students.
- CPT is authorized for specific increments of time, not to exceed one year of authorization at a time. There is no cumulative maximum for CPT. Thus, a student could be authorized to engage in 12 months of CPT, then authorized for another 12 months, and so on, throughout the student's academic career. However, once a student has engaged in 12 months of full-time CPT, he or she would not be eligible for OPT. If the student uses less than 12 months of CPT, or if the CPT is part time, OPT is still available.

  Example: Sally is authorized for 20 hours of CPT per week to engage in a co-op program. Her DSO approves the CPT from August 25, 2005 to August 24, 2006. In August 2006, her DSO approves her for a second co-op program running from August 24, 2006 to August 23, 2007, also for 20 hours of CPT per week. At the conclusion of her studies, Sally will still be eligible to request optional practical training authorization, as discussed below, because she did not engage in full-time CPT, only part-time.

5. There is a limited exception whereby a student may be authorized for CPT prior to completing a full academic year, such as in the case of a graduate student whose program requires immediate participation in curricular practical training. See 8 C.F.R. § 214.2(f)(10)(i).

Example: Dan is authorized for full-time CPT for a one-year period, from August 25, 2006 to August 24, 2007. Unlike Sally, when Dan completes his studies he will be ineligible for optional practical training authorization because his CPT was full-time for 12 months.

Optional Practical Training (OPT)

Optional practical training (OPT) is a common method for many employers, including colleges and universities, to hire top graduates with minimal fees and paperwork. A student in F-1 status is eligible for 12 months of OPT, which he or she may take in increments of less than 12 months during his or her course of study (for example, during summer breaks, or part-time while school is in session). OPT must be authorized by the DSO. In addition, before employment can begin, the student must apply for and obtain an Employment Authorization Document (EAD) from CIS. The EAD is a card that resembles a driver's license in size. It has a photograph of the bearer and authorizes employment only for the time period stated on the card.

To qualify for OPT, the work must be related to the student's field of study. OPT can be authorized for full-time employment during school breaks and for part-time employment while school is in session (not more than 20 hours per week). Most importantly, OPT can be used for up to 12 months after the student has completed all course requirements for his or her degree. This is how many graduates first obtain employment with U.S. employers.

Note that, while CPT is available only to F-1 students enrolled in a program that has a work component as an integral part, OPT has no such limitation. OPT is available to all F-1 students, as long as the proposed employment is related to the student's degree program.

Example: Roger is pursuing a Bachelor's degree in Computer Science at Computers-R-Us College. With his DSO's assistance, he applies in March for an EAD for 12 months of full-time OPT with the EAD card effective after his graduation in May 2007. While waiting for his EAD card, Roger applies for a position at the college as a Programmer/Analyst and is offered the job. He receives his EAD in mid-May and starts work the following Monday. (He may not begin work prior to receiving his EAD.)

Tips for OPT:

- A student does not need a job offer to apply for OPT.
- Unlike CPT, a student working in OPT must have an EAD before starting work.
- OPT is often a convenient way for employers to "try out" employees before deciding to sponsor them for H-1B status.

Economic Hardship

An F-1 student who suffers severe and unforeseen economic hardship while in school (such as the death of parents who are providing support, or civil war in the home country resulting in devalued currency, or other severe circumstances) may apply to the CIS for authorization to work. This generally is for off-campus employment, since an F-1 student is eligible for on-campus employment even without demonstrating economic hardship.

H-1B for Faculty and Other Degreed Professionals

8 U.S.C. § 1101(a)(15)(H); 8 C.F.R. § 214.2(h)

H-1B is one of the most frequently used work visa options for college and university faculty and staff. This visa category permits U.S. employers to hire foreign professionals (including professors and researchers) who have at least a Bachelor's Degree (or the equivalent), if those individuals will work in a position requiring the type of degree held by the individual.

Eligibility for H-1B

The initial questions to determine whether H-1B is the appropriate status for a potential hire are the following:

- Does the position require at least a four-year Bachelor's Degree in a particular field?
- Does the prospective employee have such a degree (or the equivalent, such as a foreign degree or equivalent work experience)?

If the answer to both questions is yes, an H-1B may be a good choice. However, as with most issues in immigration, both of these questions can become considerably more complex. For example, the issue of whether an individual holds a Bachelor's Degree in a specific field may be answered not only by examining whether the individual studied a particular field for four years at a U.S. college or university (or equivalent foreign institution), but also by a review of whether the individual's combination of education and experience are equivalent to a four-year degree from a U.S. institution of higher education. Three years of progressively responsible work experience are considered by the CIS to be equivalent to one year of university education.

Example: Sam, an Indian citizen, is an expert electrical engineer who has applied for a position at Wonderful University. He holds a "Bachelor's Degree" from an institution in India. However, the degree program only required three years of study, and his degree is not equivalent to a U.S. four-year engineering degree. In addition to his degree, though, Sam has ten years of progressively responsible work experience as an engineer. To qualify for H-1B status, two experts in the engineering field must review his transcripts and work experience and conclude that he has knowledge equivalent to that possessed by an individual who has graduated from a U.S. four-year program in engineering.

Duration of H-1B Status: Six Years and Beyond 8 C.F.R. § 214.2(h)

H-1B status can be granted to individuals in increments of up to three years and, except as noted below, cannot exceed a maximum of six consecutive years. An employer may request a three-year H-1B period, or a shorter time period if desired. The shorter the H-1B period requested, the more times it would need to be extended to reach the six-year maximum.

Example: College A hires Pete as a research scientist in H-1B status. Because the grant-based funding covering Pete's salary is determined on a year-to-year basis, College A requests an initial period of one year for Pete's H-1B. Near the end of the year, the funding is extended and College A requests a one-year extension of H-1B status for Pete. College A continues to extend Pete's stay in this manner for six consecutive years. Note that each filing requires CIS filing fees (and legal fees if outside counsel is used).

Example: College B hires Amy as a tenure-track professor in H-1B status. It requests the maximum stay possible – three years – in its initial petition for her H-1B. Before the expiration of her initial three years, College B requests the maximum extension of her status: an additional three years. (Note: while in H-1B status, the faculty member may apply for permanent residency, which if approved would allow an unlimited stay in the U.S.)

Example: College C hires Nigel as a teaching faculty member, and obtains a three-year H-1B approval. After one year, Nigel obtains a new position at College D, which in turn can obtain an H-1B approval for three years for Nigel. If Nigel works all three years at College D, he is eligible for only a two-year extension, since he already spent four years in H-1B status (one year at College C and three years at College D).

In certain situations, H-1B status can be extended in one-year increments past the normal six-year maximum. This is permissible when the employee is the beneficiary of a Labor Certification application or I-140 petition (both of which are filings related to the permanent resident green card process) that has been pending for one year (365 days) or more. H-1B status also can be extended beyond six years to recapture time spent outside the U.S. during the six-year validity period of the H-1B. Finally, an H-1B can be extended

beyond six years in three-year increments if the alien is the beneficiary of an approved I-140 immigrant petition, but is unable to complete the green card process because he or she is from a country that has exhausted its quota of green cards (frequently, China and India). (See the discussion of these items under Permanent Residence options in Section II beginning on page 20.)

Example: College B has hired Amy as a tenure-track professor and applied for H-1B status for her. College B then files a Labor Certification application for Amy as the first step towards obtaining permanent residency for her. By the time Amy has spent six years in H-1B status, the Labor Certification application has been pending for more than one year. Therefore, College B may extend Amy's H-1B status for additional increments of one year at a time until a final decision is made on her permanent residency. There is no specific limit on the number of one-year extensions.

If an individual has spent six years in H-1B status and is not eligible for additional extensions, he or she must spend one year outside the U.S. before being eligible to re-enter the U.S. in H status. Alternatively, the individual may be eligible to change to some other visa status, such as O for individuals of outstanding ability, or TN for citizens of Canada or Mexico. If an application for another visa status is filed before the end of the sixth year in H-1B, the individual may change status in the U.S.

Filing and Timing

An employee who has not previously held H-1B status must be approved by CIS for such status before he or she is eligible to begin working at a college or university.[6] As of this writing, it is taking CIS three to five months or longer to process an H-1B petition. If desired, an employer can obtain 15-day "premium processing" by paying an additional $1,000 fee to CIS.

An employee in H-1B status with one employer may transfer employment to a new employer immediately upon filing a new H-1B petition, and the employee may begin work for the new employer before the new petition is approved. However, the following conditions must be met:

- The individual entered the U.S. lawfully and was either admitted in or later changed to H-1B status;
- The individual has not violated his or her status by working without authorization; and
- The petition for H-1B status is non-frivolous and was properly filed before the expiration of the individual's current H-1B status.
  (In order to ensure that CIS accepts the petition, some employers prefer to wait until they receive the receipt notice issued by CIS before the employee starts working. Others simply rely on the proof of mailing – e.g., Federal Express receipt and proof of delivery.)

This process is known as "H-1B portability." For "portability" petitions, employers and employees should note that the individual is authorized to work only while the petition is still pending. If the petition and request for transfer to the new employer are both approved, the individual may continue working. However, if the petition or the request for transfer/extension of stay is denied, the employment authorization immediately ends on the date of denial.

Example: Susan is employed in H-1B status by ABC University. XYZ University offers her a position, which she accepts. As soon as XYZ University files an H-1B petition for Susan at CIS – but not before – Susan may begin working for her new employer.

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6. There is a limited quota of 85,000 H-1B's available each year for most employers. H-1B petitions filed by institutions of higher education are exempt from that quota, as are non-profit entities related to or affiliated with institutions of higher education.

H-1B Processing Issues

Petitions for H-1B status involve a number of filings with different government agencies, as well as certain regulatory obligations on the part of the employer. The following is a general overview of these issues.

Labor Condition Application Form ETA-9035

Prior to filing an H-1B petition with CIS, an employer must obtain an approved Form ETA-9035, which commonly is known as the Labor Condition Application (LCA), from the Department of Labor. This document attests that the employer will pay the H-1B worker the higher of the "prevailing wage" for the occupation in the area of intended employment (as determined by the Department of Labor for the specific geographic area and occupation) or the wage paid by that employer to U.S. workers performing the same job. The LCA also attests that hiring the foreign worker will not adversely affect wages and working conditions of U.S. workers.

This requirement may seem more onerous than it actually is. Filing the LCA has become streamlined with electronic filing, and an approved LCA can be obtained in seconds. Furthermore, the Department of Labor understands that salaries at colleges and universities are not always as high as they are in the private sector, and so, has a special set of prevailing wages that apply to such jobs.

Posting

The employer must post a notice, announcing that it is hiring an H-1B worker, in two different places at the worksite for 10 business days. The employer may use the LCA itself as the posting, but is not required to do so. NOTE: These notices are not job advertisements. There is no requirement that the job be advertised or made available to U.S. workers, and the employer does *not* have to demonstrate that U.S. workers are unavailable for the position. Even if U.S. workers apply or are interested in the position, the employer may hire an H-1B worker.[7]

The Public Access File

An employer must maintain a "public access file" for each H-1B employee. The public access file is the subject of detailed and complex regulations, most of which are outside the scope of this monograph. However, the basic rules are as follows:

The public access file must be created within one day of filing the LCA (ETA-9035, discussed above), and must be retained for one year beyond the authorized period of employment on the LCA, or for one year from the date the LCA is withdrawn. According to the regulations, the following items must be kept in the public access file:

1. **Proof of prevailing wage**.
2. **The certified LCA** (Form ETA-9035).
3. **The posted notices and verification of posting**. As noted above, the employer is required to post a specific notice about the H-1B filing in two places in the worksite for 10 business days. Verification of this posting should be maintained in the public access file, stating the dates and locations of the postings.
4. **Proof that the employee received a copy of the certified LCA**.
5. **Statement of wage rate paid to the H-1B worker**. This should be updated as the wage changes.

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7. Certain employers that rely heavily on H-1B workers (15% or more of their work force) may be qualified as "H-1B dependent." H-1B dependent employers have certain obligations to recruit U.S. workers. No other employers have this obligation.

6. **Actual wage statement**. The employer must maintain documentation that an H-1B employee is being paid at or above the "actual wage" paid to similarly employed U.S. workers at the institution. To satisfy the "actual wage" requirement, the employer must maintain in each public access file documentation showing how the wage set for the H-1B employee relates to the wages paid to all other individuals with similar experience and qualifications. If the H-1B employee is compensated differently from U.S. workers, the employer must be able to show objective reasons why.
7. **Benefits documentation**. Institutions must demonstrate that they offer H-1B employees benefits on the same terms and conditions as those they offer to U.S. workers. If an institution's benefits plan differs for different employees, the employer must explain why.

Again, all of these items must be retained in the public access file for one year beyond the authorized period of employment on the LCA (Form ETA-9035) or for one year from the date the ETA-9035 is withdrawn. The file must be available to any member of the public who wishes to view it. For that reason, it is advisable to keep a separate public access file for each H-1B employee, and to keep that file separate from other personnel information that is not publicly available.

Dual Intent

H status, unlike many non-immigrant categories, allows for "dual intent," or the intention to hold non-immigrant status while pursuing immigrant status in the U.S. This makes the H-1B a desirable option for individuals needing short-term employment authorization while their permanent residency petition is pending. This also means that the H-1B is entirely appropriate for tenure-track positions.

Termination of H-1B Employees

Sometimes, an employer must terminate an employee in H-1B status before the end of the requested period of stay, or the employee may terminate the employment. In those cases, the employer has two obligations:

1. Notify CIS of the termination. 8 C.F.R. § 214.2(h)(11). CIS will then revoke the individual's H-1B status.
2. If the employer terminated the employment prior to the expiration of the authorized period of H-1B status, the employer must offer to provide the individual with return transportation to his or her home country or country of last residence. 8 C.F.R. § 214.2(h)(4)(iii)(E). NOTE: the offer of return transportation is required only for the individual, not for his or her family or belongings. CIS considers this obligation a contractual matter between the employer and employee, and has no enforcement mechanism in place to ensure compliance. There is no obligation to provide return transportation if the employee terminates employment, or if the termination by the employer is at the end of the requested period of stay.

If an individual ceases employment with his or her H-1B employer (and does not file for a transfer or change of his or her status), he or she falls "out of status" immediately, and is legally required to depart the U.S. – also immediately. (Note: If the termination occurs at the expiration of the employee's period of H-1B eligibility, as stated on the employee's I-94, then the employee has a 10-day grace period to depart the U.S. Otherwise, his or her departure must be immediate.) Departure is the responsibility of the beneficiary, not the sponsoring institution; thus, the employer has no obligation to police the employee to ensure departure.

Concurrent H-1B Employment

It is possible for an individual to hold H-1B employment with more than one employer at the same time. However, each employer must separately petition and obtain approval for that employee to work at its institution.

Example: Karina is a Research Scientist at Ivy League College, which petitioned for her H-1B and has an approval notice for her full-time employment. Karina also wishes to perform part-time additional work for Research Company. However, in order for her to do so, Research Company also must file an H-1B petition for Karina, noting her proposed duties, work location, wages, and hours, before she may begin working for it. In this example, because Karina held H-1B status with Ivy League College, she could begin working for Research Company as soon as Research Company filed the H-1B petition, using H-1B portability.

H-1B Fees and Costs

The government takes the position that the fees and costs associated with H-1B filings (such as legal fees and CIS filing fees) are the obligation of the employer, not the employee. If the Department of Labor conducts an audit, and finds that the fees and costs were either (1) paid by the employee, or (2) initially paid by the employer but billed to the employee, the employer may be required to reimburse the fees and costs to the employee. There is an argument under the "prevailing wage" regulations to the effect that, as long as payment of the fees and costs by the employee does not reduce his or her wage below the prevailing wage, then payment of these expenses by the employee is appropriate. See 20 C.F.R. § 655.731(c)(9)(ii) and (iii). However, in practice, the government has not adopted this position. Instead it has required that all fees and costs be paid by the employer or, if paid by the employee, be reimbursed by the employer.

J-1 Visas for Exchange Visitors, Short-Term Scholars, Medical Residents, Students, and Others

8 U.S.C. §1101(a)(15)(J); 8 C.F.R. § 214.2(j); 22 C.F.R. Part 62

Eligibility

The J visa is issued for a multitude of purposes and to a wide range of individuals, including students, research scholars, professors, physicians, and other individuals receiving training in a variety of fields. As with the F-1, the J-1 visitor must establish that he or she intends to return to his or her home country after completing the program. Some J-1 visa holders may be subject to a mandatory requirement that they return to their home country for two years before they are eligible to work and live in the U.S. in certain other immigration categories, including H-1B and permanent resident.

The most commonly used J visa categories for university employment are for the following:

- *Professors* – must be engaged primarily in teaching, lecturing, observing, or consulting. A professor also may conduct research.
- *Research Scholars* – must be engaged primarily in "conducting research, observing, or consulting in connection with a research project." Research Scholars also may teach or lecture.
- *Medical Residents* – employment must be related to the medical resident's medical specialization and authorized by the Educational Commission on Foreign Medical Graduates. Medical resident training subjects the resident to the two-year home residency requirement mentioned above.
- *J-1 Students* – must pursue a full course of study and can work on-campus as part of a scholarship, fellowship, or assistantship.

To sponsor J-1 visitors, a university must be approved and enrolled in SEVIS (the Student and Exchange Visitor Information System). The Department of State, which governs J programs, must specifically certify the university to host professors and researchers. Once this certification is given, the university is authorized to issue Form DS-2019 (formerly IAP-66) to J visitors. With Form DS-2019, the individual may apply for a J-1 visa at a U.S. Consulate outside the U.S. or, if he or she is in the U.S. in another non-immigrant status, may apply to CIS to change his or her status to J-1.

Length of Stay

A professor or research scholar may work in the U.S. as indicated on his or her Form DS-2019, (issued by the J-1 sponsor) for a minimum of three weeks to a maximum of five years.[8] The J-1 visitor is admitted to the U.S. for a period of time noted as "d/s" or "duration of status" on the I-94 card. "Duration of status" is defined as the time on the DS-2019, plus 30 days for travel. If necessary, the DSO may authorize a six-month extension beyond the maximum of five years (and issue a new DS-2019 for the visitor) in order for the visitor to complete a specific project or research activity. Any other extensions may be granted only in exceptional or unusual circumstances, and must be specifically approved by the Department of State. *See generally* 22 C.F.R. § 62.20(i)(3).

Tenure Issues

The regulations specifically note that a J-1 visa holder "shall not be a candidate for tenure track positions." 22 C.F.R. § 62.20(d)(i). However, it is important to note that a J-1 researcher or professor *may* hold a position that is normally classified as "tenure track," even though he or she is not eligible to receive tenure, as long as the position is only temporary for that individual.

Example: Professor A, a U.S. citizen, holds a tenure-track position at ABC University. He takes a one-year sabbatical to complete his great American novel. The university may fill this tenure-track position with Professor B in J-1 status, who will hold the position as a university professor for one year. Upon Professor B's departure, Professor A will resume his tenure-track position.

212 (e) Home Residency Requirement 8 U.S.C. § 1182(e); 22 C.F.R. § 41.63

Some (but not all) J-1 visitors must return to their home country for a period of two years after completing their program in the U.S. This is called the 212(e) requirement, or the "two-year home residency requirement." These J-1 visitors will not be able to obtain an immigrant visa or H-1B or L-1 non-immigrant status unless and until they have either completed the two-year home residency requirement or obtained a waiver of the requirement. They may be able to change to other non-immigrant categories (such as F-1, TN, or O-1), but will have to depart the U.S., obtain a new visa at a U.S. consulate, and re-enter the U.S. to activate the new status. They cannot change status in the U.S.

In general, a J visa holder will be subject to the two-year home residency requirement if: (1) his or her participation in the J-1 program was financed by either his or her home government or the U.S. government; (2) he or she has skills that the individual's home country government has identified on a "skills list" provided to the U.S. Department of State; or (3) his or her purpose in the U.S. was to receive graduate medical education.

It is possible to obtain a waiver of the two-year home residency requirement in some instances. CIS will consider granting a waiver upon a favorable recommendation by the Department of State, for such reasons as:

8. The five-year maximum became effective in Fall 2006. The previous maximum was three years.

- Proof that the residency requirement would be an exceptional hardship to a U.S. citizen or lawful permanent resident spouse or child of the J-1 visitor;
- A request by a U.S. agency showing that it is in the public interest for the J-1 individual to remain in the U.S., and that compliance with the two-year requirement would be clearly detrimental to a program of official interest to the U.S. agency;
- Issuance of a "no objection" letter from the J-1 visitor's home country, specifically noting that the home country does not object if the J-1 visitor remains in the U.S.;
- A showing that the J-1 visitor's return to his or her home country would result in persecution because of race, religion, or political opinion; or
- A request by a U.S. government agency or a state department of health to allow foreign-born medical graduates to provide primary medical care in an underserved area of the U.S.

Employment Pursuant to Academic Training for J-1 Students and Post-Docs 22 C.F.R. § 62.23(f), (g)

Certain J-1 visitors are eligible for academic training during or after completing their education in the U.S. (18 months for most J-1 students; up to 36 months for post-doctoral research). This is similar to F-1 optional practical training; however, unlike F-1 students, J-1 students engaging in academic training do not require formal employment authorization from CIS. Instead, they need only a letter of authorization from their DSO noting that the employment is related to their degree. The DSO also must note the employment in the individual's SEVIS record. In certain cases, this authorization may allow students to work on-campus in a position related to their studies.

Tips:

- J-1 is a streamlined and rapid option for bringing students, scholars, and other university personnel to the U.S. This is because the university, once it is a qualified by the U.S. Department of State as a J-1 sponsor, can issue the DS-2019 on its own, without CIS involvement, to allow an individual to obtain a J-1 visa to enter the U.S.
- Ease of entry must be balanced against the home residency requirement, and prohibition on tenure for J-1 visa holders. These issues may make H-1B more desirable than J-1 for faculty or staff.
- If a J-1 employee is subject to the home residency requirement, this only prevents change to H-1B, L-1 (for certain employees of multi-national companies), or permanent residence. The employee is still eligible for change to O-1, F-1, TN, or other visa categories, but must first depart the U.S. to obtain a new visa.

O-1 Visas for Individuals of Extraordinary Ability

8 U.S.C.§ 1101(a)(15)(o); 8 CFR § 214.2(o)

The O visa is reserved for individuals who have demonstrated "extraordinary ability" in their field of expertise. For university professors and researchers, the O visa can be an excellent alternative to the H-1B visa if the latter is inappropriate or unavailable.

Eligibility

Eligibility for the O-1 is based on a showing of "sustained national and international acclaim" and recognition of the individual's achievements. Such acclaim and recognition can be demonstrated by receipt of a major internationally recognized award, such as the Nobel Prize, or at least three of the following:

- Receipt of nationally or internationally recognized prizes or awards for excellence in the field;
- Membership in associations in the field that require outstanding achievements of their members, as judged by recognized national and international experts in their discipline;
- Published material in professional and major trade publications or major media about the alien, relating to his or her work in the field. The evidence must include the title, date, and author of such material;
- Participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
- Original scientific, scholarly, or business-related contributions of major significance in the field;
- Authorship of scholarly articles in the field, in professional journals, or other major media;
- Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation; and
- Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

If the above evidence does not readily apply to the occupation, then the employer may submit other comparable documentation of extraordinary achievement.

Length of Stay

An O visa can be issued for periods of time from one to three years initially, with extensions available, generally in one-year increments. The number of extensions is not limited by the regulations.

Tips:

- O-1 can be an option for employees subject to the J-1 home residency requirement. As discussed above, certain J-1 visitors are subject to the 212(e) requirement that they spend two years in their home country before re-entering the U.S. in H-1B status, L-1 status, or as a permanent resident following the expiration of their J visa. This can make it difficult for an employer to extend the employment of a valued J-1 employee through change, for example, to H-1B status. However, the O visa can be a valuable tool to circumvent this restriction because the 212(e) requirement does not prohibit a former J-1 visitor from obtaining O-1 status, even before the visitor obtains a waiver or spends two years back in his or her home country. The J-1 visitor would still be barred from changing his or her status in the U.S.; however, he or she could leave the U.S., obtain an O-1 visa in his or her passport, and then re-enter the U.S. in O-1 status.
- The O-1 also may be used if a candidate has exhausted six years of H-1B eligibility and is not qualified to obtain an extension of H-1B status.

TN Status for Citizens of Canada and Mexico under the NAFTA Treaty 8 U.S.C. § 1184 (e); 8 C.F.R. § 214.6

TN status is a creation of the North American Free Trade Agreement (NAFTA) between the U.S., Canada, and Mexico. As a result, only Canadians and Mexicans are eligible for TN status. Particularly for Canadians, the TN visa can be an effective means by which university personnel can enter the U.S. quickly and with minimal paperwork.

TN status can be issued for a single year at a time, with unlimited extensions, but the TN visitor must continue to demonstrate non-immigrant intent to return to Canada or Mexico at the completion of TN employment. Furthermore, it is available only for certain occupations and for individuals demonstrating specific qualifications for those occupations. Among the university-related positions available for TN status are:

- Research Associate
- Librarian
- Medical Laboratory Veterinarian
- College or University Teacher
- Animal Scientist
- Biochemist
- Biologist
- Astronomer
- Mathematician
- Chemist
- Dairy Scientist
- Entomologist
- Epidemiologist
- Geneticist
- Geochemist
- Geologist
- Geophysicist
- Horticulturist
- Economist
- Meteorologist
- Pharmacologist
- Physicist
- Plant Breeder
- Poultry Scientist
- Soil Scientist
- Zoologist
- Agriculturist
- Seminary Teacher
- Scientific Technologist

For Canadians

Canadians may apply for entry in TN status directly at a port of entry into the U.S. (i.e., with an immigration official at a land border or at pre-clearance stations at international airports in Canada). There is no formal application form; Canadians are admitted upon proving Canadian citizenship and that they meet the qualifications for TN status. Typical documentation includes educational credentials, proof of proffered employment in a qualifying job in the U.S., and proof of Canadian citizenship. As of January 2007, Canadians must have a Canadian passport to enter the United States by air. The passport requirement is expected to apply to land and sea entries in the future.

For Mexicans

The process for Mexican citizens applying for TN status is not quite as streamlined. A Mexican must first obtain a TN visa at a U.S. Consulate prior to applying for entry to the U.S.[9] As a result, Mexicans who are eligible for both H-1B and TN status may wish to consider applying for H-1B status, which has the advantages of dual intent and a longer time frame (three years at a time, rather than a single year). However, the TN process for Mexicans is still faster than the H-1B process since it does not require filing a petition with CIS.[10] The TN visa can also be very useful for those Mexican citizens who have exhausted the H-1B six-year maximum period of stay, and still wish to enter the U.S.

Tips:

- TN offers streamlined processing for many university positions, including university instructor.
- A one-year validity period makes it advisable to change to H-1B prior to commencing green card processing, since employees in TN status cannot have dual intent.

R-1 Visas for Religious Workers 8 U.S.C. § 1101(a)(15)(R); 8 C.F.R. § 214.2(r)

The R-1 visa is specifically limited to bona fide nonprofit religious organizations, or to organizations closely affiliated with religious denominations that hold tax-exempt status as a religious organization. Therefore, the R-1 is useful only for a limited number of colleges and universities. Institutions that meet these criteria may sponsor an individual for R-1 status as a "religious worker."

9. 9 Foreign Affairs Manual 41.59 N4.2.

10. Prior to January 1, 2004, Mexican applicants for TN's were required to hold an approved CIS petition, but that is no longer the case.

Eligibility

Basic qualifications for this visa include:

- The employer must be a nonprofit religious organization;
- The individual must have been a member of the *same religious denomination* as the employer for the two years preceding the filing of the application (this is not the same as having been employed by the denomination for two years);
- The individual must be seeking to enter the U.S. to: (1) be a minister for the religious denomination; or (2) work in a religious vocation or occupation. A religious vocation is defined by a calling to religious life, such as a monk or a nun. A religious occupation is one that is related to a traditional religious function. For example, a religious instructor, cantor, or missionary would be a religious occupation. A clerk or fundraiser for a religious organization, however, would not be a religious occupation. Note: if the individual is a religious professional, he or she must have a U.S. Bachelors Degree or its foreign equivalent, and a degree must be required for entry into the religious profession.
- While the position may be part-time, it is important that the individual receive salary or funding sufficient to support his or her family and self without resorting to unauthorized employment.

Length of Stay

An initial R-1 can be approved for three years, with a two-year extension available, for a maximum five-year stay in R status.[11]

Application Procedures

As of May 2007, the R-1 does not require prior CIS approval unless the individual currently is in the U.S., and is seeking a change or extension of status. Aliens who are outside the U.S. may apply for the R visa directly at the U.S. Consulate in their home country. However, CIS has proposed a regulation (which is not in effect as of the writing of this monograph) that would require a religious worker to obtain an approved petition from CIS before he or she could apply for an initial R-1 visa stamp.

APPLICATION PROCESS FOR NON-IMMIGRANT VISAS

There are different procedures for obtaining non-immigrant status in the U.S. The first consideration is whether the individual is inside the U.S. in another non-immigrant status, or outside the U.S. in his or her home country.

Processing Within the U.S.: Changing Status

An individual who currently is in the U.S. in valid non-immigrant status may be able to change his or her status to a new non-immigrant status and/or change to a new employer without leaving the U.S.[12] This is done by applying to CIS with the proper forms, evidence, and filing fees.

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11. CIS has proposed a regulation that would limit the initial period of R-1 stays to one year, with the opportunity for two potential extensions in two-year increments. As of the date of publication of this monograph, the proposed regulation has not taken effect.

12. There are some exceptions. For example, an individual in J-1 status who is subject to the 212(e) home residency requirement is not eligible for a change of status in the U.S. Also, if an individual has violated his or her status (e.g., by staying past the authorized period of time allowed or by engaging in activities prohibited by the terms of his or her initial status), a change of status may not be possible. *See generally* 8 C.F.R. § 248.1. And, someone entering the U.S. using the visa waiver program is not eligible to change status in the U.S., except in the case of marriage to a U.S. citizen.

There are two options for processing at CIS: normal and premium. Normal processing is available for all changes of status and, depending on the requested status, generally takes several months (the timeframe depends on the workload at the particular service center and the priority of the particular status requested). Premium processing is available for those wishing to change their current status to H-1B, TN, R, and O, as well as others not specifically addressed in this pamphlet. Premium processing requires an additional $1,000 filing fee (over and above the normal filing fee). In exchange, CIS guarantees that it will respond to the request within 15 calendar days (or will refund the $1,000).

Premium processing can be a valuable tool when an employee must start work as soon as possible. For most visa categories, the new employer must obtain CIS approval of the employee for the new status before the individual can begin working for the college or university. H-1B is an important exception. By using "H-1B portability," discussed earlier, a person in H-1B status may begin working for a new employer as soon as the new petition is filed and received by CIS.

Example: John holds J-1 status as a professor at Collegiate College. His J-1 will expire in April. It is now March, and Collegiate has decided to offer John a tenure-track position. John accepts, which he may do because he is changing from his current J-1 status. The college knows that if it sponsors John for H-1B status under the normal processing times, the petition will not be approved before the end of April. John will have to stop work when his J-1 expires and not resume work until the H-1B is approved. Wishing to avoid this delay, the college files an H-1B petition under premium processing, requesting that John's status in the U.S. be changed to H-1B. The petition is approved in 15 days and John is able to work continuously for Collegiate. (NOTE: in this hypothetical, John is not subject to the 212(e) home residency requirement.)

Processing Outside the U.S. at the U.S. Consulate

For an individual outside the U.S., the application process may become a two-step procedure. For many statuses, including H-1B and O, it is necessary first to obtain an approval notice from CIS. This is done by applying to CIS with the proper forms, evidence, and filing fees.

After the approval is received, or for those categories for which prior CIS approval is not required (such as B-1, F-1, and J-1 status), the individual must schedule an interview with the U.S. Consulate in his or her home country. The Consulate will adjudicate the case and (assuming all goes well) place the requested visa stamp into the individual's passport. For categories F and J, the individual may apply at the U.S. Consulate without a CIS approval notice, but is required to have the school-issued SEVIS I-20 or DS-2019, respectively.

Special Issue: Security Checks

Security checks at U.S. Consulates, many of which have been instituted since the attacks of September 11, 2001, may cause considerable delay at this stage. For example, citizens of some countries require additional security processing that could take several weeks or months. It is essential, therefore, to plan ahead when hiring an individual who currently is outside the U.S., particularly if he or she is from one of the countries listed below. Note, however, that the Department of State has not formally announced such a list.[13] It is therefore subject to change or additions at any time. Nonetheless, at the time of this writing, the following countries appear to require additional time for security clearances:

13. The Department of State takes the position that information regarding which countries require special security clearance (other than the five state sponsors of terrorism – Cuba, Iran, Syria, Sudan, and North Korea) is classified. The information provided here is anecdotal.

Afghanistan	Indonesia	Libya	Somalia
Algeria	Iran	Malaysia	Sudan
Bahrain	Iraq	Morocco	Syria
Bangladesh	Jordan	Oman	Tunisia
Djibouti	Kenya	Pakistan	Turkey
Egypt	Kuwait	Qatar	United Arab Emirates
Eritrea	Lebanon	Saudi Arabia	Yemen

If the individual is from one of the countries designated by the Department of State as a state sponsor of terrorism (Cuba, Iran, Syria, Sudan, and North Korea),[14] these security clearances will be even more rigorous, and the delays could be even longer. In addition, if the individual will be engaged in activities related to technologies of national security interest (designated by the Department of State on its "Technology Alert List"), yet additional security clearance will be required.

In the current post-9/11 climate, policies and rules governing security procedures and the time required for visa issuance may change rapidly and without notice. University officials and other employers must be prepared to be flexible and expect delays for individuals entering the U.S. from abroad.

Finally, pursuant to the U.S. Visitor and Immigrant Status Indicator Technology (U.S. VISIT), a program instituted in January 2004, individuals entering the U.S. in non-immigrant status will be fingerprinted and photographed at the port of entry (airport, seaport, or border crossing) before they are allowed to enter the U.S., and their information will be checked against government "watch lists" of suspected terrorists and criminals.

Special Rules: Canadians 8 C.F.R. § 212

As noted in the section on TN visas, Canadians seeking to enter the U.S. in TN status need not obtain an approval notice from CIS or apply for a visa at a U.S. Consulate. They may simply apply at a port of entry into the U.S. by showing their qualifications for the status. Also, Canadians generally are not required to obtain a visa to enter the U.S. in other categories. For example, unlike any other nationality, a Canadian with an H-1B approval notice may immediately enter the U.S. through a port of entry without obtaining a visa stamp in his or her passport.

TRAVEL

Once an individual is inside the U.S. in non-immigrant status, any travel outside the country should be carefully examined prior to making the trip to ensure that he or she will be able to re-enter. With few exceptions, the individual must have a valid visa in his or her passport prior to re-entry. One of these exceptions, as noted above, is for Canadians, who generally are "visa-exempt," and need only show that they have been approved for a particular status in the U.S. The second is "automatic visa revalidation," explained below.

Automatic Visa Revalidation 22 C.F.R. § 41.112(d)

Many non-immigrant aliens (including those in H-1B and O status) may make a trip of fewer than 30 days to Canada and Mexico and re-enter the U.S., even with an expired visa, as long as their I-94 remains current. They will be readmitted upon showing their old visa and their valid I-94 (including an I-797 Approval Notice I-94). Individuals in F-1 and J-1 status may travel to Canada, Mexico, and also islands contiguous to the U.S. (except

14. Libya and Iraq were previously considered state sponsors of terrorism, but have been removed from the list as of the date this monograph was published.

Cuba) for fewer than 30 days and be permitted to re-enter the U.S. even with an expired visa. There are, however, important exceptions to this rule:

1. If the individual is a national of a state sponsor of terrorism (Iran, Syria, Sudan, North Korea, or Cuba), he or she will have to obtain a new visa in his or her home country before being allowed to re-enter the U.S.
2. Regardless of the individual's nationality, if he or she applies for a new visa at a U.S. Consulate while in Canada or Mexico, the individual *cannot* return to the U.S. until that visa has been issued. If the visa is denied at the U.S. Consulate in Canada or Mexico, the individual will have to return to his or her home country and re-apply for a visa to enter the U.S.
3. If the individual enters Canada or Mexico, and then travels to another country, the option of Automatic Visa Revalidation is lost.
4. If the individual has failed to maintain valid non-immigrant status before departing the U.S., he or she may not use Automatic Revalidation to re-enter.

SPECIAL REGISTRATION

8 U.S.C.S § 1305(b); 8 U.S.C.S § 1303(a); 8 C.F.R. § 264.1;
See also, e.g., 67 Fed. Reg. 67766 (Nov. 6, 2002); 67 Fed. Reg. 70525 (Nov. 22, 2002);
68 Fed. Reg. 2363 (Jan. 16, 2003); and 68 Fed. Reg. No. 67577 (Dec. 2, 2003)

In addition to security checks, some individuals continue to be subject to "special registration" as part of the post-9/11 National Security Entry Exit Registration System (NSEERS). Implemented on September 11, 2002, NSEERS required certain nationals to "register" upon entry. Individuals already in the U.S. on that date were required to register with NSEERS through a "call in" procedure.

Registration upon U.S. entry affected individuals who were born in certain countries, including Iran, Iraq, Libya, Sudan, and Syria. NSEERS registration involved fingerprinting, photographing, and collecting information about the individual such as address, status in the U.S., purpose of the person's stay in the U.S., etc. Although entry registration under NSEERS was suspended in December 2003, previously registered individuals are still required to depart the U.S. only through designated ports of exit and only after informing immigration officials of their plans for departure. In addition, immigration border officials have continued authority to "register" individuals at their discretion.

Call-in registration required males 16 years of age and older from certain countries (including Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen), who were present in the U.S. in non-immigrant status when the regulations were published (in late 2002 and early 2003), to report to immigration offices and register. NSEERS also included individuals who are determined by the immigration border officials to pose security challenges,[15] even though that assessment may be both subjective and discretionary.

The rules governing special registration for affected individuals are highly specific and require both strict adherence and strict attention to detail. The penalties for non-compliance are severe, including removal from the U.S. and a prohibition against re-entry.

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15. The Department of Homeland Security official at the port of entry must determine whether each entrant "merits monitoring in the interest of national security." Factors leading to a positive determination include "unexplained" trips to Iran, Iraq, Libya, Sudan, Syria, North Korea, Cuba, Saudi Arabia, Afghanistan, Yemen, Egypt, Somalia, Pakistan, Indonesia, or Malaysia; the individual's explanation for travel (to those or other countries) is not well justified by his job or other legitimate reasons; the individual has previously overstayed or violated his immigration status in the U.S.; the individual has been identified by local, state, or federal law as requiring monitoring; or the individual's demeanor or behavior leads the inspector to believe that monitoring would be advisable.

II. Permanent Residence: Immigrant Visas

Many colleges and universities want their foreign employees to work for them longer than is permissible on non-immigrant visas, and have offered them jobs for an indefinite period of time. In these situations, permanent residency for the employee (a "green card") may be appropriate.

Obtaining permanent residence allows an individual to work for any U.S. employer and to travel in and out of the U.S. without restriction. Permanent residence carries with it many of the rights given to U.S. citizens (exceptions include the right to vote, run for office, and sit on juries). However, it can be revoked if the individual commits certain crimes or is held to have abandoned the residency by leaving the U.S. for lengthy periods (usually six months to a year or more). After holding permanent residence for a number of years (three years if permanent residence is based on marriage to a U.S. citizen, or five years if permanent residence is obtained by other means), the individual may apply for naturalization to become a U.S. citizen.

There are a number of options by which an individual can obtain permanent residence in the U.S., including marriage to a U.S. citizen or permanent resident, other immediate family relationships to someone who is a citizen or permanent resident, asylee or refugee status, or through employment or special skills. The following section focuses on permanent residence based on employment or special skills.

PROCESSES FOR OBTAINING IMMIGRANT VISAS FOR FACULTY AND STAFF

There are four typical options for obtaining permanent residence available to the faculty and staff of a U.S. college or university based on employment or special skills. First, there is a process for aliens of "extraordinary ability" in their field. Second, institutions may sponsor aliens who are considered "outstanding professors and researchers." Third, there is a "national interest waiver" process for aliens shown to have exceptional ability and who are working in the U.S. national interest. Finally, for aliens not falling into any of these categories, there is a process known as labor certification for teaching faculty members who are the best qualified applicants for the position, and for non-teaching employees who are the *only* qualified applicants for the position. Each of these categories is discussed below.

Obtaining permanent residence (i.e., a green card) is a two-step process for individuals who qualify for extraordinary ability, outstanding researcher/professor, or national interest waiver. The process can take anywhere from a few months to one to two years or more to complete. The first step is for the individual to qualify for the green card by applying for and obtaining approval of an I-140 immigrant petition (as an alien of extraordinary ability, an outstanding researcher/professor, or an alien of exceptional ability working in the U.S. national interest). The second step is for the alien to show that there are no personal reasons to exclude him or her from permanent residence in the U.S., such as a criminal background, certain communicable diseases, membership in terrorist organizations, etc. This latter process can be undertaken in the U.S. if the individual is

present in a non-immigrant status, and is known as "adjustment of status." It also can be undertaken outside the U.S., through a U.S. Consulate, using a procedure known as "consular processing." In either case, the individual will undergo a criminal background check, a medical exam, and various other checks.

For individuals who do not qualify for extraordinary ability, outstanding researcher, or national interest waiver, obtaining permanent residence through employment is a three-step process. The first step, called "labor certification," involves the employer advertising to locate qualified U.S. workers. The final two steps (the I-140 immigrant petition and adjustment of status) are as discussed above. The various processes for obtaining permanent residence are as follows.

Aliens of Extraordinary Ability 8 U.S.C. § 1153(b)(1)(A); 8 C.F.R. § 204.5(h)

This category is reserved for aliens who have risen to the top of their fields of expertise. It generally is viewed as a desirable category for the applicant because he or she needs neither an employer sponsor nor a labor certification from the Department of Labor for the position (labor certification is discussed in detail beginning on page 23). The eligibility criteria to qualify as an alien of extraordinary ability for purposes of permanent residency are very similar to the eligibility standards for an "O" visa (discussed earlier on page 13), although, in practice, they are slightly more stringent.

Tips for Success:

- A simple collection of information (copies of awards, articles, and curriculum vitae) generally is not sufficient to achieve approval in this category. In most cases, the evidence must be accompanied by multiple letters from other experts explaining the significance of the alien's work, the distinguished reputation of the organizations for which he or she worked, the significance of the alien's publications and conference presentations, and other evidence of significant renown. In addition, a letter outlining all the evidence and explaining why the alien qualifies for this category is advisable. As this is a time-consuming and complex process, many colleges and universities choose to hire immigration attorneys (or have the alien hire his or her own attorney) to assist in compiling and submitting the petition and supporting documentation.

Outstanding Researcher/Professor 8 U.S.C. § 1153(b)(1)(B); 8 C.F.R. § 204.5(i)

"Outstanding Researcher or Professor" is another available category for university professors and researchers who have achieved acclaim in their field. It requires employer sponsorship, but does not require a labor certification.

Eligibility

The first requirement for this category is that the institution must be willing to sponsor the individual and affirm that his or her position is "permanent." This does not mean that the individual may never be fired or that he or she has been promised employment for life. It means that the position is tenured, tenure-track, or for a term of indefinite duration, such that the employee ordinarily will have an expectation of continued employment unless there is good cause for termination.

The second requirement is that the individual must be recognized internationally as outstanding in his or her field. The supporting evidence must include documents confirming at least two of the following:

- Receipt of major prizes or awards for outstanding achievement in the academic field;
- Membership in associations in the academic field that require outstanding achievements of their members;
- Published material in professional publications written by others about the alien's work in the academic field, including the title, date, and author of the material, and any necessary translation;
- The alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied academic field;
- The alien's original scientific or scholarly research contributions to the academic field; or
- The alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

The third requirement is that the researcher or professor must have at least three years of teaching or research-related work experience in the academic field, as evidenced by letters or other documents from current and/or prior employers.

Tips for Success:

- The outstanding researcher/professor category is a good choice for employees who have achieved renown in their field but perhaps not quite enough to qualify them as an alien of extraordinary ability. As with the extraordinary ability petition, this category allows the individual to skip the time-consuming task of labor certification.
- Faculty members may seek to file for outstanding researcher or professor shortly after finishing their Ph.D. or other advanced degree. Note, however, that the three years of work experience required for this category does *not* include work performed while studying for an advanced degree, unless: (1) the work experience was in teaching, and the alien had full responsibility for the class taught; or (2) the work experience was in research, which has been recognized as outstanding within the field. Furthermore, in order to succeed in this category, individuals will need to wait until they have truly established themselves as outstanding in the field, and that often is not the case for a recent graduate.

National Interest Waiver Process 8 U.S.C. § 1153(b)(2); 8 C.F.R. § 204.5(k)

Certain individuals may be eligible for a National Interest Waiver ("NIW"), which means that the U.S. government will issue a green card without the requirement of a job offer and without the lengthy labor certification process.

Eligibility

To qualify, the alien must (1) possess the equivalent of a U.S. Master's Degree or higher, or (2) prove that he or she is an individual of "exceptional ability." To demonstrate "exceptional ability," CIS requires evidence of at least three of the following:

- A degree from a college or university related to the area of expertise;
- Ten years of full-time experience in the occupation;
- A license or certification to practice the occupation;
- High remuneration for services, which demonstrates exceptional ability;
- Membership in professional associations; and
- Recognition for achievements and significant contributions to the industry or field by peers, government entities, or professional and business organizations.

In addition to these items, the applicant will need to present evidence of the importance of his or her work to the "national interest" of the U.S. – in other words, how his

or her work or research advances the interests of the U.S., such as improving the health of U.S. citizens, improving working conditions, advancing the education of U.S. children, etc. As the result of a 1998 decision, *New York State Department of Transportation*, 22 I&N Dec. 215 (1998), CIS also requires evidence of the following in order to support a National Interest Waiver:

- The alien's work is national in scope, benefits multiple regions of the country, and involves no adverse impact to other regions of the country;
- The alien's work is in an area of substantial intrinsic merit;
- The alien has achieved a degree of expertise significantly above that ordinarily encountered in his or her field;
- The national interest of the United States would be adversely affected if a labor certification were required;
- The alien is not seeking a National Interest Waiver for the purpose of ameliorating a local labor shortage;
- The alien's innovative work serves the national interest; and
- The alien's record of prior achievement justifies projections of future benefit.

National interest can be shown in many ways. In scientific or medical research fields, it is useful to explain how the alien's research will provide an economic or social welfare benefit, such as developing new telecommunications technologies, improving the health of premature infants, or advancing the efficiency of drug-delivery systems. Likewise, waivers can be granted for unique contributions that can be expected to improve wages and working conditions, provide affordable housing, improve the U.S. environment, or otherwise benefit the United States. As a practical matter, most areas of research at U.S. universities will qualify as research in the "national interest."

Tips for Success:

- Because this process allows for an exception to the lengthy labor certification process (described below), as well as the job offer requirement, the National Interest Waiver is a very popular option. However, CIS scrutinizes these applications very closely. Before filing an NIW case, an employee should consult with an immigration attorney to determine whether his or her request is likely to win approval, based on his or her specific qualifications.

Labor Certification 8 U.S.C. § 1153(b)(2)(A); § 1153(3); 8 C.F.R. § 204.5(k)(i)

For employees who do not qualify for one of the preceding options, the process for permanent residence requires the "Labor Certification" procedure, which in turn requires the employer to advertise the employee's position to determine if there are available U.S. workers who meet the minimum requirements for the position. The employer must apply to the U.S. Department of Labor (DOL) for certification before any application for permanent residence can be made to CIS. A special labor certification process is available for teaching faculty members (called "Optional Special Recruitment"), while regular labor certification is available for all non-teaching faculty.

PERM Labor Certification

Effective March 28, 2005, the DOL instituted a new procedure that governs all applications for Labor Certification. There are special "Optional Special Recruitment" rules for teaching faculty, which are discussed later in this section on page 25. For individuals who are not teaching faculty, the process is called "Program Electronic Review Management" (PERM) Labor Certification. Under PERM, employers file an application for Labor Certifi-

cation with the DOL to sponsor an alien for permanent resident status by demonstrating that there is an insufficient number of U.S. workers available who meet the minimum qualifications for a given position.

The PERM process requires the following steps:

1. The employer must obtain a written determination from the DOL regarding the "prevailing wage" for the position (i.e., the wage paid to similarly employed U.S. workers), and certify that it will pay at least this wage to the foreign worker once the worker obtains his or her green card.
2. The employer must advertise the position using the following recruitment methods to determine if there are qualified U.S. workers available for the position:
   - *Post a notice of the job opportunity* in conspicuous places at the work site for at least 10 consecutive business days.
   - *Post a notice of the job opportunity through all "in-house media"* within the employer's organization regularly relied upon to recruit workers. This includes both electronic (e.g., intranet) and printed in-house media, and is separate from the posting requirement listed above. The duration and manner of these in-house media postings must accord with normal procedures used by the employer to recruit for similar positions.
   - *Place a Job Order* with the State Workforce Agency (SWA) for at least 30 days. The SWA is the state employment agency with jurisdiction over the place of employment.
   - *Place advertisements on two different Sundays* in the newspaper of general circulation in the area of intended employment. The ads need not include the salary or a detailed listing of the job requirements, but they must be specific enough to apprise U.S. workers of the job opportunity. The employer's name must be mentioned in the advertisement. If the job requires experience and an advanced degree, the employer may opt to use a professional journal advertisement instead of one of the two Sunday ads.
   - *For professional positions, take three additional recruitment steps*. In addition to the measures set forth above, for professional positions (i.e., those that require attainment of a Bachelor's Degree or higher), the employer must seek applicants through at least three of the following 10 types of recruitment options within 180 days before filing the application: (1) job fairs; (2) posting the position on the employer's web site; (3) posting the position on a job search web site other than the employer's; (4) on-campus recruiting; (5) listing the position with trade or professional organizations; (6) listing with private employment firms; (7) an employee referral program, if it includes identifiable financial incentives; (8) posting a notice of the job opening at a campus placement office; (9) advertising in local and ethnic newspapers if appropriate for the job opportunity; and (10) radio or television advertisements.
3. Prepare a detailed recruitment report. The employer will have to review all applications submitted in response to the recruitment efforts to determine if any U.S. workers applied who met the minimum qualifications for the position. The employer then must prepare and sign a recruitment report including a summary of U.S. workers rejected and the lawful job-related reasons for the rejection.
4. Consider qualified laid-off workers. If applicable, the employer must notify and consider for the position any workers it laid off in the six months prior to filing the PERM application who worked for the employer in the same or a related occupation for which certification is sought. The employer must document that it offered the position to those laid-off workers who were able, willing, and qualified to do the job.

The final stage of the PERM process requires employers to submit an electronic application form (Form ETA-9089) to the DOL. The employer must maintain certain documentation in support of the application, but need not submit this to the DOL unless audited. The DOL may audit some applications at random and others for cause prior to certification. The purpose of the audit is to ensure that U.S. workers were in fact properly considered and, if rejected, it was for lawful job-related reasons. If no audit is initiated, the DOL generally will approve PERM cases within 90 days.

In the event of an audit, the DOL Certifying Officer will send the employer a letter requesting additional documentation. The employer will have 30 days to respond to this letter with a possible 30-day extension upon request. After receiving the employer's response, the DOL Certifying Officer may: (1) approve the Labor Certification application; (2) request more documentation; or (3) require the employer to conduct additional recruitment for the position under the direct supervision of the DOL.

The PERM process can be a complicated procedure, and the assistance of experienced immigration counsel or other qualified personnel is advisable. The key to a successful PERM case is to identify those qualifications that are essential for successful performance of the job held by a foreign employee. Examples include specific experience with a particular research tool or knowledge of a particular technology. As long as the employer can show that no U.S. applicant possesses the requisite qualifications for the position, the PERM case will be approved.

"Optional Special Recruitment" Labor Certification

PERM Labor Certification applications filed on behalf of college and university teaching faculty are processed through a procedure called "Optional Special Recruitment." This procedure is very beneficial, since the standard for evaluating U.S. candidates is more favorable to university teaching faculty. Under normal PERM processing, the standard is: if any U.S. worker meets even the *minimum* qualifications for the position, the employer cannot proceed with the application for the foreign worker, even if the foreign worker is better qualified. Under Optional Special Recruitment, the standard is: if the foreign teaching faculty member is the *best qualified*, then the employer can proceed with the application even if other minimally qualified U.S. workers applied.

To sponsor a teaching faculty member under this procedure, a university must file a PERM application with the DOL within 18 months of the decision to hire the individual. The application must include evidence that: (1) the university has advertised the professorial position in a national journal appropriate to the field, and (2) the employee chosen was the best qualified applicant for the position. The Optional Special Recruitment process is available only to college *teaching* faculty holding a tenured or a tenure-track position.

After receiving the information, DOL reviews the PERM application and the summary of reasons why the chosen candidate was the best qualified. If it decides that (1) the application was filed within 18 months of the date of decision to hire, (2) the position was properly advertised in an appropriate national journal, and (3) the individual chosen was in fact the best qualified applicant, then it will approve (or "certify") the application. It would be unusual for the DOL to question the university's decision of who was the best qualified individual for the position. If the application is not filed within 18 months of the date of decision to hire the teaching faculty member, then the university cannot file under Optional Special Recruitment. Instead, it would have to recruit using the basic PERM process for non-teaching faculty, although it still could rely on the "best qualified" standard.

Note on Payment of Fees and Costs

The DOL issued new regulations, effective July 2007, which, among other items, address who must pay the advertising costs and legal fees associated with the PERM process. The regulations require the employer to pay all such fees and costs unless the employee and the employer are represented separately by counsel, in which case the employee may be responsible for paying the legal fees for his or her own lawyer. This raises an interesting issue for colleges and universities, since many institutions employ university counsel. Nevertheless, if a faculty member decides to retain his or her own outside immigration attorney to process the PERM application, the DOL regulations indicate that, accordingly, he or she may pay the full fees for the outside attorney since he or she and the university are being represented separately. Of course, the employer always has the option of paying all related fees and costs, including the fees of the immigration attorney retained by the employee.

Filing the I-140 Petition for Immigrant Workers

Following approval of the Labor Certification application, either through regular PERM processing or Optional Special Recruitment for teaching faculty, the university must submit a petition (Form I-140) to CIS showing that the individual chosen does in fact meet the requirements for the position, and that the university has the ability to pay the prevailing wage for the position. (NOTE: If PERM Labor Certification is not required, as is the case with a filing based on Extraordinary Ability, Outstanding Researcher/Professor, or National Interest Wavier, the I-140 is the first filing made.) Processing times vary, depending on the workload of CIS, and can range from four to 12 months or longer. CIS has implemented 15-day premium processing for certain types of I-140 cases.

Final Steps: Adjustment of Status or Consular Processing

The final step in any immigrant case is either adjusting the individual's status from non-immigrant visa holder in the U.S. to lawful permanent resident, or obtaining an immigrant visa for the individual at a U.S. Consulate abroad and having that individual enter the U.S. as a permanent resident. Both processes take into consideration whether there are any grounds for excluding the individual from permanent resident status in the U.S., such as a criminal background, terrorist activities, medical issues, and the like.

An adjustment of status application can be filed concurrently with the I-140 immigrant petition (or any time thereafter while the I-140 is pending). Consular processing can begin only after the I-140 is approved. There are pros and cons to each type of processing, and an individual would be well served to consult with an immigration attorney prior to deciding which process to employ. Some of the highlights of each include the following.

Adjustment of Status (Form I-485) 8 U.S.C. § 1255; 8 C.F.R. Part 245

- Forms are filed with CIS in the U.S.
- Each person adjusting his or her status must submit the following to CIS: completed signed forms, copies of supporting documentation, medical examination results in a sealed envelope, photos, and filing fees.
- When filing for adjustment of status, each person (if desired) has the option to also file for employment authorization, which allows him or her to work even after the expiration of a work visa, and "advance parole" to allow travel in and out of the U.S. without the need for a visa stamp. Both employment authorization and "advance parole" are valid for a period of 12 months, and may be renewed as many times as necessary until the adjustment of status application has been approved. As an alternative, those in

H-1B status can remain as such while the adjustment is pending and use their H-1B status to work and travel.

- While the adjustment of status is pending, CIS will schedule each applicant 14 years of age or older for an appointment to have his or her fingerprints taken. The prints are then sent to the F.B.I. for a criminal background clearance.
- In most cases, approval notices are mailed; however, CIS reserves the right to interview individuals in person prior to approving the adjustment in status.

Immigrant Visa "Consular" Processing

- After CIS approves the I-140 petition, it notifies the National Visa Center, which in turn sends a bar coded visa fee bill to the applicant. After payment is received, the National Visa Center assigns the individual a consular case number. The necessary forms and required documentation are then filed with the National Visa Center for its review and, if satisfactory, are forwarded to the U.S. Consulate in the individual's home country or country of citizenship.
- Either the U.S. Consulate or the National Visa Center (depending on the processing country) will send a notification to the individual for an interview. Individuals have the option to request a rescheduled date, although doing so may cause a delay in processing.
- There is no option to file for employment authorization or "advance parole" to allow travel in and out of the U.S.
- Individuals may remain in the U.S. while waiting for their interview only if they have a valid non-immigrant status, and may maintain that status while the immigrant visa application is being considered.
- The U.S. Consulate will conduct a name clearance (i.e., criminal background check) on all persons prior to assigning them for an interview. Those 16 years and older may be required to submit police certificates for each country in which they have resided for more than six months since reaching the age of 16. Similarly, a police certificate also may be required from any country where the individual was arrested, regardless of the length of stay.
- Each person who requests consular processing must undergo a medical examination while abroad, conducted by a U.S. Consulate-approved physician.
- If a required document is missing at the time of the consular interview, issuance of the immigrant visa may be delayed or denied.
- Once the immigrant visa is issued, the individual must use it to enter the U.S. within six months in order to activate his or her status as a permanent resident.

Portability of Permanent Residence 8 U.S.C. § 1154(j)

An employee whose I-140 immigrant petition has been approved and whose adjustment of status application has been pending for at lease six months may "port" to the same or similar employment with another employer without having to re-start the green card process. He or she also may transfer to other offices or other jobs with the same company or institution, provided that the new job is in the same or a similar occupational classification.

The possibility of concurrent filing (e.g., filing the I-140 and the adjustment of status application together, rather than filing the adjustment only after I-140 approval) raises the question of what to do when an approved I-140 is revoked by the original employer, or when an I-140 petition is withdrawn before approval, before the adjustment of status application has been pending for 180 days. Should this occur, the adjustment of status

application may be denied even if the employee presents information about a new employer and a new position that is the same or similar to the original job. For this reason, colleges and universities should exercise caution when hiring an international employee using "portability" of a green card process started by another employer.

Citizenship

After an individual has been a permanent resident for the designated period of time (three years if permanent residence was obtained through marriage to a U.S. citizen; five years in all other cases), the individual may apply for U.S. citizenship. This is not required, however, and an individual may remain a permanent resident without ever applying for citizenship. An application for citizenship may be submitted within 90 days of the three- or five-year anniversary (as the case may be) of obtaining permanent residence, or any time after the required time period. The applicant must have been physically present in the U.S. for at least half of the required time period in order to apply.

III. Employment of Unauthorized Aliens

Before a new employee (whether U.S. citizen or foreign national) begins work, the employer is required to determine the individual's identity and verify that he or she is authorized to work in the U.S. Both of these tasks are accomplished using Form I-9. While a detailed treatment of Form I-9 is beyond the scope of this monograph, a few key issues – that also are related to other points outlined in this publication – are addressed below.

Employment of an Alien Before Obtaining Work-Authorized Visa Status

If an individual does not yet hold work authorization (either an EAD or work visa status, such as H-1B or O-1), he or she cannot work legally in the U.S. The fact that an employee has applied for work-authorized status is irrelevant.

Example: Sophie graduated from Appealing University in May 2006 with a Bachelor's Degree in Computer Science, and was granted optional practical training for a one-year period, until May 25, 2007. She obtains a job as a programmer analyst at Appealing University. In March 2007, Appealing sponsors her for an H-1B and requests that CIS change her status from F-1 to H-1B. On May 25, 2007, the H-1B is still pending and has not yet been approved. Sophie must stop working for Appealing until her H-1B has been approved. Appealing may want to consider premium processing of the H-1B petition to expedite approval.

Employment of an Alien While an Extension of Status is Pending

Example: Sophie (from the example above) is approved for a change of status to H-1B on May 30, 2007, valid until May 29, 2010. In early May 2010, Appealing sponsors Sophie for an H-1B again, and requests a three-year extension of status. Because this is an *extension* of status for the same employer *and* same employee, and because the petition was filed before the expiration of her initial H-1B status, Sophie *may continue* working for Appealing for up to 240 days while the application is pending. 8 C.F.R. § 274a.12(b)(20). If the application still is pending after 240 days, or is denied, Sophie must stop working. (Of course, this example assumes current law is still in effect in 2010.)

Volunteering

Employees and employers often wonder whether it is permissible for an individual to simply "volunteer," or perform tasks without payment, during the weeks or months prior to receiving official authorization to actually begin working. The Department of Labor's position on volunteer activities is that, if an individual is performing tasks for the employer that normally would be compensated, it is in fact not a volunteer activity. The employee must be compensated and, if he or she is an alien not authorized to perform work in the U.S., the employee is violating his or her status and the employer is violating the law.

Example: John works as a researcher at Research Company, and offers to teach a full semester course at Exceptional University. He is an expert in his field, and Exceptional is delighted to have him teach as an adjunct faculty member. However, when the university discusses compensation with John, he notes that he is on H-1B status with Research Company and indicates that he cannot be paid for any other work. Although he offers to "volunteer" for the university, this is not permissible. Exceptional must sponsor John for a concurrent employment, part-time H-1B.

Conclusion

This monograph touches only briefly on the many issues that college and university legal counsel and administrators may encounter when their institution sponsors an alien employee for status in the United States. While U.S. immigration laws and regulations often are confusing and complex, they nevertheless provide a number of options for employing and retaining highly talented international faculty, researchers, and staff. However, since the law in this field changes rapidly, colleges and universities would be well served to consult an immigration specialist when offering employment to international candidates.

Glossary

For purposes of general definitions, the following may be helpful.

Alien – Any person not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3).

Department of Labor – The federal agency designated to protect the wages and working conditions of U.S. workers (U.S. citizens and permanent residents), and to encourage the employment of U.S. workers.

Department of State – The federal agency that operates U.S. embassies and consulates abroad, and is charged with issuing visas to aliens wishing to travel to the United States. The Department of Homeland Security may take over this function in the future.

Employment Authorization Card – Card issued to certain aliens evidencing an individual's authorization to work for any employer in the United States. Different from a green card in that it is limited in time and generally issued for one year. This is only one of several types of documents that can be used to prove authorization to work, depending on the alien's immigration status in the United States.

Form I-94 – **Arrival/Departure Card** – Card stapled into a passport by the immigration officer at the port of entry authorizing an individual to enter the United States, stating the visa status that the person is authorized to hold, and the date by which the individual must depart the United States.

Green Card/Permanent Resident Alien Card – Also called Form I-551, this card evidences an individual's authorization to reside permanently in the United States and to work for any employer.

Immigrant – An alien who intends to reside permanently in the United States. 8 U.S.C. § 1101(a)(15).

Non-Immigrant – An alien who intends to remain only temporarily in the United States, and to return to an unabandoned foreign residence abroad. 8 U.S.C. § 1101(a)(15). There are more than 20 different non-immigrant visa categories, each allowing entry to the United States for a specific purpose. Most non-immigrants enter the United States using a visa issued by a U.S. Consulate abroad, and all are given an I-94 card upon entry.

Citizenship & Immigration Services (CIS) – Formerly the Immigration and Naturalization Service (INS). CIS is the government bureau within the Department of Homeland Security that determines an individual's eligibility for visa status (non-immigrant and immigrant), and is charged with enforcing immigration law and policy.

Visa – Form laminated into a passport by a U.S. Consulate that allows the holder to board passage to the United States and to present himself or herself for inspection by a Department of Homeland Security officer at the port of entry into the United States. Non-immigrant visas are limited in duration, depending on the particular category.

NACUA Publications

NACUA publishes a variety of pamphlets, monographs, compendia, and other resources of interest to both higher education attorneys and administrators. The publication series offers more than 50 publications of different types and categories, and new titles are added regularly. For the most up-to-date listing of publications offerings and more detailed descriptions of any of the publications listed below, please go to: http://www.nacua.org/publications/index.asp.

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Giving a Deposition: A Witness Guide
Overview of a Lawsuit

For More Information

The NACUA Publications Brochure, with detailed descriptions of the resources listed above, can be found at:
http://www.nacua.org/publications/brochure.pdf

For a list of publications available on-line, please go to:
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National Association of College
and University Attorneys
One Dupont Circle, NW, Suite 620
Washington, DC 20036
202-833-8390
FAX 202-296-8379
www.nacua.org