NEITHER SAFER NOR MORE SECURE:
UNINTENDED CONSEQUENCES OF IMMIGRATION REFORM

INTRODUCTION

One would think that in yet another year in which the national debate on immigration grabbed daily front-page headlines, more progress would have been made on critically needed comprehensive immigration reform. The few legislative and regulatory changes have been relatively modest, without a solution in sight for the now-annual H-1B quota exhaustion, the backlog in permanent residence visa numbers or the creation of a skilled worker program. Beyond the approved expenditure for a barrier on our southern border (to be paid for by our descendents), the legislative initiatives have been a mere whisper. Yet, the status quo has not been maintained. Rather, we have begun to experience the effects of prior legislation, which has proven itself a practical nightmare for employers and employees alike. Sound-bite legislative initiatives like “The Real ID Act” have begun to take shape and meaning. Social security card issuance has been delayed and no true relief has emerged from the proposed “Safe Harbor Procedures for Employers Who Receive a No-Match Letter”.

There is little that is clear about the path to security, but what is abundantly obvious is that the unintended consequences of well-intentioned but ill-considered legislation has a cost, both financial and personal. Educational institutions, along with every other employer, bear the brunt of compliance and must responsibly fashion practical solutions for themselves and their employees.
This paper will highlight the more problematic current issues facing the legal foreign national, with practical solutions for employers. It will also provide a summary of existing immigration law as it affects higher education.

BACKGROUND: THE U.S. IMMIGRATION SYSTEM

The issues discussed in this paper require an understanding of the framework of the immigration system. Immigration issues are complex and involve several branches of the federal government, located in the United States and abroad, as well as some state government offices. The immigration life of a foreign national employed at a university will involve the Department of Homeland Security (www.dhs.gov) and its three bureaus, United States Citizenship and Immigration Services (“USCIS”) (www.uscis.gov), Immigration and Customs Enforcement (“ICE”) (www.ice.gov), and Customs and Border Protection (“CBP”) (www.customs.ustreas.gov). Additionally, the Department of State, which oversees the consulates abroad (www.state.gov), and its Bureau of Educational and Cultural Affairs, which oversees the J-1 exchange program, play a significant role in the immigration process. Not to be left out, the U.S. Department of Labor becomes involved in the action surrounding both the H-1B temporary visa and the permanent residence process (www.dol.gov and www.doleta.gov), as do the State Workforce Agencies for each state.

Categories of Status in the United States

In broad terms, all those in the United States fall into four broad categories: U.S. citizens, permanent residents, nonimmigrants and those illegally here. A non-citizen enters the United States legally either under temporary status or as a permanent resident.

Temporary, Nonimmigrant Status for Prospective Employees of Academic Institutions

Temporary, or nonimmigrant, status permits an individual to be in the United States for a specific and limited period of time and for limited and defined activities, depending upon the category of entry. Each category has specific rules and not every person is eligible for all work categories. The decision to pursue a particular visa category is fact specific. A summary of
some of the temporary categories that permit foreign nationals to work for a temporary, defined period appears at the end of this paper.

**The Path to Permanent Residence - Overview**

While work-authorized nonimmigrant status permits an individual to work in the United States for extensive periods of time, most foreign nationals will seek to anchor themselves and their families in the United States beyond the confines of the permissible time limitations. Permanent residence permits a law-abiding individual to remain in the United States for a lifetime, with the choice of applying for U.S. citizenship after several years as a lawful permanent resident. 8 USC §1427.

A number of factors lead to the decision to remain permanently in the United States, including the obvious opportunities that exist here professionally and personally and precarious home-country conditions. Additionally, practical issues fuel the desire to remain: the ability to obtain a mortgage and to make long-term financial investments or commitments, the desire to maintain family unity and the need to secure stability for children who are in school. Children may accompany a principal nonimmigrant visa holder until they reach the age of 21, so the employee with college-age children will be particularly concerned about permanently securing the status of the entire family in the United States sufficiently in advance of the “aging up” of children.

How does one become a permanent resident? There are four possible paths:

1. As a refugee or asylee;
2. Through the Diversity Lottery Program;
3. Under family-based immigration; or
4. Under employment based immigration.

As might be expected, asylum or refugee status will only be granted to nationals of certain countries who can establish a well-founded fear of persecution in that country. 8 CFR Parts 208, 209. The grant of such status is limited and highly dependent upon not only the country of nationality, but also upon the particular circumstances of an individual case, and only upon the proof that can be assembled. It is fair to say that a person from a country considered an ally of
the United States will have considerable difficulty in proving the necessary case, but in all cases, the process is long, involved and uncertain.

The second path to permanent residence is through the annual Diversity Lottery program. 8 USC §1153(c). The Diversity Lottery program, which takes place annually, awards permanent residence to 50,000 "winners" of a lottery system. Only nationals of specific countries (ones which have recently experienced low immigration to the United States) may participate. The subject of significant criticism, the system requires lottery entrants to submit an electronic application and a digital photograph during a limited registration period, generally about one month long. Information relating to the lottery can be found at the Department of State’s website at [http://www.dvlottery.state.gov](http://www.dvlottery.state.gov).

The third path to permanent residence is through family-based immigration. 8 USC §1153(a). Much misunderstood as being more generous in its scope than it is, this path may be pursued through a limited circle of relatives in the United States. Those in the United States who may sponsor are: U.S. citizens, who can sponsor their children (minor or adult, unmarried or married), parents, siblings or spouses; and permanent residents who may only sponsor their spouses, minor children and unmarried adult children. Waiting periods can range from a few months to over a decade. Waiting periods for the various categories of family based immigration which are published in the monthly "Visa Bulletin" and are found on the Department of website at: [http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html).

Thus, if one is not from the "right" country for consideration as a refugee/asylee or for consideration under the Diversity Lottery program or if one does not have the "right" relatives in the U.S., the only hope of attaining permanent residence is through employment based immigration. Here it is important for the intending or current employer to understand the critical role that the employment relationship plays in the life of the employee and his extended family. The institution becomes their life-line to the United States.

Not all foreign national employees holding nonimmigrant work status will be able to obtain permanent residence through the employment based system. 8 USC §1153(b). Those aligned to academia have certain advantages in the process, however. Employment based immigration
generally requires an employer to prove that there is a shortage of U.S. workers for the job. This process is called Labor Certification. The premise of the system is protection of jobs for the U.S. workforce (which includes U.S. citizens, permanent residents, asylees, refugees and certain others in temporary resident status). 20 CFR §656.20 et seq. For academic positions that involve any teaching, the standard is that the foreign national must be proven to be more qualified than any U.S. worker. For non-academic or non-teaching positions, the foreign national must be the only available worker who is minimally qualified to perform the job. Thus, academic institutions have a competitive hiring advantage over industry because the former may be able to provide a more feasible path to securing permanent residence.

Certain exceptions to the Labor Certification Process exist, many of which are particularly well-suited to the academic milieu. The pertinent exceptions to the Labor Certification Process include: outstanding professors and researchers, those foreign nationals who possess extraordinary ability, those whose work is in the national interest and certain others who have exceptional ability.

Pertinent Issues Relating to the Labor Certification Process

The Labor Certification Process for an academic teaching position at a college or university, known as “Special Handling”, is one that requires the employer to compile and retain detailed proof of the recruitment process. 20 CFR §656.18. Among other benefits under the special handling provisions, recruitment information remains “usable” for eighteen months from the date of selection of a candidate for a job. This means that a college or university may file a Labor Certification Application within eighteen months of the selection of the candidate and may rely upon the pre-existing recruitment documentation. If more than eighteen months has passed, a new recruitment would be required, resulting in additional advertising cost and staff time devoted to interviewing applicants.

For positions that do not involve teaching, more extensive recruitment is required and this must have occurred within the six months prior to filing the application.
From a policy perspective, creating an established procedure for the retention of documents of all recruitment for faculty members is advisable, whether or not a labor certification application is contemplated at the time of recruitment. Additionally, Department Chairs and those responsible for recruitment should be encouraged to consider the permanent residence process for foreign nationals hired in competitive recruitment within a specified period after selection (for example, within one year). In the event that inadequate records were retained or the eighteen-month time period for the use of documents has expired, a new process of advertising and recruitment will be necessary.

Before embarking upon a new recruitment process, consideration should be given to whether the foreign national currently falls within one of the exceptions to the Labor Certification Process, or might reasonably be expected to do so in the future.

**Exceptions to the Labor Certification Process**

As noted above, there are certain circumstances in which the Labor Certification Process may be avoided and the goal of job protection for U.S. workers is relaxed if not abandoned. This occurs when foreign nationals bring such substantial talent to the United States that it will ultimately benefit the economy and other workers to grant permanent status. One need only look at the annual list of Nobel Prize winners to understand that this theoretical construct has paid huge dividends to the United States.

The following are exempt from the process:

a. Foreign nationals with extraordinary ability in their field.

b. Outstanding researchers and professors.

c. Those whose work is in the national interest of the United States.

d. Those with exceptional ability.

**Extraordinary Ability**

A foreign national with extraordinary ability in the sciences, arts, education, business, or athletics that has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation is exempt from the Labor Certification Process. Extraordinary ability is defined as “a level of expertise
indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 CFR §204.5 (h)(2). The person must intend to enter the United States to continue work in the area of extraordinary ability and must establish an ability to substantially benefit prospectively the United States. 8 USC §1153(b)(1)(A).

A Labor Certification is not required for this classification, nor is an offer of employment. 8 CFR §204.5(h)(5). Accordingly, a foreign national may self-petition in this category, i.e., submit a petition without the necessity of a sponsoring employer. Nevertheless, the petition must be accompanied by clear evidence that the alien is coming to work in the area in which expertise is claimed. Id. Evidence may include letters from prospective employers, contracts which evidence prearranged commitments or a statement of intent from the alien that explains how he or she plans to continue the work in the field of stated expertise. Id.

**Outstanding Professors or Researchers**

A foreign national who is recognized internationally as outstanding in a specific academic area and who has at least three years of research or teaching experience in that area may also be exempt from the Labor Certification Process. 8 USC §1153(b)(1)(B). To qualify, one must be entering the United States for a tenured or tenure-track position within a university or institution of higher education to teach or for a comparable position with a university or institution of higher education to conduct research. Alternatively, one may be entering to work in a comparable position with a private employer to conduct research if that employer employs at least three full time researchers and has achieved documented results in the field. Id.

Unlike the priority worker of extraordinary ability, this category requires an offer for employment and, accordingly, a sponsoring employer must submit the petition. 8 CFR §204.5(i)(1). Consequently, this category is of no utility to the individual who seeks to be a self-petitioner.

The documentary evidence needed to support this classification is less onerous than that for an extraordinary ability alien. 8 CFR §204.5(i)(3).
National Interest Waiver
Foreign nationals who are members of the professions holding advanced degrees or those of exceptional ability may also seek permanent residence outside the Labor Certification Process if the exemption “would be in the national interest.” 8 CFR §204.5(k)(4)(ii). The term “national interest” is not one that is defined by statute or regulation. The administrative appellate court within the immigration service attempted to articulate a standard. This non-precedent case, now known as Matter of Mississippi Phosphate, discussed factors that might be considered as supportive of the national interest, such as improving the economy, improving the wages and working conditions of U.S. workers, improving education, improving health care, providing more affordable housing, improving the U.S. environment or the request of a U.S. interested government agency. (AAU, July 21, 1992; EAC 9209150126).

A 1998 precedent decision, In re: New York State Department of Transportation (Int. Dec. 3363, Comm. AAO 1998), eviscerated this standard and substituted a burdensome test for determining national interest waiver eligibility. Scant basis exists in the legislative history to support this standard. Specifically, the beneficiary must be seeking to work in an area of “substantial intrinsic merit,” the prospective employment must have a benefit that “will be national in scope” and it must be prove that the beneficiary will “serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.”

The national interest route has been seriously undermined by this decision, but it may have some utility in certain instances. This is a category that also permits, but does not require, the foreign national to submit a petition in his or her own name without employer sponsorship.

Aliens of Exceptional Ability
This last category (foreign nationals of “exceptional ability”) under current regulations of the Department of Labor is also one that exempts the individual from the Labor Certification Process. 20 CFR §656.22. Its requirements are very similar to both outstanding researcher/professors and those of extraordinary ability. A petition by an employer is required.

Considering Options Available Through a Spouse
When analyzing options for faculty members, it is always wise to also consider options that might be available for their spouse to serve as the principal applicant. A faculty member whose spouse falls into one of the categories noted above may prove to be a better candidate for sponsorship.

THE PRACTICAL PROBLEMS FACING FOREIGN NATIONAL EMPLOYEES

Driver’s License Woes – Baby You Can Drive My Car

Little did the Beatles imagine that foreign nationals coming to the U.S. would likely have to give the steering wheel over to others due to an inability to obtain or to extend a driver’s license. Almost all employers are confronted by agitated new employees, who are either unable to immediately secure a license or, sometimes worse, who are unable to obtain an extension of their expired license. The most frequent scenario is the temporary worker (H-1B) for whom the institution has sought an extension. In light of the ability to continue working for 240 days when the extension is pending (8 CFR 274a.12(b)(20)), there is little reason to pay the expedite fee of $1000 to secure a speedy adjudication. However, once the initial period of stay is passed, the individual will be unable to show the necessary proof of status to extend a license. Increasingly, it is the driver’s license issue which is causing employers to pay the premium processing fee; not the immigration issue. In many states, the expiration of the initial driver’s license is set to coincide with the expiration date of their current immigration status.

Although some states, including New York, adopted such policies prior to 2005, the apparent culprit for this newest practical problem in the remaining states is the Real ID Act (109 P.L. 13), which was passed as part of the Emergency Supplemental Appropriation Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (HR 1268. Signed into law on May 11, 2005 and effective May 2008, driver's licenses cannot be accepted by federal agencies for any "official" purpose unless they meet the requirements of the Act. 109 P.L. 13, § 202(a)(1). The Real ID Act covers all aspects of driver's license issuance, including the information on the license, technology, acceptable documentation to obtain a license, and storage and sharing of personal information.
Passed without hearings, testimony or public discussion, the Real ID Act effectively imposed prescriptive federal driver’s license standards on all of the states and directly impinged upon the individual state’s right to decide how to make their highways safer. At its inception, opponents predicted it would prevent many U.S. citizens and lawful residents from being able to secure a driver’s license. This has been borne out by experience.

The National Conference of State Legislatures considered the provisions to be unworkable. Its website provides a good summary of the provisions of the Act and the ultimate requirements imposed upon the states. Real ID Act of 2005 Driver’s License Title Summary. http://www.ncsl.org/standcomm/sctran/realidsummary05.htm. The National Governors Association and the American Association of Motor Vehicle Administrators opposed the Act because of the technological burdens and substantial cost of what was deemed a “massive unfunded federal mandate.”

Notably, states are not obligated to have their driver’s licenses meet the requirements of the law, but this presents possible problems for its citizens who need proof for federal purposes, including obtaining passports, entering federal buildings, flying. Thus, increasing states are lining up to meet the federal mandate.

Section 202(b) of the Real ID Act provides that at a minimum the following information must be provided on a person's drivers license in order to be honored by Federal Agencies: (1) full legal name; (2) date of birth; (3) gender; (4) driver's license or identification card number; (5) a digital photograph of the person; (6) the person's address of principle residence; (7) the person's signature; (8) physical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes; and (9) a common machine-readable technology, with defined minimum data elements.

Section 202(c) (1) (A)-(D) of the Real ID Act provides the following minimum issuance standards: (A) a photo identity document, except that a non-photo identity document is acceptable if it includes both the person's full legal name and date of birth; (B) documentation showing the person's date of birth; (C) proof of the person's social security account number or verification that the person is not eligible for a social security account number; and (D)
documentation showing the person's name and address of principal residence. When one considers that a newly-entered H-1B must apply to the social security office for a number and wait 3 to 6 weeks for its issuance, there is a built-in delay for the issuance of a driver's license. Note that accompanying spouses and children must physically appear at the social security office to obtain verification that they are ineligible for a number.

Additionally, Section 202(c) (2)(B)-ix of the Real ID Act provides that a State shall require documentary evidence of a person's lawful status before issuing a driver's license or identification card, specifically that the person is one of the following: (i) is a citizen or national of the United States; (ii) is an alien lawfully admitted for permanent or temporary residence in the United States; (iii) has conditional permanent resident status in the United States; (iv) has an approved application for asylum in the United States or has entered into the United States in refugee status; (v) has a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States; (vi) has a pending application for asylum in the United States; (vii) has a pending or approved application for temporary protected status in the United States; (viii) has approved deferred action status; or (ix) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.

Section 202(C)(I) of the Real ID Act provides that if a person presents evidence under any of clauses (v) through (ix) of subparagraph (B), the State may only issue a temporary driver's license or temporary identification card to the person. This temporary driver's license will be valid “only during the period of time of the applicant's authorized stay in the United States or, if there is no definite end to the period of authorized stay, a period of one year.” Section 202(C) (ii). The license will state its temporary and the date on which it expires. Section 202(C) (iii).

Section 202(C) (iv) provides that a temporary driver's license or identification card may only be renewed upon presentation of valid documentary evidence that the status by which the applicant qualified for the temporary driver's license or temporary identification card has been extended by the Secretary of Homeland Security.

Practical advice includes warning foreign nationals of these possible delays even before they
enter the U.S. and urge them to secure an international driver’s license before they enter the U.S. This may provide them with an interim document to use while they await the necessary documents (social security number/letter of its unavailability) to secure a state driver’s license. It is also of critical import that one plan for the eventual gap in licenses between nonimmigrant status extension and issuance. This may prompt university employers to pursue permanent residence at an earlier date or to budget for the payment of expedite fees.

**Social Security Headaches – Neither Social Nor Secure**

In an effort to limit the issuance of social security cards that might be used improperly, additional procedures have created significant delays in their issuance. Gone are the days when one could walk in to a Social Security Office and apply for a card, receiving a temporary card and number on the spot. The domino impact of delays in social security number issuance is staggering. Driver’s license issuance is delayed and the ability to maneuver modern life’s necessities is blocked: obtaining cell phones and credit cards, opening bank accounts and entering leases. While these problems frustrate employees, they pale in comparison to the shriek that emanates from the payroll office when it is time to put someone on the payroll and no social security number is available. Payroll system software spits back a rejection without the number and service providers who take care of payroll issues reject the number-naked employee.

As so often occurs, there is a collision between legal responsibilities. When an H-1B enters the U.S. from abroad, the employer must commence payment within 30 days. 20 CFR 655.731(c) (6) (ii). Additionally, state labor laws almost uniformly require that one must be paid for services provided (without regard to having legal documentation to support work authorization or a social security card). Consider a fixture on many campuses, the J-1 trainee who enters for a summer internship for a six to 10 week period. By the time the person arrives and seeks a social security number, it is just about time to leave. What is an employer to do?

The following present some of the common questions posed by an employer in these circumstances. It is recommended that each institution consider these issues to set a policy for new employees.
Employment and Payment of an Authorized Worker Without a Social Security Number

It is legally permissible to employ and to pay a person who is otherwise eligible for employment in the U.S., but who has not yet received a social security number, if such person has applied for a social security number? Though practically difficult, the legal answer is ‘yes’. As discussed below, the employee will have to fill out Form W-4 using “Applied For” where a social security number is required, and then update the information when it becomes available. If the employee has not received a social security number by the time that the employer is required to file Form W-2, then the employer must use “Applied For” or “000-00-0000” as the employee’s social security number, and later file a Form W-2c once the social security number is received.

If a foreign national employee does not have a social security number, how can the alien be paid? What are the tax implications of paying a foreign national without a social security number?
The foreign national employee can be paid as any employee would, and the employer will be required to withhold on the person’s wages based on the employee’s Form W-4. The only tax ramifications are that tax forms filed before the social security number is issued generally must use “Applied For” or “000-00-0000” as the employee’s social security number, and the employer must file corrected forms after the actual social security number is issued to reflect that number.

If a foreign national employee begins working without a social security number, must they work without pay? If they do work without pay until the SSN is received, can we pay an increased rate of pay once the SSN arrives and the employee is placed on payroll (to make up for time spent working and not being paid)?

An employee does not have to work without pay before a social security number is issued. (See response to first question, above.) In fact, state labor laws generally require the payment of wages within a certain time period, so a delay of payment could violate such laws. For example, New York State Labor Law Section 191(1) sets forth the frequency with which an employer must pay wages to individuals in certain positions (e.g. manual workers, clerical and other workers). Section 191(2) also states, “[n]o employee shall be required as a condition of
employment to accept wages at periods other than as provided in this section.” The New York Labor Law does not provide an exception to the wage payment requirements for workers who have failed to provide a social security number to their employer and, according to the New York State Department of Labor, Division of Labor Standards, an employee’s wages cannot be suspended on this basis. Thus, even if an employee otherwise agreed, an employer may not withhold wage payments beyond the statutory periods for workers who fail to provide a social security number. Under U.S. labor law, employees who are in the United States under H-1B status must be paid in regular, prorated installments but no less than monthly. Thus, a withholding of pay would also potentially violate the requirements for payment of wages for H-1B workers. 20 CFR 655.731.

Is there a difference between a person “working” (being employed) without a social security number, or a person who is “volunteering” in a work-like situation?

A person who is “volunteering” works without the expectation of any compensation. The employee can be paid and must file the appropriate tax forms and submit an application for a social security number as previously discussed. The volunteer would never have that obligation, as there is no expectation of compensation. Designating an employee as a “volunteer” is a practice that should be avoided for foreign nationals who do not have work authorization in the U.S. and similarly should be avoided for those who have work authorization but have not yet received a social security number.

There is no prohibition against the payment of wages to a foreign employee who has applied for a social security number before such social security number is issued, assuming that the employee has authorization to work in the United States. To ensure that an employee has actually applied for a social security number, many employers require the employee to provide them with a copy of the IRS letter acknowledging the receipt of the application. Although there is no legal requirement that the employer obtain a copy of the letter, doing so is advisable, as it confirms that the employee has in fact applied for a social security number.

Although a foreign national employee may begin work and be paid before the receipt of a social security number, payroll software often presents an issue because it may require a unique social security number to generate a new payroll account for the employee. Some employers address
this issue by prohibiting the payment of wages until a social security number is issued, but this is not a recommended course of action. The issuance of a social security number can take three months or longer. Accepting an employee’s services but withholding pay usually violates state labor law.

A practical approach used by some employers to resolve the problem on an interim basis (to deal with the software requirements of its payroll system) is to issue the foreign national employee a temporary “dummy” social security number for use in their payroll system. It should be made clear to the employee that the “dummy” number is only for internal payroll processing purposes until the actual social security number is received, and that the “dummy” number cannot be used for any other external purpose for which a social security number is normally required (e.g., opening a bank account or applying for a driver’s license). In addition, care must be taken by the employer not to use the “dummy” social security number on any of its government filings – it should be used only for internal purposes. When the employee’s actual social security number is received, the payroll software records are updated and the “dummy” social security number is replaced with the actual social security number.

**Got a Match? Inconsistent Document Numbers**

The simplicity of the children’s card game of Match surely does not mirror the “match” problem faced by employers. Employers send hundreds of millions of earnings reports (W-2 forms) to the Social Security Administration (SSA) each year, containing the name and social security number of the employee. The Department of Homeland Security states that “millions” do not match the SSA records. SSA then sends a “no-match” letter to the employer, which may be an indication of an unauthorized worker. The problem is what steps should an employer take in this circumstance? Obtain new I-9 forms, fire the employee, ignore the issue?

I-9 obligations and a concern for being charged with constructive knowledge of unauthorized employment collide with a fear of a claim of discrimination by the employee, laced with a potential loss of a portion of an employer’s workforce, and sprinkled with a healthy suspicion of the validity of the government’s information. On June 14, 2006, the Department of Homeland Security issued proposed regulations (71 FR 34281) to describe “safe harbor” procedures that an
employer can follow when faced with the dreaded “no-match” letter. The proposed regulations have not been adopted and therefore, the collision of concern, fear and suspicion remain.

What is clear in the interim is that an employer should have an established procedure that is followed the same way in each instance when a “no match” letter is received. It would be imprudent to ignore a signal of a problem with one’s workforce. It would also be imprudent to terminate an individual whose documents appear to be valid on their face. The procedure proposed by the DHS is as follows:

- Checking the employer’s records to determine if there was a simple clerical error and responding to the SSA with that information
- If no error is found, requesting the employee to confirm the information is correct
- Have the employee review his/her information with the social security office
- Completing a new I-9 form.

RECENT HEADLINES IN IMMIGRATION LAW

Retrogression of Employment-Based Immigrant Visa Numbers

Continuing for yet another year is the retrogression of employment based immigrant visa numbers. The Immigration and Nationality Act sets limits on how many permanent resident visas may be issued each Fiscal Year (October 1 through September 30) in all visa categories. When it appears that the demand will exceed the supply, the Department of State announces a waiting list. The law further provides that no one country may have more than a specific percentage of the total number of visas available annually. If these limits are exceeded in a particular category for a particular nationality, a waiting list is created which is specific to the country and applicants are placed on the list according to the date of their case filing. One can view the waiting list (both worldwide and country-specific) in the monthly Visa Bulletin of the Department of State, which can be accessed at: http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.
Each month, the State Department issues the visa bulletin, usually in the middle of the month. When the bulletin is issued, it provides information that will take effect on the first day of the following month. Depending on the availability of immigrant visas, the priority dates in each category and for each country can change each month, forwards or backwards, quickly or slowly. They can also stay the same. Therefore, there is no way to anticipate what the priority date will be in a future month or when a category will become current. An individual needs to have a current “priority date” in order to file the I-485 application for permanent residence.

Currently, the most significant impact of the retrogressed priority dates affects those born in India and China, but for the rest of the world, the entire EB-3 category is backlogged. The bottom line to the problem is that it will take longer for individuals to obtain permanent residence, especially if they were born in India and China. Accordingly, now more than ever, it is wise to start the process sooner rather than later.

**Exhaustion of H-1B visa petitions for non-academic employers and its impact upon academia**

The crisis occasioned by the small supply of H-1B numbers for non-academic employers continued during fiscal year 2007, which opened on October 1, 2006. By the end of May, 2006, the USCIS announced that virtually all of the available H-1B petitions had been used and that no further numbers would be available until October 1, 2007.

As has occurred in the prior three fiscal years, the exhaustion of the visas for non-academic employers has had a beneficial impact on academia. First, it has continued to create opportunities for recruitment for universities and colleges because foreign nationals who were precluded from non-academic H-1Bs could only turn to a job in academia for relief (assuming they were not eligible for any other visa category.) Second, it also created a better atmosphere
for retention, because the foreign national who was already employed in academia (and thus had never been counted towards the quota) could not take a job outside of academia because an available H-1B number would be required. (Such an individual could move to a different university, but would not have considered a job in industry.)

Another outgrowth of the H-1B exhaustion has been an outreach by industry to establish affiliation agreements with colleges or universities under which an H-1B employed directly by the college could be delegated to work on projects at the business entity. Various subcontracting agreements have permitted these arrangements. They must be carefully structured to satisfy tax and benefits obligations as well as to fully comply with disclosure requirements under immigration law.

Beyond that, the exhaustion of numbers did not create a crisis for faculty hiring. It did, however, create a significant crisis for foreign students who, upon completion of optional practical training (OPT) were unable to obtain non-academic positions once the quota had been exhausted.

CONCLUSION

It is anticipated that the debate about the value of immigration will continue as long as our country endures. It is our foundation and will be our future. Its wise use is a sharp competitive tool, both for our country and our individual campuses. Recruiting and retaining the best talent available requires knowledge of the substantive law and fashioning wise campus policies which embrace an understanding of the practical ramifications of those laws on employees. It also requires participation in the conversation from those who can best educate – the academic community.
APPENDIX - NONIMMIGRANT (TEMPORARY) VISA CATEGORIES THAT PERMIT WORK IN THE U.S.

The following will serve as a brief resource for those seeking to hire foreign nationals for faculty and staff positions for a temporary or defined-duration basis. Those applicable to the university setting will most likely include:

**F-1 Student with Authorized Practical Training**
Upon completion of a degree, F-1 students are entitled in most circumstances to obtain one year of optional practical training (OPT) employment authorization. 8 CFR §214.2(f). They obtain preliminary authorization from the college or university from which they graduated and then must apply to the USCIS for an Employment Authorization Document (EAD). Additionally, F-1 students may work on campus while still engaged in study and may also obtain permission to work pursuant to a grant of curricular practical training. A prospective employer is not required to file a petition on their behalf. Note, however, that within the year, and frequently within only a few months, an employer who wishes to continue that employment must actually sponsor the individual for another category of work authorized status. It is critical to avoid delaying that decision because it may result in an interruption in the ability to work.

**Spouse of E-1/2 or L-1**
Spouses of E-1/E-2 and L-1 visa holders are eligible to receive work authorization by applying to the USCIS for an Employment Authorization Document (EAD). 8 USC §1184(e)(6) and 8 USC §1184(c)(2)(E). Work authorization is granted in two-year increments and is incidental to the continued status of the primary visa holder. A prospective employer is not required to file a petition.

**E-3 Specialty Worker, Australian**
A relative newcomer to the immigration scene, the E-3 was enacted to solve the H-1B quota crisis as it impacted Australians. Thus, a national of the Commonwealth of Australia who is to be employed in a Specialty Occupation (as an H-1B) may seek E-3 status. This visa may be sought directly from a U.S. consulate, thereby eliminating prior USCIS petition processing. In
light of its exemption from the worker fraud fund, it may be reasonably considered as an alternative for faculty positions (or other professional positions) for Australians. 8 USC §1101(a)(15)(E).

H-1B Specialty Worker
This category, well known and well used in the university setting, is the one in which foreign nationals likely will be temporarily employed. 8 CFR §214.2(h). Simply stated, H-1B status is available for a position that normally requires at least a bachelor’s degree, the prospective employee must hold at least a bachelor’s degree or its foreign equivalent in the field in question and the employer must be paying a sufficient salary (the higher of actual wage or prevailing wage). An H-1B worker is limited to a six-year maximum stay, but in limited instances, additional time is permitted if the person is substantially involved in the permanent residence process. Pub.L. 106-313, as amended Pub.L. 107-273. H-1B status is employer-specific, geographic-specific and position-specific and changes generally require the filing of a new petition. An employee is eligible to change employers and move from one H-1B employer to another through “portability” provisions. 8 USC §1184(m). This would permit the employee to begin work as soon as the new employer has filed an H-1B petition and a receipt is obtained from the USCIS. (Caution: When obtaining the first H-1B, the employee must wait for approval before commencing work. Additionally, note that a person who has not previously been subject to the H-1B “cap” by reason of being employed by an exempt entity (like a college or university) will become subject to the cap upon moving employers to a non-exempt entity. 8 USC 1184(g)(6).) A prospective employer is required to file a petition.

J-1 Exchange Visitor with Practical Training Authorization and J-2 Spouse
J-1 exchange visitor students are generally entitled to 18 months of post completion practical training; i.e., work authorization. The J-2 spouse may obtain work authorization throughout the entire course of J-2 status, including all the years in which the primary J-1 is a student and during the time that the J-1 is working under practical training authorization. 8 CFR §214.2(j)(1)(v). A prospective employer is not required to file a petition.

J-1 status is also available to professors and research scholars, trainees, short-term scholars, and foreign medical graduates who are engaged in residence or fellowship training, among others. If
the academic institution has its own J-1 program, issuance of DS-2019 and securing status as a J-1 permits the individual to work for the sponsoring entity.

It is important to recognize that many J-1 visa holders are subject to a two-year foreign residence requirement (“2yfrr”). 8 USC §1182(e). One becomes subject to the 2yfrr if he or she has received either U.S. or home country funding, if the field of endeavor is on the “skills list” (i.e., a shortage list) from the home country or if he or she entered the United States to receive postgraduate medical training (i.e., medical residents). If the 2yfrr exists, the person must return to the country of last residence or nationality before being able to obtain H or L status or permanent residence. Alternatively, it may be possible to obtain a waiver of the 2yfrr. Depending upon the manner in which the individual was subjected to the requirement, the waiver procedure may be relatively simple or very complicated.

O-1 Extraordinary Ability

O-1 status is available to foreign nationals shown to have extraordinary ability in the sciences, arts, education, business or athletics. 8 CFR §214.2(o). Those prospective faculty members who possess substantial prior experience may be eligible for this category. Documentation to be submitted will include evidence of receipt of awards or prizes; membership in associations which require outstanding achievements of members; published work about the foreign national; evidence of the individual having acted as the judge of the work of others; evidence of original work of major significance to the field; authorship; evidence that the individual has been employed in a critical or essential capacity for distinguished organizations; evidence of high salary or other comparable evidence. The initial period of validity is 3 years, and thereafter, annual extensions of stay may be sought without limitation. A prospective employer is required to file a petition.

TN Treaty NAFTA

Under the North American Free Trade Agreement (NAFTA), both Canadian and Mexican citizens who seek to enter the United States to teach at a college or university are eligible for TN status. 8 CFR §214.6. This is granted in one-year increments without limitation, as long as the Treaty remains in effect and the category of “Teacher” for colleges, universities and seminaries remains on the list of professions covered by the Treaty. The TN process does not require an
employer to file a petition, but does require the employer to provide a detailed letter for a border-adjudicated application for a Canadian or a consular-adjudicated visa application for a Mexican.