

IMMIGRATION-RELATED ISSUES FACING COLLEGES AND UNIVERSITIES

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This article, meant as a supplement to the other articles of this distinguished panel, focuses on a variety of immigration-related topics affecting colleges and universities. As such, this article explores export controls, visa application and entry issues, I-9 compliance strategies, and recent developments that could impact immigration-related issues, policies, and practices at colleges and universities.

Export Licensing and Control Issues:

"Any item that is sent from the United States to a foreign destination is an export."² Though the export licensing requirements have been in place for more than two decades, they have been largely ignored by colleges and universities due to the "fundamental research exception" created by National Security Decision Directive 189 in 1985 ("NSDD 189"), which will be discussed in more detail below. However, since the tragic events of September 11, 2001, there has been a general refocusing of existing export control laws from control on strategic goods to the technologies that permit others to make strategic goods. Furthermore, in 2004, the Inspectors General of several federal agencies including the Department of Commerce and the Department of State recommended the increased application of "deemed" export regulations to foreign students and scholars involved in university-based research.³ Under this general guise, the government has begun to chip away at the "Fundamental Research Exception" and colleges and universities

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² "Introduction to Commerce Department Export Controls," found at <http://www.bis.doc.gov/Licensing/ExportBasic.htm>, Jan. 10, 2006.

³ "Deemed Export Controls may not Stop the Transfer of Sensitive Technology to Foreign Nationals in the U.S.," Inspector General, U.S. Department of Commerce, Final Inspection Report No. IPE-16176, March 2004.

need to be aware of these Regulations and how to remain in compliance on their campuses.

In the 1980s, the U.S. Government began to apply the export Regulations to university research, which resulted in backlash and confusion from the higher education sector. As a result, the U.S. Government worked with the higher education sector and issued NSDD 189. NSDD 189 created the "Fundamental Research Exception," which provides that export controls will not apply if:

information/non-encrypted software resulting from basic and applied research in science and engineering, the results of which are ordinarily published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted from proprietary or national security reasons. This exception will not apply if the university accepts restrictions on publication of the research results or the university accepts specific access and dissemination controls in federally-funded research.⁴

The general exception for "fundamental research" under the export control regulations only applies to the information; it does not apply to the scientific equipment provided to or developed by colleges or the technology/software provided to or developed by colleges. Therefore, colleges must secure a license for shipment of any equipment or software on the applicable export-controlled list, even if most of the technical information about the items may be exchanged with foreign nationals provided that the information falls under the fundamental research exception AND controls on participation in research and dissemination have not been accepted. That is, a college will NOT qualify for the exception if the college

⁴ NSDD 189 was reaffirmed in 2001 by then National Security Advisor Condoleezza Rice.

accepts ANY restrictions on the publication of the information resulting from the research other than limited prepublication reviews by research sponsors or where the research is federally funded and specific access controls have been accepted.

Because this exception that has been utilized by colleges for most of the research it conducts is under attack and because this exception is not always applicable in a given situation, colleges must understand export controls, and implement written, published, and disseminated export control policies, procedures, and practices to assist the college in maintaining compliance on its campus.

First and foremost in understanding the potential reach of export controls, colleges must understand the concept of "deemed exports." As a general proposition, a "deemed export" (one requiring a license and imposing access restrictions) exists whenever a foreign national⁵ on U.S. soil may be exposed to or be able to access in any manner an export controlled item of information. As such, nearly all information in restricted fields, including several engineering, life sciences, biotechnology, and other science-related fields could be subject to the deemed export rule if the research involves a foreign national faculty member, student, or organization. Given that the foreign national populations at nearly all colleges in the United States have been steadily increasing or at least maintaining large numbers, it would serve colleges well to understand the restrictions imposed and the possible licensing requirements implicated.

⁵ A "foreign national" under EAR or ITAR is **not** a U.S. citizen, a U.S. lawful permanent resident ("green card" holder), or an asylee/refugee in the United States. As an example, **all** F-1 students and H-1B employees at the college would be subject to restrictions under these regulations.

Though there are several U.S. Government entities involved in export licensing and control, the primary entities are the Department of Commerce and the Department of State.

The U.S. Commerce Department Bureau of Industry and Security ("BIS") oversees and regulates the Export Administration Act of 1969 (as amended), which is implemented by the Export Administration Regulations ("EAR"), 15 C.F.R. §§730-774. These regulations are issued by the BIS under laws relating to the control of certain exports, re-exports, and export activities. The EAR administers controls on "dual use" products and technologies, i.e., both military and civilian applications. The Export Licensing Requirements created by the Export Administration Act as implemented by the EAR, cover virtually ALL fields of engineering and science, but only require a license for the export of certain identified materials or information.

The Department of State Office of Defense Trade Controls ("ODTC") oversees and regulates the Arms Export Control Act of 1976, which is codified at 22 U.S.C. Chapter 39, and implemented by the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. §§120-130. ITAR administers controls on "munitions" products and technologies.⁶ There are twenty-one listed categories that require a license including weapons, chemical and biological agents, vehicles, missiles, and all satellites.

Because EAR/ITAR are the most often implicated regulations in this arena, they will be discussed and reviewed herein. Both EAR/ITAR look at the nature of the goods, technology, and/or

⁶ 22 C.F.R. §121 (U.S. Munitions List)

data including the actual and potential uses of the same, the destination point including the country, organization or individual, and the intended end use and/or end user in determining the applicability of the control to be imposed on the item.

To a lesser extent, the Nuclear Regulatory Commission ("NRC"), which administers controls on nuclear materials and technology, and the Department of Treasury Office of Foreign Assets Control ("OFAC"), which administers economic and trade sanctions against targeted foreign countries, terrorism-sponsoring organizations, and other individuals based on national security goals and other U.S.-foreign policies, may also be implicated in the export licensing arena. A list of current targeted countries listed by OFAC can be found at <http://www.ustreas.gov/ofac>.⁷ Colleges that deal in nuclear research or admit/employ several foreign nationals should also review the restrictions imposed by the organizations to ensure overall export licensing compliance.

Export Licensing under EAR/ITAR:

Generally, if an export is listed by the U.S. Government as an export-controlled technology, then the college will require a license to "export" that product or technology.⁸ "A relatively small percentage of total U.S. exports and reexports require a license from BIS."⁹ The first step in export compliance is for

⁷ 31 C.F.R. §500 *et seq.* (OFAC Regulations)

⁸ An "export" is any oral, written, electronic, or visual disclosure, shipment, transfer or transmission outside the United States to anyone including a U.S. Citizen of any commodity, technology, or software/codes, or with an intent to transfer it to a non-U.S. entity or individual, e.g., foreign national, wherever located.

⁹ <http://www.bis.doc.gov/Licensing/ExportingBasics.htm>, Jan. 10, 2006

the college or university to determine whether there is a need for an Export License. "When making that determination consider:

- What are you exporting?
- Where are you exporting?
- Who will receive your item?
- What will your item be used for?"¹⁰

As a first step, the college must determine whether it is subject to U.S. jurisdiction. If the college is located in the U.S. or has U.S. Citizens working in an overseas location, campus, or operation, then the college is subject to U.S. jurisdiction on export controls. Next, the college must review the questions posed above by the BIS.

Classify the Technology, i.e., what are you exporting: The BIS maintains a goods and related technology listing at 15 C.F.R. §774, Supp. 1, known as the Commerce Control List. There are ten categories that require a license: nuclear materials; chemicals, microorganisms, and toxins; electronics; computers; telecommunications; lasers and sensors; avionics; marine; and propulsion systems.¹¹ There is an additional "catch-all" category that may or may not require a license depending on the destination of the goods.¹² The ODTIC maintains the U.S Munitions List at 22 C.F.R. §121, which lists twenty-one categories that require a license including weapons, chemical and biological agents, vehicles, missiles, equipment, and satellites.

The college must determine whether the technologies utilized by or released to the foreign national employee are

¹⁰ <http://www.bis.doc.gov/Licensing/ExportingBasics.htm>, Jan. 10, 2006

¹¹ 15 C.F.R. §774, Supp. 1

¹² 15 C.F.R. §734.3(a)

subject to control and regulation by the U.S. Government based on these lists. The specific export license requirements will often depend on the precise Export Control Classification Number or the U.S. Munitions List Category that is applicable - a college must consult the applicable Regulations and list to determine whether an exception applies, a license is required, or other applicable control applies. Generally, exports of most high-technology and military items as well as associated technology require U.S. export authorization (i.e., either a license or an applicable exception). Furthermore, colleges must be mindful of the deemed export concept: a controllable technology provided to a foreign national within the United States for use only in the United States is still considered an "export" under both ITAR and EAR.

Once the college has determined that the technology is controlled by the BIS or the ODTIC, the college must then determine how the technology is specifically classified by the applicable regulation.¹³ Furthermore, changes created by the USA PATRIOT Act amended the existing biological weapons possession statute and extended the regulations that govern the transfer and receipt of certain viruses, bacteria, toxins, rickettsiae, and fungi categorized as "select agents."¹⁴ The USA PATRIOT Act criminalizes possession of these materials in quantities not justified by "reasonable" research - unlike ITAR and EAR, the fundamental research exception does not apply to "restricted persons," which includes illegal aliens, nonimmigrants from ANY country designated by the ODTIC as supporting terrorism, and

¹³ The ITAR list is available at <http://fas.org/spp/starwars/offdocs/itar/pl21.htm> and the EAR list is available at http://www.access.gpo.gov/bis/ear/ear_data.html

¹⁴ These amendments are available at <http://www.nih.gov/od/ors/ds/pubs/appendxa.html>

individuals who have been convicted of a crime punishable by imprisonment for a term exceeding one year.

Who will receive the item: "Once you have classified the item, the next step is to determine whether you need an export license based on the 'reasons for control' of the item and the country of ultimate destination."¹⁵ The college must consult Supplement No. 1 to Part 774 of the EAR to determine the Export Control Classification Number for the item. Then the college must cross-check this number with the Commerce Country Chart found in Supplement No. 1 to Part 738 of the EAR. The Export Control Classification Number "and the Commerce Country Chart, taken together, define the items subject to export control based solely on the technical parameters of the item and the country of ultimate destination."¹⁶

The cross-check will reveal whether a license is or is not required. However, even if no license is required at this stage, the query does not end here. Next, the college must determine whether an individual with access to the information/technology requires a license.

Determine if a license is required for the individual: Any individual not a U.S. Citizen including lawful permanent residents of the United States or individuals who have been granted political asylum or refugee status, or a "protected individual"¹⁷ is subject to licensing requirements under ITAR and EAR.¹⁸ Once the college has determined the individual is subject

¹⁵ <http://www.bis.doc.gov/Licensing/ExportBasics.htm>, Jan. 10, 2006

¹⁶ <http://www.bis.doc.gov/Licensing/ExportBasics.htm>, Jan. 10, 2006

¹⁷ 8 C.F.R. §1324(a)(3)

¹⁸ All nonimmigrant classifications, e.g., F-1, J-1, H-1B, are subject to ITAR and EAR licensing requirements.

to licensing requirements, the college must then look at the individual's nationality to determine whether any exceptions apply. For example, Canadian citizens are generally excepted from the licensing requirements. However, citizens from countries that have historically supported terrorism are subject to very rigid licensing requirements (Cuba, Iran, Iraq, Libya, North Korea, Sudan, Syria). Furthermore, EAR Part 744, Supplement No. 4, contains a list of organizations identified by the BIS as targeted entities that require a license to obtain an export. EAR Part 764, Supplement No. 3, contains a list of "Specially Designated Nationals and Blocked Persons List" maintained by OFAC. Finally, the BIS also maintains a specific list of "Denied Persons" who are absolutely prohibited from obtaining exports. A copy of this list can be obtained directly from BIS.

Does the end-use of the item require a license or prohibit its export: Part 744 of the EAR lists specific end-uses that are prohibited and/or require a license. For example, nuclear end-uses, missile end-uses, and chemical weapon end-uses are all prohibited.¹⁹

Do any exemptions or exceptions apply? The last inquiry conducted by the college in this analysis is whether there are any applicable exceptions and/or exemptions.

- A. Public Domain/Information Exception: Under ITAR, export controls will not apply if the information is available in the public domain.²⁰ Under EAR, they will not apply if the

¹⁹ 15 C.F.R. §744

²⁰ 22 C.F.R. §§120.10, 120.11

information is publicly available.²¹ The “public domain/public information” exclusion is the broadest exclusion available under both ITAR/EAR in that it allows a deemed or “traditional” export without ANY control under the following circumstances: (1) No equipment or encrypted software involved; (2) Encrypted software or information that has already been published through one or more of the following: (a) Libraries open to the public; (b) Unrestricted subscriptions; (c) Published patents; (d) Conferences in the U.S. generally open to the public; (e) Websites accessible to the public without host’s knowledge or control of who visits or downloads information; (f) General science, math, engineering, commonly taught at colleges located anywhere; (g) No reason to believe information will be used in or for weapons of mass destruction; or (h) U.S. Government has not imposed an export control as a funding condition of research.²²

- B. Fundamental Research Exception: Export controls will also **not** apply if the information is subject to the fundamental research exceptions found in either the ITAR²³ or EAR²⁴. Under the exceptions, an individual cannot create fundamental research information or non-encrypted software anywhere other than at an accredited institution of higher learning located in the United States. Foreign nationals can participate in creation of fundamental research only

²¹ 15 C.F.R. §§743.3(b)(3), 743.7, 743.9

²² Massachusetts Institute of Technology Briefing on “Deemed Exports” for Faculty Members and Senior Research Staff, Office of Sponsored Programs, available at web.mit.edu/osp/www/Deemed%20Export_Information%20to%20faculty_researchers_September_2004.doc

²³ 22 C.F.R. §120.11(8)

²⁴ 15 C.F.R. §734.8(a) and (b)

at an accredited university located in the United States, which means that U.S. Citizen faculty and students cannot do research abroad on restricted items under this exception. Once the fundamental research exception is created, the technology can be exported without control. However, there are several preconditions to establishing the exception: (1) EAR-/ITAR-listed equipment and encrypted software must not be utilized; (2) there is no reason to believe information will be utilized in or for weapons of mass destruction; (3) the information is being released to foreign nationals in the U.S. only at an accredited college; (4) there are NO publication restrictions on results; and (5) the research results are not proprietary or classified.²⁵

Under EAR, fundamental research is defined as basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, i.e., is not proprietary research.²⁶ Under ITAR, fundamental research is defined as basic and applied research in science and engineering at accredited institutions of higher education in the United States where the resulting information is ordinarily published and shared broadly in the scientific community.²⁷

Again, once the exception has been established, there are

²⁵ Massachusetts Institute of Technology Briefing on "Deemed Exports" for Faculty Members and Senior Research Staff, Office of Sponsored Programs, available at web.mit.edu/osp/www/Deemed%20Export_Information%20to%20faculty_researchers_September_2004.doc

²⁶ 15 C.F.R. §734.8

²⁷ 22 C.F.R. §120.11

no restrictions on the export of the technology. Currently, most research conducted by colleges falls within this exception. But, with changes be called for by several Inspectors General, this exception may become less available or even disappear in the very near future. Therefore, understanding export controls is quickly becoming a very important issue for colleges.

Important Note: The fundamental research exception does not apply to for-profit entities and the for-profit sector. Why is this important? Often, colleges and universities will undertake research projects funded by for-profit companies and part of this funding requires significant research and publication limits and controls. Limits and controls that can take the particular project out of the fundamental research exemption and subject the university to export controls that it might not otherwise be subject to. To protect the exemption and the freedom of academic research, the university must negotiate with the for-profit company to remove the limits and controls. This is easier said than done.

Furthermore, the fundamental research exception does NOT apply to equipment, prototypes, or certain types of software; only to information.

- C. Individual exceptions: As discussed above, once the college has determined the individual is subject to licensing requirements, the college must then look at the individual's nationality and the applicable regulation to determine whether any exceptions apply to that individual's country of birth or nationality. A dual

citizen will generally be considered a "resident" of her last place of citizenship for purposes of EAR/ITAR.²⁸ This concept is also under attack and proposed changes by the Inspectors General call for a foreign national to be subject to stricter definitions of "residence" under the dual citizenship standard.

- D. Bona fide Full-Time Regular Employee exception under ITAR: Disclosures in the United States by a U.S. university of unclassified technical data to foreign nationals who are: (1) the university's bona fide full-time regular employee; (2) the foreign national's permanent abode throughout period of employment is in the United States; (3) the foreign national is not a national of an embargoed country; and (4) the university informs the foreign national in writing that data may not be transferred to other foreign nationals without government approval.

- E. Educational Instruction Exception: No license is required for classroom/laboratory teaching of foreign nationals in U.S. universities: (EAR) so long as the information is in the public domain; (ITAR) so long as the information is general scientific, mathematical, or engineering principles commonly taught in schools, colleges, or universities, or the information is in the public domain.

- F. Technical and Software under Restriction ("TSR") Letter of Assurance: A TSR Letter of Assurance is made available to any exporter under EAR and allows a college or university to obtain a specific "exception" to export controls. The

²⁸ Deemed Export Questions & Answers, available at <http://www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html>

TSR Letter of Assurance is outlined in the EAR and is strictly scrutinized by the BIS for adherence to the guidelines.²⁹ These letters, provided that the university can meet the requirements, are an excellent proactive approach to export controls compliance, and should be a part of the university's regular program.

Once the college has determined that the regulations apply and no exceptions/exemptions are available, what information is required in the export license process?

The college must provide to the applicable governing body the following information: (1) project location; (2) type of technology (classification number/category); (3) scope of technology; (4) how the technology will be utilized; (5) in what form the technology will be utilized; (6) the technical scope of the project; (7) the foreign availability of the technology abroad; and (8) the full, complete, legal name, current address, nationality, passport number, date and place of birth, and complete, accurate, and full job description outlining the foreign national's access to and use of the controlled technology.

The export license application will be filed with the appropriate U.S. Government agency charged with overseeing the particular Regulation in question and may be reviewed by other agencies as well including OFAC, the Department of Defense ("DOD"), the Department of Energy ("DOE"), Department of Justice, and the Central Intelligence Agency ("CIA").³⁰ It

²⁹ 15 C.F.R. §740.6

³⁰ DOS licensing requirements and forms are available at <http://www.pmdtc.org>; CDBXA licensing requirements and forms are available at

generally takes 90-180 days for the application to be reviewed by the appropriate agency(ies). If an application is denied, the college can file an appeal to the Under Secretary of Commerce for Industry and Security. If the application is approved, then the license will list specific restrictions that must be adhered to by the college. The college will NOT get license if the destination country (via the individual) is a Department of State-listed terrorist country, a U.S. arms embargo-listed country, or a UN Security Council arms embargo-listed country.

The penalties for noncompliance with the export licensing controls focus more on end-user or country rather than technology, and can be criminal, civil and/or administrative sanctions. Under ITAR, these sanctions include: (1) Criminal - up to \$1,000,000 per violation and up to 10 years in prison; and (2) Civil - seizure or forfeiture of information, technology, or product, and up to \$500,000 per violation. Under EAR, these sanctions include: (1) Criminal - \$1,000,000 or up to five times the value of the export, whichever is greater, per violation; and (2) Civil violations - up to \$120,000 per violation. Both ITAR and EAR also have "death penalty" provisions that provide for the complete denial of export privileges to the sanctioned agency. Under OFAC, sanctions can include: (1) Criminal - up to \$1,000,000 per violation and up to 10 years in prison; and (2) Civil - up to \$55,000 per violation. The sanctions for the foreign national can also be severe including grounds for inadmissibility or removal under INA §212(a)(3)(A)(i)(II) and criminal penalties.

<http://www.bis.doc.gov>; OFAC licensing requirements and forms are available at <http://ustreas.gov/offices/enforcement/ofac/>

The challenge for colleges is maintaining the balance between nondiscriminatory research opportunities, academic freedom, and export compliance. Colleges should have internal compliance procedures in place including a written and published export control policy, which includes an explanation to all students, faculty, and staff of the "deemed export" provisions. Colleges should provide export control training to the appropriate Departments, faculty, staff, and administration. Although colleges have generally been able to use exemptions and exceptions to avoid licensing, a recent GAO Report attacked the applicable agencies for not enforcing the deemed export provisions strongly enough. The end result, enforcement and compliance are on the rise and colleges must pay more attention to the export control Regulations.

Visa Application and Entry Issues:

Border patrol, security, and safety have all taken precedence over speed, efficiency, and courtesy in the admittance of foreign nationals into the United States. Since the tragic events of September 11, 2001, the passage of the USA PATRIOT ACT, and the continued, increased focus on border security by Congress, the ability of a foreign national to obtain a visa and subsequent admittance into the United States has been greatly hindered. My grandmother always said, "you put a lock on your door to keep the honest people out." The United States has placed the metaphoric lock on the door and honest foreign nationals are finding it more and more difficult to gain entry. This article is not meant to be a social commentary on whether or not increased security is warranted or needed. Rather, this article seeks only to address a fact that colleges and universities that admit foreign national students and/or

employ foreign nationals in the workforce must face: it is and will become more difficult for these individuals to gain entry to the United States in a timely fashion, which means that colleges and universities will need to plan for a myriad of possibilities, including placing professors on sabbaticals, losing students for extended periods, etc. The landscape is changing and will impact the way colleges conduct business, educate students, and hire faculty and staff.

Since January 31, 2003, the Department of State ("DOS") database, which includes more than 50 million visa applications including names, photographs, home address, date of birth, etc., has been available to local law enforcement officials.³¹ The database, CHIMERA, is now linked between the DOS, Central Intelligence Agency, Federal Bureau of Investigation, and State and Local police departments. Currently, every individual that applies for a visa abroad through the DOS undergoes a security check. Security checks take the form of name-checks, nationality-checks, field-checks, and biometric-checks (fingerprint and photographs). If the DOS comes up with a "hit," this can result in a significant delays in the visa process. A "hit" means the individual is a suspected security risk due to a criminal arrest or conviction or the individual has had prior visa problems. A "hit" can also be the result of a false positive due to similar names and identity theft.

All nonimmigrant applications, e.g., F-1, J-1, H-1B, are checked via the Interagency Border Inspection System ("IBIS"). IBIS checks the following databases: Federal Bureau of Investigation ("FBI") National Crime Information Center

³¹ "State Department Link will open Database to Police Officers," New York Times, January 31, 2003, Jennifer Lee.

("NCIC"); Consular Lookout and Support System ("CLASS"); Bureau of Alcohol, Tobacco, and Firearms ("ATF") database; Customs database; National Automated Immigration Lookout System ("NAILS"); and the Treasury Enforcement Communication System ("TECS"). All immigrant applications, e.g., I-485 Adjustment of Status, are run through IBIS, the Interagency Fingerprint Identification System ("IAFIS") - fingerprints sent to the FBI to check all available U.S. criminal history, and through the CIA and FBI databases for a name and biographic data check.

Foreign Nationals seeking visa at the US Embassy must first have a CLASS check conducted by the DOS. CLASS includes data from prior visa applications and contains information on more than 13 million entries. A "hit" in the CLASS database is a potential reason for ineligibility of a visa (INA §212(a)(3)) and may require "special clearance" procedures where the DOS will seek clearance from other agencies, i.e., Department of Justice, Central Intelligence Agency, Federal Bureau of Investigation, which can cause substantial delays in the visa issuance process. Furthermore, individuals that will work with information falling under export licensing controls (discussed below) or with information on the Technology Alert List (9 F.A.M. §40.31, Exhibit I) will need special clearance and should plan on a substantial delay in the issuance of the visa.

Colleges must counsel their faculty, staff, and foreign national students regarding potential delays in securing a visa and the potential affects on course availability, research projects, etc. Furthermore, colleges must be equipped and ready to deal with these delays and the impacts that these delays cause on their business and educational models. Visa issuance is a problem not only for the individual experiencing the delay,

but also for the college that is planning for and expecting the arrival of that individual within a certain timeframe.

I-9 Compliance Issues:

Under the Immigration Reform and Control Act of 1986 ("IRCA"), every new hire since November 6, 1986, must complete a Form I-9. IRCA imposes penalties on employers for knowingly hiring or continuing to employ foreign nationals who are not authorized to work in the United States.³² It is illegal under IRCA for an employer to hire foreign nationals who cannot present documentation evidencing their authorization to work in the United States.³³

IRCA imposes a variety of paperwork requirements on employers to insure that workers have presented proper documentation to establish their authorization to work.³⁴ For example, within three days of hire, an employer must attest under penalty of perjury on Form I-9 that employment and identity documents have been presented and examined.³⁵ Violations of these paperwork requirements, even technical ones, can result in the imposition of substantial fines.

An employer must not knowingly hire any person not authorized to work in the United States and must not knowingly continue to employ any person who is not authorized to work in the United States. The employer must verify the employment eligibility of **every** person hired by the employer whether the person hired is a citizen or foreign national. Has each person

³² 8 U.S.C. §1324a(a)(1)(A) and (2)

³³ 8 U.S.C. §1324a(a)(3)

³⁴ 8 U.S.C. §1324a(b)(1)(B)

³⁵ 8 U.S.C. §1324a(b)(1)(A)

with hiring authority been provided with a written copy of the company's policies with respect to the hiring of new employees? Does the company have a company handbook regarding the interview of potential employees? Is there a person in charge of centralized oversight of the compliance program? These questions and their respective answers are vital to a college's ability to maintain an efficient and effective I-9 program.

It is recommended that the employer audit its I-9 records every 2-3 years to ensure compliance with the law. In an audit, the first step is to prepare a random sample list of employees hired since November 6, 1986, including the date of hire and termination (a number that will represent a sufficient "test" group). Second, the employer should check the I-9 records for improper completion, e.g., (1) Has the employee failed to check one of the three boxes regarding immigration status?; (2) Has the employee checked too many boxes, e.g., claims to be a citizen and a permanent resident?; (3) Has the employee failed to insert the expiration date of time-limited work authorization?; (4) Has the employee failed to sign and/or date Part 1?; (5) Has the employer photocopied documents and attached them to the I-9 form, but has failed to identify the documents under List A, B or C?; (6) Has the employer failed to record the expiration date of time-limited work authorization documents?; (7) Under Section 2, has the employer failed to insert the date the employee starts work?; (8) Has the employer failed to sign and/or date the I-9?; and/or (9) Are there documents which do not establish employment eligibility or identity that have been accepted, e.g., USCIS approval notice?

Third, the employer should check I-9 records by verifying work authorization for the listed employees. Did the employee

provide a document from List A (Documents that establish BOTH identity and employment eligibility), e.g., U.S. Passport; Certificate of U.S. Citizenship (USCIS Form N-560 or N-561); Certificate of Naturalization (USCIS Form N-600); Unexpired foreign passport with I-551 stamp or attached USCIS Form I-94 indicating unexpired employment authorization; Alien Registration Receipt Card with photograph (USCIS Form I-151 or I-551); Unexpired Temporary Resident Card (USCIS Form I-688); Unexpired Employment Authorization Card (USCIS Form I-688A); Unexpired Reentry Permit (USCIS Form I-327); Unexpired Refugee Travel Document (USCIS Form I-571); and Unexpired Employment Authorization Document issued with by the USCIS which contains a photograph (USCIS Form I-688B)? Did the employee provide a document from both List B (documents that establish identity), e.g., Driver's license or state issued I.D. card; I.D. card issued by state, federal or local government agencies or entities; School I.D. card with a photograph; Voter's registration card; U.S. military card or draft record; Military dependent's I.D. card; U.S. Coast Guard Merchant Mariner Card; Native American tribal document; or Driver's license issued by Canadian government; and List C (documents that establish employment eligibility), e.g., U.S. social security card (other than card stating that it is "not valid for employment"); Certification of Birth Abroad issued by the DOS; Original or certified copy of birth certificate; Native American tribal document; U.S. citizen I.D. card (USCIS Form I-197); I.D. card for use of Resident Citizen in the United States (USCIS Form I-179); or Unexpired employment authorization document issued by USCIS other than those listed on List A.³⁶

³⁶ 8 U.S.C. §1324a(b)(1)(B)

Next, the employer should establish a procedure to re-verify employees with time-limited employment authorization, e.g., establish a "hot date" calendar listing employees whose employment verification expires on certain dates. The employer must also discontinue any verification procedures that may appear discriminatory based upon a person's national origin, e.g., only checking employment eligibility of individuals who "appear" to be foreign nationals. An employer cannot refuse to hire an individual based on that individual's national origin or citizenship status ("national origin discrimination").³⁷ An employer cannot discharge an individual based on that individual's national origin or citizenship status ("national origin discrimination").³⁸ An employer cannot request certain or specific documents in completing the employment eligibility procedure (this is "document abuse"). And, an employer cannot refuse to accept documents during the employment eligibility procedure that are acceptable under law, relate to the individual and appear to be genuine on their face (also called "document abuse").³⁹

There is discussion to increase I-9 enforcement as part of the Department of Homeland Security's overall effort to enhance security in the United States. I-9 compliance will become a larger issue for colleges and universities, and one that they will need to manage effectively and efficiently to avoid costly penalties.

Potential Future Developments and Issues:

³⁷ 8 U.S.C. §1324b

³⁸ 8 U.S.C. §1324b

³⁹ 8 U.S.C. §1324a(1)(B)

The Border Protection, Antiterrorism, and Illegal Control Act of 2005 (H.R. 4437). This lengthy bill contains several items that should be of interest to colleges and universities that admit and hire foreign nationals.⁴⁰

First, the bill seeks to expand the definition of "aggravated felony," which would make a larger class of foreign nationals who commit crimes inadmissible or removable as a result of those crimes. This would also include expanding the definition to encompass any foreign national who is convicted three times of DUI, regardless of whether each offense on its own is considered a misdemeanor.⁴¹

More importantly, the bill seeks to create a new federal crime of "unlawful presence."⁴² Unlawful presence is the presence in the United States by a foreign national without valid status. Furthermore, it seeks to expand the definition of "presence" to include even technical, non-intentional violations, i.e., I-94 card expires and individual failed to file a timely extension of status. The bill also seeks to amend the rules for voluntary departure to reduce the period of time from 120 days to 60 days and to require a foreign national to waive all rights to any further motions or appeals in exchange for a granting of voluntary departure.

The bill also seeks to make major revisions to the Employment Eligibility Verification System found in INA §274A.⁴³ The bill would create a telephonic or other electronic

⁴⁰ The version passed by the House of Representatives is available at <http://thomas.loc.gov/cgi-bin/query/D?c109:3:./temp/~c109GuRK7W>

⁴¹ H.R. 4437, Sec. 201

⁴² H.R. 4437, Sec. 203

⁴³ H.R. 4437, Secs. 701-711

verification system in which an employer could check an individual's employment authorization and obtain a confirmation or "tentative" denial within three (3) days. If an individual is tentatively denied, then the case would be entered into a secondary process in which the employer would receive a confirmation or denial within ten (10) days. During that time, the individual could present evidence that her employment authorization was valid. An employer could not terminate an individual during the tentative denial period for a failure to provide valid work authorization documents. The employer must wait for the final denial before being eligible to fire the employee for noncompliance. Finally, the bill would require the employer to conduct this check on all previously hired employees still employed by the university within six (6) years of the bill's passage. Any check that indicated potential fraudulent use of a social security number would result in an investigation of the individual by the Department of Homeland Security. The bill does make a point of stating that it does not authorize issuance of a national identity card (Whew! What a relief!).

The bill would also increase the current penalties for I-9, i.e., hiring, recruiting, and retention, violations. The minimum penalty under the bill would be \$5,000 for each foreign national with respect to whom the violation occurred. Paperwork penalties would be subject to a minimum penalty of \$1,000 and a maximum penalty of \$25,000. "Pattern and practice" offenses would also incur stiffer penalties including a minimum fine of \$3,000 and a minimum imprisonment of one year (please note, the current maximum term of imprisonment is six months).

Finally, the bill would require all foreign nationals seeking admittance into the United States to waive their right

to any review or appeal of an immigration officer's decision at the port-of-entry as to the foreign national's admissibility.⁴⁴ Essentially, this would mean that any admitted foreign national has waived her right to a hearing before an Immigration Judge in the event that she is later charged with any immigration violation. To enter the United States, the foreign national must virtually waive all of her rights to relief should anything happen during her stay in the United States.

The REAL ID Act (H.R. 418).⁴⁵ The Act amends the USA PATRIOT Act by expanding the terrorism-related grounds of inadmissibility and removal to include the removal of foreign nationals who are members of or support any political organization that has used, or threatened to use, violence, even if the organization has not been designated as a "foreign terrorist organization." The Act permits the construction and maintenance of security fences and barriers along the U.S.-Mexico and the U.S.-Canada borders. Finally, the Act attempts to create federal controls over the issuance of driver's licenses to certain foreign nationals and to attempt to set national security standards for all drivers' licenses, e.g., digital photograph.

To provide or not provide in-state tuition to noncitizen students. As of November 2005, at least eleven states have implemented legislation permitting foreign nationals who were neither U.S. citizens through naturalization nor U.S. lawful permanent residents, i.e., "green card" holders, to pay in-state tuition under certain circumstances. Generally, most states

⁴⁴ H.R. . 4437, Secs. 801-808

⁴⁵ The REAL ID Act version that passed in the house is available at <http://thomas.loc.gov/cgi-bin/query/D?c109:3:./temp/~c109LwYyTU>

have required foreign national students that were not U.S. citizens or lawful permanent residents to pay out-of-state tuition to attend college within the state. Now, more and more states are reconsidering this decision as enrollment of foreign national students declines and as the foreign national population continues to grow. In 2003, the DREAM Act and the Student Adjustment Act were both introduced (one in the Senate and one in the House), and both sought to eliminate the federal provision that discourages states from providing in-state tuition without regard to immigration status and permit other foreign national students who have been in the United States for an extended period to apply for legal status. Both have stalled and not much progress has been made, which is why states have begun taking action individually. This is worth mentioning because it is a situation that colleges and universities face daily in terms of application numbers, admittance numbers, and revenues. Legislation within your state could change your ability to admit or attract foreign national students, therefore, it behooves a university to be aware of the legislation and to drive legislation where none has been enacted.

Visa Number Retrogression. The "green card" system in the United States is built upon two sets of quotas: (1) numbers allotted to certain preference categories, e.g., EB-1 (extraordinary ability, outstanding researcher and professors, and multinational managers) and (2) percentage of overall immigrant visas allotted based on country of birth. These limits on the number of immigrant visas available each fiscal year are established by the INA. If the limits are exceeded in a particular category for a particular nationality, then a "waiting list" is created, i.e., the category for that

nationality becomes backlogged and foreign national applicants are placed on the waiting list according to the date they filed their first action toward the "green card." This date is known as the "priority date." In recent months, certain preference categories for certain countries have become severely backlogged resulting in very long wait lists. This process has been described by the DOS as follows:

The Visa Office subdivides the annual preference and foreign state limitations specified in the Immigration and Nationality Act (INA) into twelve monthly allotments. The totals of documentarily qualified applicants that have been reported to VO are compared each month with the numbers available for the next regular allotment and numbers are allocated to reported applicants in order of their priority dates, the oldest dates first. If there are sufficient numbers in a particular category to satisfy all reported documentarily qualified demand, the category is considered "Current." For example, if the Employment Third preference monthly target is 5,000 and there are only 3,000 applicants, the category is considered "Current". Whenever the total of documentarily qualified applicants in a category exceeds the supply of numbers available for allotment for the particular month, the category is considered to be "oversubscribed" and a visa availability cut-off date is established. The cut-off date is the priority date of the first documentarily qualified applicant who could not be accommodated for a visa number. For example, if the Employment Third preference monthly target is 5,000 and there are 15,000 applicants, a cut-off date would be established so that only 5,000 numbers would be used, and the cut-off date would be the priority date of the 5,001st applicant.⁴⁶

Why is this important to your university? If you employ foreign nationals under an H-1B or O-1 or other nonimmigrant status and have sponsored these individuals to progress through the "green card" process, then you must be prepared to assist these individuals with maintaining their underlying nonimmigrant status (or similar immigration strategies) during the long delays expected in processing the applications. Universities must engage in long-range planning for foreign nationals presently employed by their university as well as those foreign

⁴⁶ http://www.travel.state.gov/visa/frvi/bulletin/bulletin_2712.html (section D, November 2005)

nationals who are seeking employment at the university. Immigration strategies will become more important as we continue to face longer and longer backlogs in the "green card" system.

Why else is this important to your university? One source estimates that a "fresh off the campus employee of a US corporation faces 15 years before receiving a green card...."⁴⁷ How then is your university going to recruit foreign national students when those same students face no real prospect of permanent employment in the United States? This may not be a very real or noticeable problem at the moment, but as this problem continues to grow, students will begin to seek their education in countries where employment and opportunity are more readily available.

CONCLUSION

Immigration is more than admitting students in F-1 status and maintaining the SEVIS database. It is more than hiring foreign national staff and faculty in H-1B or other nonimmigrant classifications. Rather, Immigration is a core competency of inter-related international topics and situations that can affect all aspects of a college's campus, business, and education. As such, the college's administration, faculty, staff, and students must work together to ensure compliance with state and federal laws, and adherence to college practices, procedures, and policies. No one office can or should handle these situations in a vacuum. Rather, there should be a total integrated effort between the office of general counsel, business and external affairs, president's office, human

⁴⁷ Immigration Daily, September 15, 2005, www.ilw.com.

resources, faculty, and the international students' office to ensure fluid and successful compliance programs for immigration-related issues.

