

UPDATE ON IMMIGRATION ISSUES AFFECTING FOREIGN FACULTY

Margaret A. Catillaz, Esq.
Harter, Secrest & Emery LLP
Rochester, New York 14604
(585) 232-6500
mcatillaz@hselaw.com

INTRODUCTION

Virtually every U.S. institution of higher education employs foreign nationals in faculty or staff positions. In order to adequately protect the institution and the employee against inadvertent breaches of immigration law and in order to maintain a competitive recruitment and retention program, one must stay abreast of the existing law and important developments. This paper will provide a summary of existing immigration law as it affects higher education and coverage of recent developments in the law that are of particular importance.

BACKGROUND – BASICS OF IMMIGRATION LAW

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.ustras.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.

The websites of the agencies provide a wealth of information, unfortunately conflicting at times. Before discussing policy and programmatic issues, academic institutions that employ foreign nationals must have a basic level of understanding of what the foreign national faces, and consequently, what the institution must do to anchor the prospective employee to the United States.

Overview of 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, 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. 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.

Temporary, Nonimmigrant Status for Prospective Employees of Academic Institutions

There are several categories of temporary or nonimmigrant status that permit work in the United States. 8 USC §1101(a)(15). These categories will provide the basis for employing a foreign national on 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.

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 (“2yfr”). 8 USC §1182(e). One becomes subject to the 2yfr 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 post-graduate medical training (i.e., medical residents). If the 2yfr 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 2yfr. 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.

The Path to Permanent Residence - Overview

While the foregoing categories of work-authorized nonimmigrant status permit 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. 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>.

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.

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 is one that requires the employer to compile and retain detailed proof of the recruitment process. 20 CFR §656.18. The application is submitted to the Department of Labor without supporting documentation. Such records are important only if there is an audit. The employer must maintain documentation to substantiate the advertisements, applicants and a detailed rationale as to why the foreign national was more qualified than all other candidates. There is a “special handling” process for college or university teaching positions. 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.

Setting up a policy of 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.*

The statute requires “extensive documentation” to establish eligibility. 8 USC §1153 (b)(1)(A). The quality of evidence is described in the pertinent regulations to include proof of a one-time achievement (that is, a major, internationally recognized award), or at least three of the following:

- a. Lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- b. Membership in associations in the field which require outstanding achievements of their members as judged by recognized national or international experts in their disciplines or fields;
- c. Published material about the individual in professional or major trade publications or other major media;

- d. Evidence of participation, either individually or on a panel, as a judge of the work of others in the same or an allied field;
- e. Evidence of original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- f. Evidence of authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- g. Evidence of the display of work in the field at artistic exhibitions or showcases;
- h. Evidence of performance in a leading or critical role for organizations or establishments that have a distinguished reputation;
- i. Evidence of having commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
- j. Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales. 8 CFR §204.5(h)(3).

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, in that only two, rather than three, of the listed categories of

documentation are required. 8 CFR §204.5(i)(3). The type of evidence submitted mirrors that for the person of extraordinary ability with some minor exceptions.

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. Although its requirements are very similar to both outstanding researcher/professors and those of extraordinary ability, there are decided differences.

The proof required in exceptional ability cases must include documentation from at least two of seven categories:

- (1) Documentation of receipt of internationally recognized prizes or awards for excellence.
- (2) Documentation of membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields.
- (3) Published material in professional publications about the individual.
- (4) Evidence of participation on a panel, or individually, as a judge of the work of others.
- (5) Evidence of original scientific or scholarly research contributions of major significance in the field.
- (6) Evidence of authorship of published scientific or scholarly articles in the field in international professional journals or professional journals with an international circulation.
- (7) Evidence of the display of work at artistic exhibitions in more than one country. 20 CFR §656.22.

This category also requires a sponsoring employer.

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.

RECENT HEADLINES IN IMMIGRATION LAW

Retrogression of Employment-Based Immigrant Visa Numbers

Perhaps the most dramatic event of recent months has been 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. (For example, on January 12, 2006, the DOS released the dates effective as of February 1, 2006). 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 2006, which opened on October 1, 2005. On August 12, 2005, even before the fiscal year had begun, the USCIS announced that virtually all of the available H-1B petitions had been used. (Indeed, some 5000 of those visas were set aside for the H-1B1 visas to be used by nationals of Singapore and Chile. Each of those countries had entered Free Trade Agreements with the United States, the numbers of which were to be taken from the 65,000 allotment.)

As has occurred in the prior two 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.

While the impact of the last three years might not yet be readily apparent on a national basis, speculation has been that the decline in job opportunities upon graduation will have a negative impact upon the enrollment of foreign students. This, in turn, is likely to reduce the pool of prospective faculty members who began their academic careers in the United States.

The New York Times reported on November 7, 2005 that there had been an overall decrease of 5 percent in foreign student applications, but that the number of international students entering U.S. graduate schools had increased by one percent in 2005. It was reported that this small increase followed several years of decline. Interestingly, the largest increase in first-time international enrollment came from Middle Eastern students, whose numbers increased by 11 percent.

The Addition of 20,000 H-1Bs for Graduates of US Graduate Programs

The crisis precipitated by a three-year undersupply of H-1B positions resulted in a significant outcry to Congress from business and academic communities. The current climate on Capital Hill was decidedly cool when immigration issues were presented however. Politically, in post-9/11 America, the expansion of the quota was infeasible, however compelling the economic reality.

A short-term solution was proposed and provided at least temporary relief. In December 2004, Congress provided certain exemptions from the H-1B cap. Public Law 108-441. Commencing on March 8, 2005, those who have graduated from a U.S. institution of higher education who earned a master's degree or higher have been provided with an additional 20,000 H-1B visas each year. (After the first 20,000 have been issued, the remaining cases will be counted against the cap.) In fiscal year 2006, the additional 20,000 visas has been used quickly. As of January 10, 2006, there were only 378 remaining, thus leaving no hope for non-academic petitions until October 1, 2006, either under the overall quota or under the 20,000 "extra" quota for graduates of U.S. graduates programs.

Increase in Fees

The Consolidated Appropriations Act of 2005, enacted on December 8, 2004, but effective on March 8, 2005, reinstated the worker-training fee in the increased amount of \$1500 (unless the employer has no more than 25 full-time employees, in which case the fee is \$750). The fee is to be paid to a training program for U.S. workers, particularly in the fields of mathematics, engineering and the sciences. Exempt from the fee are primary or secondary educational institutions, institutions of higher education, nonprofit entities related to or affiliated with any such institution, nonprofit entities which engage in established curriculum-related clinical training of students registered at any such institution, non profit research organizations or governmental research organizations. 8 USC §214(c)(9)(A).

In addition to this fee, a new Fraud Prevention and Detection Fee of \$500 was instituted on March 8, 2005. 8 USC §214(c)(12)(A). This fee is due from all employers (including colleges and universities) who file an H-1B for the first time for an employee. Thus, even if the employee previously held an H-1B with another employer, this fee must be paid by a new employer seeking to obtain H-1B status for the individual.

The foregoing fees are in addition to the “normal” base processing fee and any premium processing fee that an employer may decide to pay to obtain expedited service.

Increase in Prevailing Wage

The Consolidated Appropriations Act of 2005 also requires that the wage to be paid to a foreign national will be 100%, rather than 95%, of the prevailing wage. This impacts H-1B, Labor Certifications and Schedule A cases. Softening the loss of the 5% variable, the statute also requires any governmental wage survey used by the Department of Labor to include at least four levels of wages. The Department of Labor has published new four-tiered wage rates to meet the requirements of this provision.

Reconfiguration and Launching of the New Labor Certification Process (PERM)

The long-awaited PERM (Program Electronic Review Management) rules became effective on March 28, 2005, creating a new labor certification process. Applications filed under the pre-existing regulations were accepted until March 27, 2005 and will continue to be governed by the

prior regulations. The Department of Labor established two backlog reduction centers, which continue to work on the “old” cases within the system.

PERM encourages electronic filing but will accept filing by mail. Experience indicates that those applications filed by mail have greater problems of rejection and denial than those filed electronically. It appears that this is largely due to inputting errors of the mailed forms by Department of Labor personnel. No fees have been designated for the program.

The necessary recruitment largely mirrors the current RIR (Reduction in Recruitment) method, with several other recruitment requirements added. The background documentation of recruitment is not submitted to the Department of Labor, but rather must be maintained by the employer. Employers will be subjected to audit by the Department of Labor. The current regulation does not provide either a monetary penalty or debarment from filing future applications upon a finding of fraud or willful misrepresentation of a material fact, but it is possible that there will be future rulemaking on this issue. At present, an unsuccessful defense of an audit will result in a denied application.

As noted above, the wage to be paid is 100% of the prevailing wage, which must be paid either from the time that permanent residence is granted or from the time that the foreign national is admitted to the United States as a permanent resident to commence employment.

The system permits the conversion of a pending application to the PERM system under 20 CFR §656.21(f)(1). Unfortunately, to utilize this provision, an employer must withdraw the first application and can take advantage of the earlier priority date only if the job and its requirements are identical to the initial application. This continues to be a high-risk procedure and one that would not appear to be a risk worth taking in most cases.

The “special handling” provisions for faculty members remain available under PERM and current turn-around times are very short. Documentation of a “competitive recruitment and selection process” includes a detailed statement from a school official who had actual hiring authority that summarizes the recruitment procedures, the total number of applicants and the specific lawful related reasons why the beneficiary was deemed most qualified. 20 CFR

§656.18. The existing rule remains viable and permits the use of prior recruitment materials if the application is filed within 18 months of the selection of the beneficiary. It is expected that if the 18 months has passed since the initial selection of the beneficiary, the university or college can retest the labor market in compliance with the special handling requirements and file the application under §656.18.

US-Visit Program - DHS Entry-Exit System

The Department of Homeland Security announced that it has implemented the US-VISIT entry-exit system at all ports of entry and visa-issuing posts abroad meeting the Congressional deadline of December 31, 2005.

Visitors requiring an arrival/departure Form I-94 to enter the United States, including those traveling under the Visa Waiver Program, are processed through US-VISIT at the secondary inspection area. US-VISIT processing involves the collection of two index fingerscans and a digital photograph. With the deployment of US-VISIT technology, a visitor is no longer required to fill out the Form I-94 by hand. Instead, the visitor's biographic information is entered electronically when the U.S. Customs and Border Protection Officer scans the visitor's travel document.

Canadian citizens and most Mexican visitors who apply for admission using a Border Crossing Card (also known as a laser visa) and travel within the border zone are exempt from the US-VISIT requirements.

More information about the program can be found at www.dhs.gov/us-visit.

Department of State Amendments to J-1 Rules for Professors and Research Scholars

On May 19, 2005 (and as corrected on June 23, 2005), the Department of State published an important amendment to the J-1 program. The proposed rule was originally published in the Federal Register on June 27, 2002.

This rule amends the Department's Exchange Visitor Program regulations set forth at 22 CFR 62.20 by extending the duration of program participation for professors and research scholars from the current three years to five years. In addition, this rule implements a limitation on the eligibility of an extension for the professor and research scholar categories and implements a two-year bar for repeat participation to encourage and foster the purpose of the Mutual Educational and Cultural Exchange Act of 1961 ("Fulbright-Hays Act"). 70 Federal Register 28815 and 26344.

The five-year period is not an aggregate of five years. Instead, this will be a calendar year, five-year period afforded to a participant on a "use or lose" basis that commences with the program "begin" date identified in SEVIS.

Individuals who have entered the United States under the auspices of the Exchange Visitor Program as a professor or research scholar, or who have acquired such status while in the United States, are not eligible for repeat participation as a professor or research scholar for a period of two years following the completion of the five-year period. Sponsors are prohibited from issuing Forms DS-2019 to proposed participants who meet this restriction.

However, if a participant completes a professor or research scholar exchange program at one institution for a period of less than five years, then remains outside the United States for a minimum period of two years, he or she is eligible to begin another five-year program. If the period of time outside the United States is less than two years, the participant is still considered to be within the five-year period of time from the initial program. If the participant completes a program at one institution, which is less than five years (e.g.; four years), the participant has the option to have the current program extended up to the maximum duration of five years, transfer to another institution for one additional year, or return home and fulfill the two year bar.

This rule also permits the extension beyond five years for participants under the direct sponsorship of a Federally Funded National Research and Development Center ("FFNRDC") or a U.S. Federal Laboratory. These sponsors will be identified in SEVIS with a separate program serial (G-7) in order to differentiate these programs from other sponsors designated to conduct exchange activities in the categories of research scholar and professor.

Once fully implemented in SEVIS by the Department of Homeland Security, professors and research scholars currently in the United States who have begun their exchange activity, as identified by the program begin date in SEVIS, will be eligible for extensions of their program to the five year maximum. Until the Department of Homeland Security develops the system change requirements necessary to implement the new five-year duration, such extensions must be submitted to the Department via SEVIS as extensions beyond the maximum duration of participation.

Hurricane Relief for Foreign Students

In a rare show of humanitarian concern, the USCIS issued a notice of temporary rule suspension in the aftermath of Hurricane Katrina. On November 25, 2005 and effective through February 1, 2006, the notice informed the public of the suspension of certain regulatory requirements certain F-1 nonimmigrant students who were enrolled in academic institutions located in areas that were adversely affected by Hurricane Katrina. 70 Federal Regulations 70992. Specifically, F-1 students granted short-term employment authorization pursuant to the notice were deemed to be engaged in a "full course of study" for the duration of their employment authorization, provided such students satisfied minimum course load requirements.

