THE IMMIGRATION LAW SURVIVAL GUIDE FOR UNIVERISTY ATTORNEYS

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I. Introduction

With Congress now considering immigration reform, institutional legal offices will continue to encounter emerging issues associated with hiring foreign nationals. Whether it is a first-year assistant professor in the department of geology or a senior-level international affairs director, immigration is becoming a core competency for hiring officials, and every legal office should at least have a basic understanding of the terms in order to seek additional advice when necessary.

As issues associated with visa processing and permanent residency petitions become more prevalent on campus, legal offices should also be prepared to comply with the regulatory requirements associated with the retention of certain records, where the records should be kept, and under what circumstances the records may or must be produced.

This note will only discuss the responsibilities of the employer from an employment-based immigration point of view. While certainly there may always be overlap between work and personal issues (especially when it comes to immigration and permanent residency), it is important to keep in mind what falls inside and outside the scope of the employer's responsibility.

II. Basic Terminology

Inherent in the very nature of immigration law is the almost overwhelming presence of acronyms, abbreviations, and form references: H-1Bs, PERM, LCAs, DOL, USCIS, ICE, I-129, I-140, ETA-9089, NIW, VAWA – even the "Green Card" application is actually the "Adjustment of Status" form I-485! This is not only due to the intersect of several laws over the last century of immigration reform (which actually began long ago with the Naturalization Act of 1790!), but also with the several ties between employment-based immigration issues, family-based immigration issues, and refugee/asylum/other-based immigration issues.[1]

NACUA already has several resources available for understanding the basics of immigration law, including "Immigration Law: Issues for Faculty and Staff, 2007 Update" which is available

[1] American Immigration Law Foundation. Appreciating America's Heritage. 2009-2010 Edition. Retrieved at: http://www.communityeducationcenter.org/sites/default/files/docs/cec/2009%20Resource%20Guide.pdf

at www.nacua.org.[2] However, the following represent some of the basic terms that counsel should know when dealing with immigration records:

- **H-1B:** Codified under 8 CFR 214.2(h) and related provisions, the most "popular" visa (*filed using "Form I-129")* that is used for international faculty and professionals in "specialty occupations" (requires a bachelor's or more) that is accompanied by work authorization which is limited to two terms of three years. It must be signed by the employer or the employer's representative prior to filing.

- **LCA:** Codified under 20 CFR 655.700 and required under 8 CFR 214.2(h)(4)(iii)(B)(2), this is a form *(officially referred to as "Form-9035/9035E")* required by the Department of Labor as a component of the H-1B petition which states that: 1) the employer will pay a certain wage for the duration of the appointment and the wage will be at or above the prevailing wage for such position; and 2) the employer will comply with all the terms of the LCA for the duration of the alien's authorized period of stay. It must be signed by the employer or the employer's representative prior to filing.

- **PERM:** Codified under 20 CFR 656.10-32, this is the process (PERM) by which an employer applies for a permanent labor certification *(officially referred to as "Form ETA-9089")* on behalf of one of its eligible employees. The online application requires detailed information from the employer regarding the position including a description, wage, education and experience requirements, detailed advertising information, employer attestations and specific inquires about the employee and the employee's education and work history. There are two types of recruitment: basic recruitment under 20 CFR 656.17 and special recruitment (for college and university teachers) under 20 CFR 656.18. It must be signed by the employer or the employer's representative prior to filing, as well as by the employee who is benefitting from the filing.

- **I-140:** Codified in 8 CFR 204.5 ("Petitions for employment-based immigrants") and referred to officially as the "Petition for Immigration Worker," this is the form filed by an employer to petition on behalf of an employee for a permanent position (meaning the position is a permanent, constant fixture – not that the employee will be staying at the employer indefinitely) as a prerequisite for filing the form I-485 (commonly referred to as the "Green Card" application). Along with this form, the petitioning employer is required to include several types of evidence including an approved PERM (where applicable), a letter of offer or evidence of continued employment, and the bona fides of the beneficiary employee. It must be signed by the employer or the employer's representative prior to filing.

- **USCIS.** United States Citizenship and Immigration Services. While U.S. Immigration and Customs Enforcement (ICE) gets all the publicity due to its role in enforcing immigration laws since its creation in 2003, USCIS carries the bulk of the responsibility for putting the nation's immigration laws into application through the coordination of petitions as well as coordination with other U.S. entities such as the Department of State

[2] Retrieved at: http://www.nacua.org/fileStreamer/default.asp?file=/pubs/immigrationlaw2007.pdf

(Consular Processing, visa issuance) and Department of Labor (work authorization, illegal work issues).

A key consideration regarding the basic terminology reviewed in this note is that it is related to employment-based nonimmigrant and immigrant processes. With each step in a nonimmigrant/immigrant employment-based process, the employer must sign off or attest to the qualifications and assertions made in the accompanying petition or application. From the letter of offer to the salary provided to the employee, the employer is responsible to several Federal agencies based upon the facts presented. It is important for counsel to coordinate any nonimmigrant or immigrant employment-based petitions benefitting their employees through the institutional legal office in order to ensure that any petitions filed on behalf of the institution as employer in fact has institutional approval.

III. Record Retention

Form I-9, Employment Eligibility Verification. Immigration records are not limited to visas and green cards. In fact, every new employee hired in the United States after November 6, 1986 filed out paperwork related to an immigration law prior to starting his/her first day of work – Form I-9. The Immigration Reform and Control Act of 1986 (IRCA) added section 274A to the Immigration and Nationality Act (INA) which imposed upon every employer the requirement to verify that each new employee had the appropriate work authorization while also providing for penalties for employers who did not follow the new law. [3]

Thus, since 1986, it is fair to state that every institution has engaged in some type of immigration filing. As one of the most prominent immigration-related work documents, the Form I-9 is also the subject of constant audit by ICE. Termed as "Worksite Enforcement" actions, ICE has a running list on its website of the employers who have been fined for improper I-9 procedures.[4] With fines ranging from $375 to $16,000 per unauthorized alien depending upon previous violations, universities are encouraged to work with their HR/Academic employment records departments to ensure that staff are properly trained and are executing the form properly.

In fact, on March 8, 2013, a new Form I-9 was issued. Failure to utilize this new form after May 7, 2013 could expose the institution to additional liabilities and penalties in the event of an audit from ICE. However, the employer institution does not have to retroactively reverify all Form I-9s completed under the older versions simply to execute the same under the new form.[5] Once completed, the Form I-9 can be documented either through the original paper form, or converted into an electronic record and stored in a manner that protects the integrity of the document while maintaining its security from unauthorized access.

[3] For more complete information on the Form I-9 and USCIS guidance on how to fill it out, please see the M-274 manual retrieved at: http://www.uscis.gov/files/form/m-274.pdf
[4] Retrieved at: http://www.ice.gov/news/releases/index.htm?top25=no&year=all&month=all&state=all&topic=16
[5] For the complete site from USCIS on I-9 compliance, go to www.uscis.gov/I-9Central

Retention period. The Form I-9 must be retained by the employer (the original Form I-9 with the original handwritten signatures) for three years after the date of hire or one year after the date the individual's employment is terminated, whichever is later.[6]

The Public Access File. Codified at 20 CFR 655.760(a), the Public Access File must be maintained by the employer upon filing the Labor Certification Application (LCA) with the Department of Labor (DOL). The LCA is a necessary prerequisite to the filing of the Form I-129, which is the petition used when applying for the H-1B visa on behalf of an employee. The LCA is an electronic application accessed through the I-Cert portal operated by the DOL at http://icert.doleta.gov. The employer (or the employer's representative) must register for an account and then the employer can begin to file the LCA (as well as other DOL documents such as a prevailing wage request for several categories including requests for H-1B and PERM purposes).[7] The LCA approval is required within seven working days unless there is an obvious inaccuracy.[8]

Retention period. According to the regulations cited previously, the employer must keep the following documentation in place for one year beyond the term of the LCA period (which should be the same period sought for the H-1B visa) or one year after the LCA was withdrawn if no H-1B employee were ultimately hired (for example, if the employee withdraws their acceptance of the job opportunity):[9]

- A copy of the certified LCA, signed by the employer;
- Documentation which provides support for the wage rate paid to the employee (which must be the same wage provided for in the Form I-129 petition for the H-1B visa;
- An explanation of the wage rate, including information on any increases that the employee may be eligible for (for example, "and subsequent increases as approved by the Board of Trustees");
- Documentation used by the employer to determine the prevailing wage;
- A copy of the document(s) with which the employer has satisfied the union/employee notification requirements (found in 20 CFR 655.734);
- A summary of benefits offered to U.S. workers in the same occupational classification as the H-1B nonimmigrant;
- Other documentation depending upon if the employer engages in a change of structure (merger, acquisition, etc.), H-1B dependent and willful violator information if applicable, as well as other special situations.

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[6] For more information on storing the Form I-9, please see http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=010af7c555b2e210VgnVCM100000082ca60aRCRD&vgnextchannel=010af7c555b2e210VgnVCM100000082ca60aRCRD, or go to http://www.uscis.gov/i-9Central and click on the "Retain and Store" link.

[7] For the purposes of this note, the LCA and its requirements will not be directly addressed as the process itself requires further training that deserves a note of its own. However, for those practitioners wading into the prevailing wage process for the first time, the "Prevailing Wage Determination Policy Guidance" is an invaluable document for ensuring the correct wage for each position. It can be found at: http://www.foreignlaborcert.doleta.gov/pdf/policy_nonag_progs.pdf

[8] 20 CFR 655.740(a)(1)-(2).

[9] See 20 CFR 655.760(a) for the documents, 20 CFR 655.760(c) for the retention information.

The Public Access File must be provided upon request. The file does not have to contain the actual name of the employee. This is particularly relevant, as the documentation must be provided upon request within one working day after the date on which the LCA is filed. The LCA must also be provided to the employee once the employee commences employment.

PERM Audit File. An overview of the Permanent Labor Certification process (the first step necessary before proceeding to filing the Form I-140 for certain employment-based immigrant petitions such as EB-2 and EB-3), is available at the Department of Labor's website at http://www.foreignlaborcert.doleta.gov/perm.cfm. The process itself not only requires that the employer complete a prevailing wage request (previously mentioned in the section explaining the Public Access File requirements), but involves the attestation of specific information including: the job duties as advertised for the position, the information from the prevailing wage request, information on the employer, information about the employee beneficiary, and most importantly a detailed explanation of the advertising and recruitment process completed for the position.[10]

Filing for permanent residency is divided into several categories, however the most relevant to universities are: the basic labor certification process codified at 20 CFR 656.17; and the optional special recruitment process for college and university teachers codified at 20 CFR 656.18. The documentation an employer should retain in the event of an audit by the DOL depends upon the process involved. For those positions that involve classroom teaching at an institution, the optional special recruitment process will most likely be followed (although this is not required).[11]

The regulations at both 20 CFR 656.10, 20 CFR 656.17, and 20 CFR 656.18 provide specific guidance on the recruitment report and other documentation necessary for the employer to support the information contained in the PERM. However, the regulations do not provide an "all-inclusive" single reference to what constitutes a complete audit file. For the purposes of this note, the following list represents a general description of the documents that must be kept; however, counsel should seek further guidance to determine what documents are necessary for the applicable position. In general, a PERM audit file should consist of the following supporting documents (which represent the exact language of the current documentation requested in the DOL's audit request as recent as April 2013):

"The documentation listed on the following attachment supporting the attestations made on the application (*this is usually to support audit-specific inquires)*.
• A copy of this Audit Notification.
• A copy of the submitted ETA Form 9089, with original signatures in Section L (Alien Declaration), Section M (Declaration of Preparer (if applicable)), and Section N (Employer Declaration).

[10] The PERM itself is completed by the employer or the employer's representative at http://www.plc.doleta.gov.
[11] A recent case on what positions constitute a "university teacher" is instructive on this issue. *Mercer University on behalf of Stanislav Trembach*, BALCA Case No: 2011-PER-00162. Issued on March 6, 2012. The case involved the position of "Instructional Coordinator" which provided instruction to faculty as opposed to undergraduate or graduate students. Though initially denied, BALCA overturned the denial based upon the fact that the position engaged in teaching to "over 400 students" which included faculty workshops. BALCA also found that "the regulations do not require any specific definitions or terminology to describe the duties of a college or university teacher."

• Proof of business necessity as outlined by § 656.17(h) if the answer for question H-12 is no, the answer for questions H-13, H-15, or H-17 are yes, or the job duties and/or requirements are beyond those defined for the job by the SOC/O*Net code and Occupation Title provided by the National Prevailing Wage Center.
• Documentation required for live-in household domestic service workers as outlined by §656.19(b) if the answer to question H-18 is yes.
• Notice of filing documentation as outlined in§ 656.10(d).
• Documentation submitted in response to this audit notification must include proof that the employer's notice of filing was posted for 10 consecutive business days and was accessible to all employees. If one or more of the 10 business days is a Saturday, Sunday, and/or a holiday, the employer must submit documentation to demonstrate that it was open for business on the Saturday, Sunday, and/or holiday in question and, again, demonstrate that employees had access to the posting location of the notice of filing.

I. Recruitment Documentation

A. §656.17 Basic Process:

1. The recruitment report for this position as described in § 656.17(g)(l) signed by the employer or the employer's representative describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, summarized by the lawful job-related reasons for such rejections. Be advised, the Office of Foreign Labor Certification Certifying Officer, after reviewing the employer's recruitment report, may request U.S. workers' resumes or applications, sorted by the reasons the workers were rejected.
2. A copy of the Prevailing Wage Determination received from the National Prevailing Wage Center (NPWC) and if not included in the Prevailing Wage Determination, a copy of the request for the determination as originally submitted to the NPWC.
3. A copy of the job order placed with the state workforce agency (SWA) serving the area of intended employment downloaded from the SWA Internet job listing site, a copy of the job order provided by the SWA, or other proof of publication from the SWA containing the content of the job order, where a job order is required by the recruitment provisions of 20 CFR § 656 and/or a job order is listed on the ETA Form 9089 as a recruitment source.
4. Documentation as outlined in § 656.17(e).

B. § 656.18 College and University Teachers Special Recruitment:

1. A statement signed by an official with actual hiring authority outlining in detail the complete recruitment procedures undertaken; and which set forth the total number of applicants for the job opportunity and the specific lawful job-related reasons why the foreign worker is more qualified than each U.S. worker who applied for the job.

2. A final report of the faculty, student, and/or administrative body making the recommendation or selection of the foreign worker.
3. A copy of the advertisement for the job opportunity and, if appropriate, evidence of all other recruitment sources.
4. A written statement attesting to the degree of the foreign worker's educational or professional qualifications and academic achievements.
5. A copy of the Prevailing Wage Determination received from the National Prevailing Wage Center (NPWC) and if not included in the Prevailing Wage Determination, a copy of the request for the determination as originally submitted to the NPWC.

Retention period. While there are several references to what documents should be contained within a PERM Audit File, the regulations are clear that the employer must keep "Copies of applications for permanent employment certification filed with the Department of Labor and all supporting documentation must be retained by the employer for 5 years from the date of filing."[12]

IV. Stakeholders in Filing/Record Retention

Institution employment-based immigration processing takes a coordinated effort between the legal office, employment managers, academic managers, and the international affairs office among other stakeholders from deans to department chairs. The manner in which records are kept depends upon the existing internal processes in place as well as the party responsible for the processing of the filings associated with an employee.

- The *international affairs office* (also called "Global Education," "Immigration Student and Scholar Services," etc.) is a common resource for the processing of the H-1B and permanent residency petitions on behalf of the employee beneficiary. As universities began to hire greater numbers of international faculty and professionals, many institution officials turned to NAFSA (the association of international educators) that had already been providing advice for international students and study abroad initiatives since 1948.[13] A central resource provided by NAFSA in this respect is the "Advisor's Manual,"[14] which is largely considered the "go to" resource many NAFSA members turn to for immigration processing questions.

  The legal office should engage the international affairs office to review the recordkeeping process in the office to ensure that it is consistent with the regulations and accessible in accordance with federal and state laws as well as with institutional policies. Some universities have also delegated processing for the Form I-9 to the international affairs office (presumably because that office would be more familiar with foreign documentation necessary for Section 2).[15] In this situation, legal offices should ensure that the recordkeeping requirements employed by the international affairs office are consistent with other offices so

[12] 20 CFR 656.10(f)
[13] For more information on the history of NAFSA: http://www.nafsa.org/Learn_About_NAFSA/History/
[14] http://www.nafsa.org/Advisers_Manual/Welcome_to_the_NAFSA_Adviser_s_Manual/
[15] For more information on the appropriate documents for the Form I-9, please see please see the M-274 manual retrieved at: http://www.uscis.gov/files/form/m-274.pdf

as to adopt a uniform standard of processing across campus (which could lessen exposure in the event of a claim of unlawful discrimination in the processing of work authorization).

- For several universities, *outside counsel* is responsible for all filings related to employment-based immigration processing. While the internal human resources or records department may be responsible for the processing of the Form I-9, universities often engage outside counsel to complete immigration filings due either to the sporadic hires of international faculty and professionals or to an absence of dedicated resources necessary to coordinate these efforts. However, even though outside counsel is engaging in the filings, it is important for the institution to coordinate (and, at the very least, for the legal office to be aware of) the retention process for any records that the regulations required the employer to retain and produce upon request (such as the Public Access File or documentation related to a PERM audit).

  The filings by outside counsel can also include outside counsel not retained by the institution but by the beneficiary employee. Universities should be very clear in the letter of offer to a prospective international faculty or professional of any immigration activities the institution will commit to funding as a benefit of employment. The institution should also be clear that non-immigrant petitions such as the Form I-129 (H-1B) and some of the filings associated with the employment-based permanent residency process (the labor certification process through PERM) require the employer's support and sponsorship and may not be submitted without the approval of the institution. In this respect, the institution should appoint a single signatory authority for all immigration forms to ensure consistency in application and to create at least a centralized knowledge base from which to monitor all immigration filings. Having such a centralized filing authority prevents the situation in which an attorney representing only the employee seeks to make immigration related filings on behalf of the University, often because the employee wishes to circumvent the University's normal approval process for deciding whether to sponsor an employee.

- *Human Resources*, as a division or department, is an essential stakeholder in nearly every record necessary for the successful filing of a non-immigrant/employment-based immigration petition. From the advertisement of the position, to the development of the final salary, to the creation of the offer letter, to the verification of work authorization, this office is most likely responsible for many of the records referenced in this note. As an institution continues to grow its international faculty and professional population, the institutional stakeholders need to determine the custodian for immigration-related filings such as the Form I-9 (one central office or multiple offices?), the Public Access File (who will process requests for access?), and supporting documentation related to PERM filings (it is better to print out all of the advertising information at the very time it is being advertised – who will be responsible for keeping these records?).

  While arguable that Human Resources may not be the most appropriate custodian for immigration filings (mostly due to the general principle and practice that immigration information should be kept separately from an employee's actual personnel file), the department is usually at the forefront of recordkeeping technologies and best practices and may already have in place a record management system that can easily incorporate another

series of records into the filing matrix (without cross reference or inclusion into the employee's personnel file).

V. Additional Considerations

Federal regulations require the institution as employer to retain certain records necessary to document properly the applicable position and immigration filings for beneficiary employees. At the end of any immigration process, there is a pile of paperwork, including the actual petitions filed, receipt notices, requests for evidence, notices of intent to deny (aka NOID!), and notices of approval. The institution should have a consistent process for the disclosure of those documents, either to the beneficiary employee or in response to a general request by another party. For example, some universities provide a complete copy of the H-1B petition (which includes the LCA which must be provided to the employee per statute) to the beneficiary employee or a copy of the Form I-140 filed on the employee's behalf. Whatever process for disclosure is adopted, the process should be consistently applied.

The institution should also ensure consistency in the retention of these documents in the normal course and scope of its own internal record retention policies. More important is the decision as to where these records will be kept (in which office, with what other files, with whom as the custodian to ensure consistency in collection, retention and access?).

Many of these issues may already be resolved at the institutional level, however, as institutions continue to hire more international faculty and professionals with immigration issues the legal office should engage each stakeholder to monitor regulatory compliance but to also assist in limiting the institutional exposure to federal audits and enforcement actions.

VI. Developing the University Immigration Policy

Every college and university, whether it hires one foreign national or hundreds per year, has an in-house immigration policy. That policy may be to make decisions about hiring foreign nationals needing immigration sponsorship on a completely ad-hoc basis, or to refrain from hiring foreign nationals at all. It may be an elaborate construct, meant to balance the budgetary issues inherent in hiring workers needing employment-based immigration sponsorship against the need for talents that can only be accessed from a population of potential employees needing such sponsorship. When working with Human Resources, International Offices, hiring departments and the institution's administrators in the immigration process, therefore, University Counsel can go beyond simply researching difficult issues or locating a reputable firm to handle immigration case services. University Counsel can help the institution to understand and articulate an immigration policy that best serves the institution's interests.

Key Policy Decisions: At a strategic level, University Counsel needs to facilitate a discussion within the institution of how a decision will be made whether or not to sponsor particular faculty or staff for immigration benefits. Depending on the nature of the organization, centralized or decentralized decision making and budgeting may be most appropriate. Counsel can help facilitate this discussion, and point out that resources are best focused when budgeting and decision making are aligned.

- *Formalized Versus Ad-Hoc Policy*: Employers do not need to have a formalized policy in which they involve departmental leaders, University Counsel and Human Resources in the decision making prior to each hire. While such a process will be a good fit for many organizations, it may not meet the need of every organization. The organization may appreciate an ad-hoc process, if immigration sponsorship issues arise relatively infrequently, or if the employer has relatively little experience with the process. The advantage of an ad-hoc process is that it can be much more flexible than a formalized process, and may be more able to respond to particular business needs than a more formalized process. The disadvantage of a lack of a process is that every case involves reinventing the wheel, and the lack of institutional memory about past policy decisions may lead to perceptions that decisions about immigration sponsorship are not made on an impartial basis by the organization.

- *Centralized versus Decentralized Process*: A centralized process may be most appropriate if the International Office or Human Resources organization will be making the decisions about which prospective employees should receive immigration sponsorship and which should not. Under such a policy, the International Office or Human Resources should also be responsible for the overall budget and for delivering performance within that budget. They will also have to be prepared to mediate discussions between departments, if some departments are seeking a greater share on the resources of the International Office or Human Resources than others. The advantage of a centralized policy is that overall costs for the immigration process can be more easily measured and therefore, to some extent, controlled; the disadvantage is that the International Office or Human Resources may be driven to consider cost at the exclusion of service, and department chairs, Principal Investigators and other stakeholders may not feel responsible for the costs of the hiring decisions they make, as they will come out of another department's budget.

  Another policy option is to locate the hiring decision and sponsorship decision in the hiring department, with the guidance of a subject matter expert from the International Office or Human Resources. The costs of the hiring would then be located in the hiring department's budget, and the hiring department can determine whether or not a case can be made for absorbing those costs. For example, the hiring department may determine that a candidate with a certain number of years of experience is necessary, and may find that immigration sponsorship is the only way to obtain a candidate with that level of seniority; as such, they will need to make sure that the justification for the position and that level of seniority supports the added expense of the immigration process that would be necessary to sponsor the worker.

  In terms of making a policy recommendation, the authors have found that it is most helpful to develop a policy which involves departmental leadership in the decision making at that time of hire, and makes them aware of, and even financially responsible for, the immigration expenses that will be necessary because of a particular hiring decision. Because the employee will have the most day-to-day interaction within the hiring department, the hiring department chair needs to understand the importance of the immigration issue to the employee. The chair also needs to take ownership of that process, and for ensuring that the organization follows through with promises made to the employee. If not, the chair will have to deal with

an unhappy faculty member, and the International Office or Human Resources will need to deal with an unhappy department chair.

- *Employee-Driven Versus Employer-Driven Policy*: A final top-level consideration in developing an immigration policy is whether the policy will be employer driven or employee driven. University counsel should encourage their stakeholders to think about whether the process should be driven by the employee's express desires, or by the institution's analysis of what sponsorship decisions are most appropriate for the organization. Some organizations may wish the process to be more employee driven, as employee satisfaction with the process will result in greater loyalty. An employee driven process may also be a competitive advantage within some fields, where immigration sponsorship is necessary to access a pool of high-performing talent. Employees in such industries often make selections of which opportunities to take based on intangible factors such as work culture, of which immigration sponsorship can be an important part.

  Some institutions may, however, prefer to have an employer driven process, communicating to employees that immigration sponsorship is of value to the employer when the employee's performance is best aligned with the employer's goals, and making it clear that the employer makes the decisions about when and whether to sponsor immigrant workers based on the employer's needs. Employers can counteract the "big brother" aspect of this policy by pointing out that in those cases where the employer is making a decision to go forward with immigration sponsorship, because that sponsorship will be closely aligned with its business needs, the employee can be assured that the company will have an increased chance of success in immigration sponsorship (for example, by being able to demonstrate that the skills for the position are justified by business necessity).

- *Selection and Payment of Outside Counsel as a Policy Decision:* No discussion of overall policy issues would be complete without addressing the selection of counsel. Employers may prefer to have employees select and retain counsel, but must appreciate the impact of the rules regarding payment for the labor certification process,[16] as well as the H-1B regulations requiring employers to pay the H-1B fees for services provided to the employer.[17] While an employer may still allow the employee to select counsel, the employer will be responsible for absorbing those legal fees if it wishes to remain in compliance with those particular regulations. As other parts of the immigration process (such as immigration of family members, the immigration petition process, and the adjustment of status process) may be at the employee's expense, employers may wish to limit their exposure to immigration-related costs by shifting as many as possible onto the employee. The advantage of such a policy is to save costs on each individual case, at the cost of loss of control by the employer over the selection of counsel and needing to re-educate counsel in every case about the employer's job opportunities, etc.

  Alternatively, employers can select the outside counsel but make employees pay all of those expenses that are legally allowed to be paid by the employee. This policy has the advantage

[16] 20 CFR §656.12(b).

[17] 20 CFR §655.731(c)(9)(ii).

of having counsel familiar with the employer's cases, while reducing exposure to legal fees. Employees may, however, feel that the employer's selection of counsel is best for the employer but not necessarily best for the employee, and may prefer to have more input into the selection of counsel.

Finally, employers may opt to select and retain the outside counsel, but minimize their cost exposure by having employees sign "pay back" agreements, under which the employee undertakes the employer's expenses in the event the employee leaves employment either during or shortly after the immigration process is completed. While such "pay back" agreements may not cover the costs of the labor certification process,[18] they may cover other processes, including most of the H-1B process.[19]

Dealing with Outside Counsel Retained by the Employee for "Self Sponsored" benefits: While the prior bullet point discusses the decision whether the University should retain outside immigration law experts to make its immigration filings, a separate issue is how the University should deal with outside counsel retained by faculty and staff to make immigration filings by the employee. Faculty and staff are frequently eligible to file petitions themselves that are nonetheless based upon their scholarly accomplishments.

Two principal issues arise with such outside counsel. The first is delineating whether the outside counsel is seeking "back door" sponsorship by the University, often by asking the employee to present an immigrant petition to his or her supervisor or department chair for signature on behalf of the University. As noted above, clearly delineating which office has such signatory authority, educating faculty about it, and enforcing it (by withdrawing improvidently submitted petitions, for example), can prevent such issues from occurring.

The second issue is what level of support different stakeholders may offer to an employee's self filed petition. In some petitions, for example, confirmation of the fact that the employee works for the university in a particular role may be helpful, and may ask the Department Chair or Human Resources to provide an employment confirmation letter. Such requests, where only factual information is sought, do not raise serious policy issues. Some requests, however, go further than confirmation of employment – a Department Chair or faculty colleague, for example, may be asked to provide a reference letter on institutional letterhead expressing his or her opinion about the employee's reputation in or contributions to the field. The University may wish to apply its general policy, if any, with respect to reference letters on institutional letterhead to such letters, or may wish to insist that employees either place such a reference on personal letterhead, or include a disclaimer such as "Institutional Affiliation for Identification Only" on such reference letters. Otherwise, University Counsel in a future employment action against the employee may be confronted with a copy of a glowing recommendation letter addressed to the US government by a Department Chair or faculty colleague.

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18 20 CFR §656.12(b); see also the Supplementary Information interpreting that regulation to prohibit payback agreements at 72 Fed. Reg. 27904, 27922 (May 17, 2007).

19 20 CFR §655.731(c)(10)(i)(B). The "pay back" agreement may not cover the $1500/$750 ACWIA fee. *Id.*

A Policy Implementation Checklist: When developing the university immigration policy, there are several items counsel should review with stakeholders, from the International Office to hiring departments to Human Resources, which may be just as important on a day-to-day basis as the overall strategic policy decisions. The first area of discussion should be in the management of work flow, and what the institution's expectations are with respect to how information will be gathered from prospective hires or new hires, how that information will be communicated to the employer, how case strategy will be decided, and how the petition paperwork will circulate between the employer and outside counsel, if any.

Date tracking, including expiration dates and PERM process deadlines, is an essential part of immigration practice, and responsibility for date tracking should be clearly divided between departments and any outside counsel. Various immigration software products can provide automated access to the outside counsel's expiration date reports, but University counsel should ensure that at least one office internally has developed a protocol for tracking and periodic reporting of such necessary information as nonimmigrant visa expiration dates, nonimmigrant status expiration dates, employment authorization document expiration dates and, most importantly, issues such as nonimmigrant visa maximum times, so that stakeholders know when they need to make decisions about whether or not to sponsor nonimmigrant visa holders for permanent residence. Each institution needs to make its own decision about how to allocate the costs necessary for this process, both in terms of technology and, more importantly, in terms of the large amount of ongoing staff time necessary to keep such information up-to-date and communicated to stakeholders. One benefit to outsourcing immigration legal services can be that such date tracking work is normally considered a value added service provided by outside counsel at no additional expense to the institution.

Communication protocols are an essential area of immigration policy that need to be developed. Each office involved will need to be very clear about how they communicate back and forth with the employee to ensure that no one creates an expectation in the employee that the institution's overall policy will not support. Those involved in the immigration process also needs to be very sensitive to issues that require escalation to their Human Resources or University counsel contact. Some institutions may prefer to have all communication with the employees handled through the International Office, Human Resources or Legal Department, so as to control the messages being given to employees about their immigration sponsorship and align those messages with other messages about the employee's performance.

It is also helpful, when developing communication protocols, to deal with the question of "managing expectations" of both employees and their supervisors. Clear communication about processing times, time frames for cases, and expectations about how a case will progress, clearly stated at the outset, will save a great deal of grief later in the process. Managing expectations also includes frequent updating of those expectations as they change. Employees and their supervisors need to understand why changes, such as longer than expected processing times or new strategies have taken place, and what is being done to manage them.

Another frequent area of policy development is handling questions of travel. International travel can be quite a challenge for international employees, including requirement to obtain U.S. visas in order to return to the United States and foreign visas to enter other countries from the

United States. Employers should develop a policy regarding how such travel questions will be answered, and whether it will be the employee's responsibility to find out how to obtain a visa. Employees should also understand the importance of communicating their travel plans with the responsible persons at the International Office, Human Resources and/or outside counsel, so that avoidable visa delays (or predictable ones) are managed in such a way that the institution is not unexpectedly deprived of the services of the employee.

One final area of policy development should be how to handle changes in position or job location during the immigration process. In this area, as with travel, communication is often key: university stakeholders should be encouraged to consult with immigration subject matter experts before any change in the employee's position, even where such a change of position may not have an adverse effect on immigration processes currently under way. A protocol should be developed for involving immigration subject matter experts in promotion discussions, and immigration subject matter experts should be prepared to address such job changes as proactively as possible, seeking to accommodate the institution's needs with a minimum of disruption to the immigration process. Employees should understand that immigration subject matter experts are not out to limit their advancement opportunities, but are looking to make sure that their advancement does not deprive them of the opportunity to complete the permanent residence process.

By having these discussions at the outset, formalizing them into an immigration policy document, and then ensuring that the processes are followed, University counsel can create a partnership with stakeholders across the institution in which they act together as a team to provide services to the institution and to the employees for the benefit of both. Such team atmosphere is most conducive to the development of long-term employee satisfaction from both employees and stakeholders such as department chairs and administrators.

The Immigration Law Survival Guide for University Attorneys

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Immigration: an issue on every campus

- Students
- Exchange visitors
- Researchers
- Staff
- Faculty
- Artists/Musicians
- Coaches
- Speakers

The Lingo: Basic Concepts/Terms

- **Immigrant:** a foreign national who intends to establish a permanent residence in the U.S.
- **Nonimmigrant:** a foreign national who intends to enter the U.S. on a temporary basis, without intent to reside permanently.
- **Green card:** The informal name of the card issued as proof of registration as a legal permanent resident. (Is no longer green).
- **Visa vs. Work Authorization:** The visa provides for permission to enter and reside, but does not always provide for work authorization.

The University: Sponsoring Employer

Specific Purposes

- F-1 Visa
- J-1 Visa
- H-1B Visa
- O-1 Visa
- Green Card

Specific limitations

- Must be enrolled (or OPT)
- Limited term/Bars to reentry
- Limited term/location specific
- Only available for top performers
- Advertisement for job is key for EB-2/3, high standard of review for EB-1

The Visa: H-1B Points of exposure

- Labor Condition Application
  - Prevailing Wage determination
  - 10-day Notice and Retention (including union notice)
  - Documentation of the position
- Public Access File
  - Keep it separate
  - Integrate into your retention schedules

The Intake: Just the facts… lots of them

- A fact-intensive process deserves a fact-intensive intake (probably more intense than your application).
- Previous visa statuses
- Previous visits
- Any restrictions
- Any dependents
- In or out of the country?

The Term: Full-time, part-time, short time?

- H-1B visa can be:
  - Full-time or part-time.
  - One day to 3 years (with a maximum of renewals to six years under normal circumstances).
  - Employer-specific.
  - Can hold multiple H-1Bs at the same time.
- **Common question:** *How soon can the person start?*

The Wage: DOL survey vs. *other*

- **DOL Survey:** OES Wage Survey, OFLC Online Data Center.
- **University survey options:**
  - OES wage Survey
  - Other Accepted Industry survey
  - In-House compensation determination
    - Must be supported by survey that meets several requirements.

- **Issue:** *When do you file for prevailing wage determination through the DOL (i-Cert system)?*

The Record: What goes where & for how long?

- **Public Access File:** one year after the expiration of the LCA, or one year after termination of the LCA whichever occurs first.
- **Other forms:**
  - Form I-129, H-1B petition.
  - Form I-797 Notice of action.
  - RFEs, Appeals, Etc.

- **Retention:** Anywhere other than the employee's personnel file! Centrally located and consistently applied. (Destruction also must be monitored!)

The End: Termination of the H-1B

- End of the term, no renewal: no duties
- Employee decides to leave: withdrawal the LCA, send letter terminating the visa to USCIS.
- Employer decides to terminate employee before term: withdrawal the LCA, send letter terminating the visa to USCIS, and offer the employee "transportation costs to his/her last place of foreign residence.
- **Question:** *What if the employer lays off the employee for a short period?*

The Green Card: The road to PR

The Petitioner: Who supports the petition?

- University as petitioner:
  - File the PERM on behalf of the employee
  - File the I-140 (EB-2/3) on behalf of the employee
  - File the I-140 (EB-1) on behalf of the employee
- Employee as petitioner:
  - National Interest Waiver
  - I-140 (EB-1) Alien with Extraordinary Ability

The Process: Basic vs. Competitive

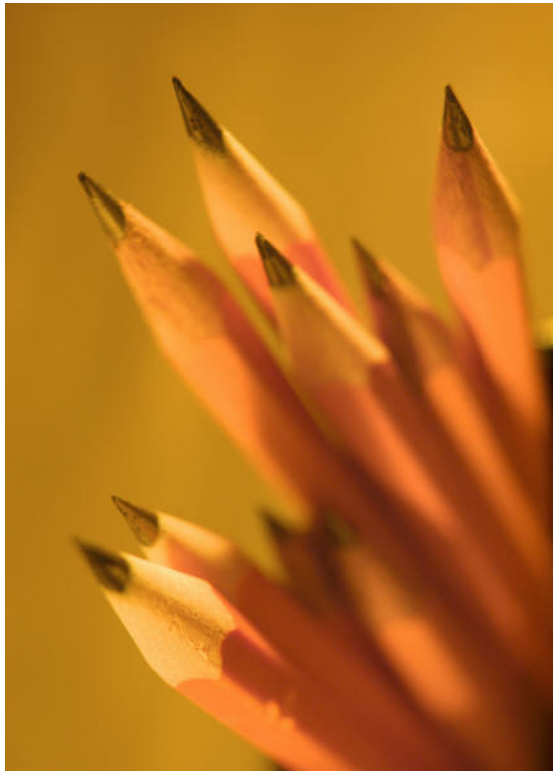
- **Basic Recruitment**
  - Specific advertising methods and content.
  - Limited time period: 180 days.
  - Standard: no other U.S. Worker applicant is able and qualified for the job opportunity, nor could any applicant acquire the skills necessary to perform the duties during a reasonable period of on-the-job training.

The Process: Basic vs. Competitive (cont)

- **Competitive Recruitment**
  - Limited to positions involving "classroom teaching."
  - Period from Offer to Filing cannot be longer than 18 months.
  - Standard: "more qualified" that any U.S. worker applicant.
- Continuing decisions from BALCA make this an ever-evolving component of immigration

The Exceptions: Outstanding Professors

- Referred to as "EB-1" or "Employment-Based immigration, First Preference."
- What is "outstanding" and how do you prove it?
- **Issue:** *What about these letters of support that the University is being asked to write? What is a "permanent position"?*



The Check: Who writes it and for how much?

- **From I-129, H-1B:** ($325, $500) Employer must pay the fees associated with the H-1B in most cases (the prevailing wage/actual wage conundrum)
- **PERM:** Employer is responsible for costs associated with the PERM process.
- **Form I-140, Petition for Immigration Worker:** ($580) Determined by policy.

The Expert: Working with outside counsel

- Whom does Outside Counsel Represent – the University, the employee or both?
- Who does the selecting, versus who does the retaining?
- Factors in vetting outside counsel
  - Knowledge of higher education and the university's policies
  - Experience & reputation in the field
  - Costs and who bears them

Outside Counsel Program

- Limit selection of counsel to firms pre-approved by university counsel
- Establish fees
- Post policy on payment of fees (department versus beneficiary)
- Post FAQ's

I-9: General Principles

- Employer must verify the employment eligibility of all employees hired after November 6, 1986.
- Employer must retain I-9s for 3 years after employee begins work or 1 year after date of termination – whichever is later.
- Treat all employees the same.
- Do not commit fraud.

Common Pitfalls

- Failure to complete the I-9
- Document information not recorded in Section 2
- Overdocumentation in Section 2
- Date of hire not provided
- Keeping I-9s too long
- Treating “foreign” employees differently when completing I-9
- Failure to reverify
- Preparer does not sign I-9 as required
- Inconsistencies

Citizenship Status Discrimination

- No Discrimination Allowed Between U.S. Citizens, U.S. Nationals, Permanent Residents, Asylees, Refugees, and 1986 amnesty program's "Temporary Residents."
- Recruiters NOT allowed to ask "Are you a U.S. Citizen?" or "Do you have a Green Card?"
- Recruiters NOT allowed to request specific documents or to require "more or different" documents than the minimum required.
- Recruiters ARE allowed to ask if an applicant is authorized to work in the U.S., or may need sponsorship for employment visa status (e.g. H1-B).

Recruitment Questions About Immigration Status

- Employers May Elect Not to Hire Candidates Needing "Immigration Sponsorship."
- Policy: Employees will be sponsored where there is a valid business reason (i.e. unavailability of other qualified candidates).
- Recruiters ARE allowed to ask "Are you legally authorized to work in the United States?" followed by "Will you now or in the future require sponsorship for an employment visa status (e.g., H-1B visa status)?"
- Policy: Once a candidate indicates he or she will need sponsorship, recruiter should request details of the candidate's status and immigration history, and forward to HR before an offer is made.

S. 744 – What would it do?
The Headlines

- Legalization – 10 year "path to residency" contingent on border "triggers"
- Reallocate family immigration: spouses and children of LPRs will be immediate relatives; brothers and sisters of USCs will be eliminated. Married sons & daughters of USCs cut off at 31 years old.

S. 744 – What would it do?
The Headlines

(cont'd)

- Temporary Workers: Add a "W-1" category to supplement current H-2B; replace H-2A (Ag Workers) with new "W-2" and "W-3" visas
- E-Verify: mandatory for all employers after 5 years
- Border Security: additional funding for physical and electronic infrastructure; sets "triggers" of 100% surveillance and 90% apprehension in "high risk" areas for illegal crossing

S. 744 – Employment based Immigration Provisions – The Good News

- Permanent:
  - Exempts EB-1 immigrants, all doctoral degree holders, and physicians with 212(e) waivers from the EB quotas
  - Exempts all derivative beneficiaries from the EB quotas
  - Adds new "startup" green card for entrepreneurs who attract investment to their business from venture capital
  - New "STEM" Green Card for recent Master's degrees

S. 744 – H-1B Provisions: The Bad News

- H-1B Dependent Employers must offer above market wages, may not place workers with other employers, and face other limits
- All H-1B employers will be required to place a 30 day job order with DOL prior to filing an LCA and attest that no "equally or better qualified" US worker applied in that period
- LCAs reviewed by DOL for 14 days and can be denied for "evidence of" fraud

S. 744 – H-1B Provisions: The Bad News

(cont'd)

- OES wage levels would be increased and would be mandatory – no private surveys unless no OES data
- For universities, 4 level wage system retained for teaching and research positions only
- Nondisplacement attestation for most employers (no layoffs w/in 90 days prior and 90 days after H-1B)

What Happens After S.744?

- House of Representatives will consider immigration bill or bills over the summer
- Committee hearings and markups likely not done before August recess
- House needs to pass some immigration related bill, will then go to Conference Committee
- Conference Committee's bill will face up-or-down vote in Senate and House
- If passed, President must sign