Nine Key Concepts College Counsel Must Know About Immigration Law

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Introduction

Lawyers at academic institutions generally are not involved in immigration cases. Rather, they often delegate such matters to the international office, outside counsel, or the human resource (HR) office. All in-house counsel should, however, understand several key areas of immigration-related issues. The nine issues outlined in this article provide the fundamentals of what every institutional counsel must know if their institution hires or sponsors foreign nationals.

This article primarily focuses on employment-related immigration issues. Two more general resources are highly recommended for in-house counsel and those preparing visa applications. The comprehensive National Association of Foreign Student Advisers (NAFSA) *Adviser's Manual* is an excellent legal analysis (with hyperlinks to regulations and policy memoranda), including discussion of institutional issues in immigration advising.[1] The American Immigration Lawyers Association (AILA) has a collection of about twenty-five short articles on a wide variety of topics in its 2011 *Immigration Options for Academics and Researchers, 2d Ed.*[2]

For every academic institution, we recommend an immigration "gatekeeper" who reviews all immigration petitions for accuracy and compliance with federal regulations. This gatekeeper should have sufficient institutional authority and resources to maintain a sound compliance program. The gatekeeper also must keep track of changes to immigration laws and procedures, and communicate them to the relevant officials on campus. The institution should support the gatekeeper in getting continuing education and creating networks for brainstorming and case liaison. The gatekeeper also should be the point person for government visits to campus (most common now are H-1B site visits by the Department of Homeland Security's Fraud Detection and National Security office).[3]

Centralized review can preserve the institution's reputation with federal agencies. In at least one case of which we are aware, an interested government agency called an institution to ask about an application for a J waiver sponsored by the institution. The international office and counsel's office had no knowledge of the application. While such cases must be sponsored by the employer and should have been signed by an authorized individual, a department head at the university's medical school signed it. This can seriously hurt the institution's credibility and ability to have applications approved in the future. Establishment of a single immigration gatekeeper can help avoid this type of problem.

Practice Pointer: In some institutions with decentralized immigration functions, there may be department heads or other administrators signing these forms after the beneficiary's lawyer prepares them. This is a dangerous practice. Someone at the institution with knowledge of immigration matters should review these forms and work with outside counsel to coordinate filing in a manner consistent with university policies.

Every institution has a unique culture. Many have decentralized services, but counsel should centralize immigration functions and limit petition signing authority. Those signatures involve legal responsibilities, and individual department heads should not be committing their institution to visa sponsorship without some oversight by the international office and/or counsel's office. This would also eliminate the possibility of "sponsorship" of someone whom the institution did not intend to sponsor, where the depart-

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[1] http://www.nafsa.org/Content.aspx?id=26557. See also a review of the usefulness of the NAFSA Manual for attorneys by Dan Berger in Am. Immigr. Law. Ass'n, Immigration Law Today 38-41 (May/June 2007), http://www.aila.org/infonet/immigration-law-today-mayjune-2007. Despite the name of the organization, the Manual covers student and scholar issues.

[2] https://agora.aila.org/product/detail/16.

[3] http://www.uscis.gov/about-us/directorates-and-program-offices/fraud-detection-and-national-security/administrative-site-visit-and-verification-program.

ment head signs the petition instead of an authorized individual.[4]

For example, the latest version of the H-1B form has this above the signature line:[5]

> **I certify**, under penalty of perjury, that this petition and the evidence submitted with it are true and correct to the best of my knowledge. Copies of documents submitted are exact photocopies of the unaltered original, and I understand that as a petitioner, I may be required to submit original documents to US Citizenship and Immigration Services (USCIS) at a later date. I authorize the release of any information from my records, or from the petitioning organization's records, that USCIS needs to determine eligibility for the benefit being sought. I recognize the authority of USCIS to conduct audits of this petition using publicly available open source information. I also recognize that the supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, including but not limited to on-site compliance reviews.

The form also instructs the signatory to "read the information on penalties in the instructions before completing this section." The instructions refer to criminal penalties for "knowingly and willfully misrepresenting" any material fact. A signature also "certifies" compliance with the Department of Commerce's export control and International Traffic in Arms Regulations (ITAR) regulations. Despite the complexity of this language, many institutions allow non-attorneys to sign I-129 forms, without ever having had a discussion with in-house counsel. Even if there are not frequent conversations between the gatekeeper and counsel, there should be an open door.

Issue #1: Ensuring I-9 Compliance and Proper Work Authorization

I-9 compliance has become a hot topic of discussion in the past few years, with government action in these areas becoming more and more aggressive. Universities and colleges are not immune from potential I-9 violations that could lead to serious civil and criminal sanctions.

The Immigration Reform and Control Act of 1986 (IRCA)[6] requires employers to verify that all employees have proper work authorization. The centerpiece of this system is the I-9 form, Employment Eligibility Verification, which employers must ensure is timely completed by the employee and the employer.[7]

Effective May 8, 2013, USCIS required employers to use a new version of the I-9 form. The updated version includes changes that streamline the manner in which the form is completed. The form now provides more clarity related to the required timing of its completion. The employee may complete Section 1 any time after accepting an offer of employment and before his or her third day of employment. Additional information is also collected on the form, including the employee's e-mail address and phone number. Inclusion of the e-mail address helps to facilitate the E-Verify process by providing an easier means by which a new employee is notified of an electronic non-confirmation of information that the employee included on the I-9 form.

If an institution has implemented E-Verify, counsel should establish a process by which they are able to confirm compliance with additional E-Verify procedures for each newly hired employee. At a minimum, each job applicant must be notified of the institution's E-Verify participation by posting a "Notice of E-Verify participation" and "Right to Work" posters. These must be clearly displayed in English and Spanish.[8]

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[4] Some institutions go so far as to oversee letters written by its employees in support of self-petition green card applications. We do not believe this is necessary. These letters attest to the accomplishments and reputation of the applicant, similar to recommendation letters for jobs, grants, etc. We do recommend a general advisory that there are immigration attorneys or applicants who will ask references to "just sign a letter" that has the language needed to obtain a green card. No one should sign a reference letter unless the reference is fully comfortable with the content.

[5] The I-129 form can be found at http://www.uscis.gov/sites/default/files/files/form/i-129.pdf.

[6] Pub. L. No. 99-603, 100 Stat. 3359 (partially codified in scattered sections of the Immigration and Nationality Act (INA)).

[7] The I-9 form and the list of acceptable documents can be found in U.S. Citizenship and Immigration Services (USCIS) Publication M-274, *Handbook for Employers* [hereinafter M-274 Handbook], *available at* http://www.uscis.gov/files/form/m-274.pdf, *and on Lexis at* Gordon, Mailman, Yale-Loehr & Wada, Immigration Law and Procedure > USCIS Sources > Other Manuals and Guides > Employment Handbooks and Guides.

[8] USCIS E-Verify User Manual, Form M-775, *available at* http://www.dhs.gov/E-Verify, *and on Lexis at* Gordon, Mailman, Yale-Loehr & Wada, Immigration Law and Procedure > USCIS Sources > Other Manuals and Guides > Employment Handbooks and Guides.

Depending upon organizational need, institutions may also display the posters in other languages provided by the Department of Homeland Security (DHS). Additional compliance monitoring actions are also necessary and responsibilities for E-Verify compliance should be clearly defined.

HR often controls the I-9 function, coordinates faculty and staff searches, and sets hiring procedures. International offices oversee and control visa processing for foreign national employees. To this end, college counsel must work to bridge the gap between international services and HR. Having the I-9 function centralized at HR often works well, with appropriate policies, systems and oversight from counsel as needed. Centralization of I-9 processing also prevents the perception of separate check-in and authorization procedures for foreign-born employees. It is ideal to have at least one HR employee with a basic understanding of employment immigration because of the complexity of maintaining I-9 compliance for international employees. Another common model is to have the I-9 function in the international/visa office, where the international employees already present themselves. The decision of where to house the I-9 function will depend on resources and institutional preference. The key is that there should be good training and consistent policies.

Academic counsel should understand the basics of the I-9 system and ensure that this function is coordinated within the institution. Often, individual departments or HR subunits with little knowledge of immigration requirements execute I-9 functions. Employers who do not pay serious attention to the I-9 system do so at their own peril. We are aware of at least one university system that left I-9s to individual departments without centralized oversight. After a lengthy audit by the Internal Revenue Service (IRS) and Department of Labor (DOL), the school was fined hundreds of thousands of dollars. Such audits at colleges and universities are not common, but college counsel should understand and weigh the risk of decentralized I-9 compliance, given the climate for audits and penalties by the U.S. Immigration and Customs Enforcement (ICE), the DHS division charged with investigating and removing unauthorized aliens from the United States.

The employment verification regulations (so-called "I-9 rules") cover only true employees, not independent contractors. As in the workers' compensation or tax fields, whether an individual or entity is an independent contractor is determined based on a balancing of various factors. The term "independent contractor" includes those who "carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results."[9] In most cases, an employer would have no direct obligation to check the immigration documents of its subcontractors' employees. Nevertheless, employers may not knowingly contract with any individuals not legally authorized to work in the United States. It is permissible to require that a contractor attest to the legal employment eligibility of all individuals who will be employed on a contract.

An argument can be made that an individual whose work is directed on a daily basis by an organization's company employee is in fact not an independent contractor. An organization that "uses a contract, subcontract, or exchange"[10] to avoid the I-9 requirements would be subject to the same liability as a direct employer who violates the employment verification rules.[11]

In general, I-9 forms are not required for volunteers or other unpaid individuals. I-9 forms are only required for employees. An employee is a person who performs labor or services in the United States in return for wages or other remuneration. Only the employer can determine whether a volunteer or other unpaid individual receives remuneration. Remuneration is anything of value an employer gives to a volunteer in exchange for labor or services. Remuneration can come in many forms, such as money, meals, lodging and other benefits, but does not include gifts. If the institution determines that the volunteer or unpaid intern will receive something of value in exchange for labor or services, the institution should complete the I-9 form. Nonimmigrants who are temporarily in the United States should take care to ensure that the volunteer

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[9] 8 C.F.R. § 274a.1(j).

[10] 8 C.F.R. § 274a.1(c).

[11] *See generally* 8 C.F.R. § 274a.1(l)(1)(iii), which states that constructive knowledge that an alien is unauthorized to work can be shown if an employer "acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into the workforce or to act on its behalf." In 2001, in a high-profile case, Wal-Mart managers were accused of having knowledge of the unlawful status of subcontracted cleaning crews. ICE alleged that the knowledge of the unlawful hiring trumped the lack of obligation on the part of the primary employer to rely on the I-9 verification conducted by the subcontractors. Before there was any litigation to decide the matter, Wal-Mart settled with ICE. To what extent ICE will continue to pursue subcontractor situations is unknown, but the Wal-Mart case should be viewed with caution in dealing with subcontractors, independent contractors, and other "quasi-employees."

work, depending on the type of work and the specific facts presented, does not violate their immigration status.[12]

ICE has greatly ramped up enforcement over the last couple of years; the penalties for IRCA violations are increasingly severe. ICE not only continues to use employer fines and deportation of unauthorized employees, but it has added criminal sanctions to its arsenal.

The civil penalties for I-9 violations range from $375 to $3,200 for a first offense up to $4,300–$16,000 for a third or subsequent offense.[13] These civil penalties apply to each I-9 form that is determined to be in violation of IRCA so for employers with many employees, these fines can become substantial. Additionally, if an employee is unlawfully denied an employment opportunity or terminated based on an improper I-9 reverification, the law also allows the employee recovery for back pay and attorney fees (only if defense is frivolous), and may permit orders to comply or reinstate the employee. ICE's criminal law enforcement tools also include felony charges against employers for knowingly making false statements on the I-9 and charging employers with "alien harboring"—a felony that turns on the notion of "aiding" an unlawful alien's stay in the United States.

We recommend an I-9 compliance plan for universities. This should include a team of professionals on campus who deal with immigration issues and interact regularly to discuss compliance, training, and periodic internal compliance audits (*e.g.*, annual review of a sampling of I-9s). While 100 percent compliance may be unattainable, especially for a large decentralized organization, the minimum goal should be "good faith/reasonable" efforts for compliance.

"Good faith/reasonable" compliance was originally defined by a restrictive "knowing" standard[14] that is difficult to reach. An employer had to fail to exercise reasonable care regarding immigration rules and had to have a "wanton disregard for the legal consequences"[15] of employing an unauthorized worker. A recent final rule[16] has arguably heightened the standard for employer compliance with immigration laws. It may be that actions that qualify as "good faith" likely will be held to stricter interpretation in the future.

"Knowing" may include constructive knowledge and failure to exercise reasonable care in learning about and implementing immigration rules. The DHS regulations specifically refer to several situations where constructive knowledge will be inferred: (1) where the I-9 form is not completed or is improperly completed; (2) where the employer has information indicating that the alien is not authorized to work, (but note: a "no-match" letter from the Social Security Administration (SSA) alone should *not* be used as conclusive evidence that an individual may not be authorized to work); and (3) where the employer acts "with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its workforce or to act on its behalf."[17]

While employers should make reasonable efforts to avoid situations in which constructive knowledge may arise, they also should recognize that overly zealous efforts to avoid any and all constructive knowledge may jeopardize their compliance with other I-9 rules that prohibit employers from inferring lack of authorization from a newly hired employee's resume, "from an employee's appearance or accent"[18] or from requiring more or different documentation than that authorized by law.

In addition to I-9 compliance, the institution also should be aware of immigration-related discrimination issues. An employer cannot selectively hire, or refuse to hire, nationals from certain countries for any reason. That practice is "national origin discrimination"[19] under both federal employment discrimination law and immigration law. In contrast, limiting hiring to individuals of a certain immigration status (generally) is permissible.

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[12] *See generally* M-274 Handbook, *supra* note 7; *see also* USCIS, Who Needs to Complete Form I-9?, http://www.uscis.gov/i-9-central/i-9-central-questions-answers/who-needs-complete-form-i-9. A chart with penalties for I-9 violations is at http://www.uscis.gov/i-9-central/penalties.

[13] 8 C.F.R. § 274a.10(b)(1)(ii).

[14] 8 C.F.R. § 274a.1(*l*)(1).

[15] 8 C.F.R. § 274a.1(*l*)(1)(iii).

[16] 72 Fed. Reg. 45,611 (Aug. 15, 2007). *See also* Supplemental Proposed Rulemaking for the No-Match Rule, 73 Fed. Reg. 15,944 (Mar. 26, 2008). Details of this rule, the preliminary injunction against it, and the recent supplemental rulemaking are discussed *infra*.

[17] *See* M-274 Handbook, *supra* note 7; Office of Business Liaison, DHS, Employer Information Bulletin 103, I-9 Document Review (Mar. 16, 2005), http://www.uscis.gov/files/article/EIB101.pdf.

[18] 8 C.F.R. § 274a.1(*l*)(2).

[19] 29 C.F.R. § 1606.1.

Various federal statutes intersect on this issue. Title 42 U.S.C. § 1981 and Title VII apply to non-citizens, and prohibit discrimination on the basis of national origin. IRCA adds another layer by prohibiting discrimination on the basis of national origin or citizenship in hiring and firing employees.[20] IRCA violations are known by the legal acronym UIREP (unfair immigration-related employment practices).

Employers may ask for only the minimum identity and employment documents outlined in the I-9 handbook.[21] Employers may not require employees to produce any more or different documentation than required by law. It is always the employee's choice, and never the employer's choice, what specific documentation is used to comply with the I-9 rule. Employment cannot be denied based on the future expiration date of a document that satisfies the minimum requirements of the I-9. IRCA created the I-9 employment eligibility verification system to reduce illegal immigration. The UIREP provisions were added to temper the effect of IRCA on aliens who have proper work authorization. Congress did not want employers to stop hiring foreigners or people with accents for fear of accidentally hiring an illegal alien.

In addition to the documentation issues, UIREP concerns can arise in the recruitment and retention processes. Specifically, what questions can be asked about visa status at a job interview, and who within the university should be responsible for these inquiries? Most immigration attorneys agree that regardless of who is asking the questions, there can be only two: (1) are you authorized to work in the United States? and (2) Will you now, or in the future, need employer sponsorship to work in the USA? Any other questions are potential IRCA violations.

One attempt to balance compliance with nondiscrimination laws is the E-Verify system. U.S. Citizenship and Immigration Services (USCIS) runs this Internet-based employment eligibility system through which an employer can compare I-9 information provided by an employee with DHS and SSA records. Employer participation in E-Verify does not automatically create a safe harbor for unauthorized employment, but use of E-Verify has been seen to mitigate the severity of enforcement actions (*e.g.*, no use of criminal penalties). Many states have attempted to legislate mandatory E-Verify use. However, while E-Verify seems like a potentially effective tool, inaccuracies in the SSA and DHS databases have made employers hesitant to voluntarily register.

More universities and colleges are finding themselves subject to E-Verify as their government contracts are rewritten to include E-Verify compliance as a requirement. The Federal Acquisition Regulation (FAR) final rule, known as the E-Verify federal contractor rule, went into effect on September 8, 2009. It requires certain federal contractors, through language inserted into their contracts, to begin using E-Verify to verify their new and existing employees hired during a contract term, as well as their current employees who perform work under a federal contract within the United States.[22]

Practice Pointer: There may be times when the university discovers that someone (such as a foreign student or dependent of a nonimmigrant visa holder) has worked on campus without authorization. This often occurs with research assistant or teaching assistant positions that work for more hours permitted under F-1 rules for Curricular Practical Training (CPT) and on-campus employment. Should that person be paid? This decision should involve discussion with college counsel to weigh the chances and severity of enforcement of I-9 rules versus federal and state wage and hour requirements. In most cases, a person must always be paid for time worked, regardless of the individual's legal eligibility to be employed in the United States. The individual also may need independent immigration counsel because noncompliance with maintenance of immigration status may have a severe impact on the employee's current and future immigration options.

Sabbaticals also can present a challenge for proper employment authorization. Frequently, deals involving payment to foreign nationals who have decided to go on sabbatical are made at the department level. If the sabbatical is spent outside the United States, there is no visa issue to be addressed. However, a sabbatical within the United States requires an appropriate university authority to consider if the visa is still valid based on whether the employee remains on the college

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[20] INA § 274B.

[21] 73 Fed. Reg. 10,130, 10,136 (Feb. 26, 2008, effective Mar. 27, 2008); M-274 Handbook, *supra* note 7.

[22] For more information about E-Verify, see Curran & Berger LLP, E-Verify - Information for Employers, *available at* http://curranberger.com/content/view/167/119/.

payroll. This will probably be a case-by-case decision, but recent case law shows that flexibility on what is a material change is diminishing.[23]

Issue #2: Identifying the Types of Applications That Should Be Prepared In-House

Counsel must decide those types of immigration applications or petitions that should be prepared in-house. At some institutions, talented and well-meaning foreign scholar advisers may offer advice on visa issues beyond the basic employment-based petitions (marriage cases, dependents, etc.), as those issues often intertwine. Some institutions have employed immigration attorneys as in-house managers of the immigration filing responsibilities, while other institutions may outsource some petitions to help manage workload. The best way to handle such discrepancies is to set a policy that clearly identifies the scope of responsibilities of the international office personnel. A policy that addresses the scope of responsibilities concerning advising on immigration matters beyond the scope of the institution's sponsorship is important to protect the institution from potential liability claims.

When developing this policy, counsel should keep in mind that even where the institution is responsible for signing a particular immigration form, case preparation and advising may be outsourced to an immigration attorney. This is because, as the world of immigration law becomes increasingly complex, international advisers, no matter how savvy, may simply be unable to properly handle certain cases. Thus, it is important to implement a solid policy regarding using outside immigration counsel and, specifically, on what types of matters outside lawyers should be retained. Note that outside counsel represents the institution signing the forms even if the employee is paying the attorney's fees. The same vetting used for outside litigation or specialist counsel should be used for outside immigration counsel.

In addition to institutional considerations of reputation, workload, and costs, federal and state laws identify applications that are always the employer's responsibility. By analogy to the income tax area, certain forms are the institution's responsibility, such as the W-2, W-3, 940, 1120, etc., while others are personal forms, such as the W-4 and 1040. By following a legal responsibility test, such as this in the immigration context, the school can create a bright-line rule. The legal responsibility test reduces the risk of personal and institutional civil and criminal liability for noncompliance with federal laws and regulations. This test also minimizes the risk of "unauthorized practice of law" under state and federal statutes.[24]

Following is a list of ten immigration documents that are *always the employer's* responsibility. These documents should be signed by a group of authorized individuals (normally, within the international office):

1. Form I-20 Certificate of Eligibility for Nonimmigrant Student Status (by designated school official of F-1 sponsoring institution);
2. Form DS 2019 Certificate of Eligibility for Exchange Visitor (J-1) Status (by responsible officer (RO) of J-1 sponsoring institution);
3. Form G-28 Notice of Entry of Appearance (if filed in connection with 4–7 below);
4. Form I-129 Petition for Nonimmigrant Worker;
5. ETA Form 9035 Labor Condition Application (LCA) for H-1B Nonimmigrants;
6. Form I-907 Request for Premium Processing Service (expedited service on temporary visas);
7. Form I-140 Immigrant Petition for Alien Worker (unless self-petition for national interest waiver (NIW) or EB-1);
8. ETA Form 9089 Application for Alien Labor Certification (this is co-signed by both the employer and the employee);
9. Form I-9, Employment Eligibility Verification (Section 2 and Section 3 only); and
10. Any letters on employer's letterhead relating to immigration sponsorship.

Filing other immigration applications or petitions, or even giving advice about them to faculty, staff, or students, can be considered unauthorized practice of law if the work is undertaken by non-attorneys or unlicensed attorneys. 8 C.F.R. § 1.2 defines the term practice (of law) as "the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf or another person or client before or with DHS." 8 C.F.R. § 1.2

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[23] Matter of Simeio Solutions, LLC, 26 I. & N. Dec. 542 (AAO 2015) (reversing long-standing DOL and USCIS policy that a change in location, addressed in advance filing a new Labor Condition Application, was not a material change. This case (holds that any change in location is a material change requiring a new H-1B petition).

[24] *See* 8 C.F.R. § 1.1 (practice of immigration law); 8 C.F.R. § 292.1 (representation of others in immigration matters).

goes on to explain that preparation, constituting practice, means "the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers." Preparation specifically does not include notarizing documents or filling in forms for a nominal fee by one who "does not hold himself out as qualified in legal matters or in immigration and naturalization procedure."[25]

While a specific finding of "unauthorized practice of law" will depend on state law and individual circumstances, there is a definite "safe harbor" for preparing the ten types of documents listed above. To avoid the unknown and potentially dangerous waters outside this harbor, counsel should review the federal regulations and USCIS memoranda in this area, as well as their own state law and legal ethical guidelines before allowing international advisers to offer any assistance on forms that are not tied to institutionally sponsored petitions.

We understand from experience that many schools have chosen to go beyond that list as a service to their students and scholars. Historically, many international advisers have been involved with individual applications for Form I-539s for reinstatement of student status and Form I-765s for student work authorization. This is an invaluable service for students, and it can be seen as part of the international adviser's obligation under the F-1 program designation. However, any responsibility taken on for applications filed directly by individuals and their families should be well supported. For example, one university had a practice of mailing a student's I-765 work card request. One such request got lost in a stack. When it was filed, it was late and denied by USCIS. The university was responsible for the loss of the F-1's employment and her attorney fees. In-house counsel spent their day doing risk assessment for all sorts of cases- the same type of analysis should be done for immigration processing.

In addition to the unauthorized practice of law issues, helping faculty, staff, or students prepare or file Form I-539s, Change of Extension of Status; Form I-485s, Application to Register Permanent Residence or Adjust Status; Form I-130s, Petition for Alien Relative; Form I-864s, Affidavit of Support Under Section 213A of the Act; Form DS-160s, online Nonimmigrant Visa Application, and other forms that are the legal responsibility of the individual may cause the institution to incur liability if the process is not done in compliance with all legal rules. Similarly, handling immigration issues for family members renders an institution liable for legal compliance vis-Á-vis that family member's immigration process. For example, helping a spouse file a change of status application can lead to assisting or advising with every request sent by USCIS for clarification or additional information and even assisting with the appeal if the application is denied. This in turn, obligates the institution to monitor the case until a final decision is obtained, which may take one or more years.

To avoid such situations, colleges and universities should be clear about those immigration benefits that will be sponsored and handled by the institution. In those instances where the institution pays for the entire immigration case, including dependents, a disclaimer may be made that such payment does not imply representation or responsibility for the family member's application. This type of disclaimer would be similar to paying for moving expenses but not taking responsibility for the company chosen by the employee or the quality of the job.

The point of this article is not to set strict rules for what services an institution should offer, but rather to make sure that counsel are aware of the potential risks and that informed decisions are made. Counsel can then engage in legal risk assessment and make an appropriate conclusion that serves the university's best interest.

If the institution provides assistance on individual applications, the school must assume the responsibility of looking out for potential grounds of denial. For instance, certain criminal, political, or medical issues may affect a foreign national's chances of qualifying for an immigration benefit. If so, the institution must be prepared to research these issues and provide a written argument as to why they should not be a bar to obtaining an immigration benefit. International advisers may not have the legal experience, and even at institutions with in-house immigration counsel, the work effort is likely well beyond the scope of the anticipated job duties. When complex tangential issues of this nature arise, the institution may find it best to advise the employee to retain qualified outside counsel.

A review of the types of issues that must be considered on *any* individual application will help to clarify the scope of responsibility entailed with preparing those applications for beneficiaries. The institution

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[25] *See generally* INS General Counsel Memorandum, Role of Visa Consultants in the Practice of Immigration Law (June 9, 2002); INS General Counsel Memorandum, Follow-up Letter Regarding Preparation of Immigration Forms (May 20, 1993), *available on Lexis at* Immigration > Administrative Materials > DOJ & (Legacy) INS Legal Opinions > 93-25.

must look for factors that could prevent the issuance of the immigration benefit. This most commonly occurs at an interview for permanent residence, at a visa interview at a consulate abroad, or when the individual tries to enter the United States. A series of short questions may avoid some of the most common pitfalls:

- Have you *ever* been denied an immigration benefit or had *any* problem with USCIS?
- Do you have *any* criminal history, been fingerprinted, or been arrested?
- If you *ever* held J status and were subject to the two-year home country physical presence requirement, have you fulfilled the requirement?
- Have you ever applied for or been sponsored for lawful permanent resident status in the United States?

Asking these questions early can help avoid the denial or delay of admission, a visa application, or adjustment of status in the future. For example, a prior, albeit baseless, finding of fraud may prevent an H-1B employee from entering the United States. Similarly, a teenage drug arrest may result in an O-1 researcher being barred from entering the United States. An overlooked J-1 two-year home residence requirement may cause the denial of a faculty member's adjustment of status application. In fact, any previous applications for lawful permanent residence, even in the family-based or asylum categories, are relevant to temporary intent, and to setting a visa strategy.

Finally, and above all, the answers to *every* question on the forms should be checked with the individual. It may be tempting to answer "no" to the questions regarding criminal history, moral character, previous immigration status or immigration visa petitions; however, the answers should never be assumed. University faculty, staff, and students lead interesting lives before joining the institution and the answers on their forms need to be true and accurate.

Issue #3: Should the University Pay for Visa Petitions?

A college or university should establish a policy not only for what petitions or applications will be sponsored, but also what immigration benefits the university will fund. Paying for visa costs may be used as a marketing tool for attracting top faculty or staff. At the same time, an overly generous policy may lead to limits on the types of positions sponsored (or frustration if the employee leaves soon after the visa or green card is approved).

Three legal issues arise in relation to an employer's obligation to pay for immigration benefits: (1) compliance with LCA rules on authorized deductions in the H-1B temporary visa context; (2) labor certification costs in the lawful permanent residence context; (3) and liquidated damages clauses.

DOL regulations at 20 C.F.R. § 655.731(c) describe the wage requirement for H-1B and LCA purposes. For example, consider an adjunct faculty member at a community college who will be teaching one section of French for one semester. Per longstanding policy, the school agrees to sponsor an H-1B petition with the instructor paying the attorneys' fees and filing fees. The instructor also wants to travel before classes start, and needs the H-1B approved, so she pays the premium processing expedite fee. Later, a DHS officer on a site visit discovers that the employee paid these fees, and reports this to DOL. The Department of Labor then fines the college, and requires it to reimburse all of the fees. This leads to a roughly $5000 in charges on a tight budget. That amount is likely more than the instructor's entire salary for the single course. The next few paragraphs will explain in detail why DOL was correct (except perhaps for the premium processing fee).

Payment of less than the higher of the actual or prevailing wage is a violation of the LCA.[26] Specifically, certain H-1B petition filing fees and H-1B program functions that are required to be performed by the employer are considered "employer business expenses" by DOL. Having the employee pay the attorney's fees or those specific filing fees would be an unauthorized deduction from the wage[27] if that deduction causes the wage received to be less than the higher of the actual wage or the prevailing wage. Under these circumstances, the employer may be susceptible to DOL investigation, assessments for back pay, civil penalties, and/or disqualification from visa sponsorship.[28] Therefore, a policy for payment of fees for cases with wage requirements should be carefully crafted, and shared within the institution and with immigration counsel.[29]

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[26] See generally the DOL's online tool for employer's to understand LCA obligations at http://webapps.dol.gov/elaws/h1b/. For a case example of an employer's liability for back wages, see Kutty v. U.S. Dep't of Labor, 764 F.3d 540 (6th Cir. 2014).

[27] 20 C.F.R. § 655.731(c)(9)(iii)(C).

[28] 20 C.F.R. § 655.731(c)(11).

[29] *See generally* 20 C.F.R. § 655.731(c).

In addition to filing and legal fees, a 2004 law[30] imposed a fraud prevention and detection fee of $500 that must be paid by the employer regardless of the actual or prevailing wage. There is no exemption to this fee for employers in higher education.

One gray area is the premium processing fee—a $1225 expedite fee that can be paid for fifteen-day processing of most temporary work visas. Some institutions decide whether to pay the fee based on who benefits from the expedited service. For example, if the expedite is to facilitate the alien's personal travel plans, the alien would pay. However, if the expedite is to make sure the alien is authorized to teach when the semester begins, the institution would pay.

In the labor certification context, DOL requires employers to pay for all costs associated with the labor certification process, including attorneys' fees (for a shared attorney) and advertisement/recruitment costs for the position.[31] It also ended the practice of payback agreements whereby the employee reimburses the employer should he or she resign within a certain time after receiving permanent residence at the employer's expense. This rule applies only to the labor certification portion of the green card process and does not prevent the employee from paying for the remainder of the process.

The employer may wish to stipulate in the employment contract that continued employment is expected for a certain time, and that any employee not abiding by this policy must reimburse the institution for some of the visa costs (except those that are subject to the prohibitions discussed above). Requesting reimbursement of any immigration costs related to the H-1B process is problematic, and the best practice is that the employer should bear all of the legal costs and filing fees to minimize problems with DOL. Also, counsel should consider the difficulty of enforcing such a provision and review state liquidated damages and contract case law before adding such language to the employment agreement.[32]

In addition to the specific instances discussed above where applicable law requires employers to cover costs of specific immigration benefits, it may be prudent for counsel to establish a general policy on funding immigration cases. For instance, would the university pay for an employee's O-1 petition or outstanding professor or researcher petition? Would the decision depend on the department's ability to fund such fees? Would it depend on the foreign national's position within the university (junior researcher vs. tenured professor)? The authors have seen institutional policies that conservatively allow for funding on immigration cases for tenure-track faculty. Others have allowed paying for non-tenure teaching positions or staff positions only after the foreign employee has worked at the institution for a specified number of years and the department anticipates continued, uninterrupted employment. For most institutions, department funding resources and attracting well-qualified applicants in a competitive job market are the primary considerations for the policies adopted. Counsel should ensure that these issues are discussed and that policies are established and consistently implemented while allowing for a degree of flexibility for departments with larger funding resources. It is also important that any institutional policy on funding immigration cases be consistent to avoid the perception of discrimination. However, it is also important to not impose unduly harsh restrictions on highly recognized and regarded departments that are willing and anxious to fund immigration cases for their employees.

Issue #4: Is an Immigration Sponsorship Application an Employment Contract?

Many employers are reluctant to sponsor employees for a visa that extends beyond their contract length. Moreover, college employment counsel may be concerned about whether a visa petition creates an implied contract. These concerns are addressed in this section of the article to show that state contract law and the written employment contract set the term of employment, not a visa petition (*e.g.*, Form I-140, I-129).

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[30] Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 426(a), 118 Stat. 2809, 3357 (2004) (codified at INA § 214(c)(12), 8 U.S.C. § 1184(c)(12)).

[31] 72 Fed. Reg. 29,704 (May 17, 2007, effective July 16, 2007). *See* DOL FAQ Prohibition on Improper Payments and Transactions, *available at* http://www.foreign laborcert.doleta.gov/faqsanswers.cfm#stands2, *and on Lexis at* Gordon, Mailman, Yale-Loehr & Wada, Immigration Law and Procedure > DOL Sources > Active DOL Sources > OFLC Frequently Asked Questions and Answers > PERM PROGRAM.

[32] *See* Administrator, Wage and Hour Division, U.S. DOL v. Novinvest, ALJ Case No. 02-LCA-24 (July 30, 2004) (similar language disallowed in the H-1B context because amount charged back to employee was not related to actual visa costs, simply liquidated damages provision that seems to violate 20 C.F.R. § 655.731(c)(10)(i)).

Consider the following hypotheticals:

1. Rose College regularly hires foreign language instructors on one-year contracts. The college hopes that each instructor will stay for at least several years, and some well-liked instructors with good research credentials are later promoted to tenure-track jobs. The college counsel's office and the dean of faculty have decided to keep the contracts to one year to guarantee that they can dismiss an instructor if they are unsatisfied with his or her performance, or if funding or staffing priorities change.
2. The college hires some of the instructors on J-1 visas. Others who are not eligible for a J-1, or who want to pursue permanent residence, are given the option of obtaining an H-1B.
3. The college has decided to sponsor each instructor for a one-year H-1B visa. This means an extension petition must be prepared every year. This policy holds even for those instructors who are very likely to be re-appointed because they are popular or are teaching a language where it is difficult to find instructors.

Is this necessary? First, an employer may withdraw an employment-based temporary or permanent visa petition if the employee is terminated. Second, the only commonly encountered provisions in immigration law concerning early termination require an employer to merely pay the return transportation costs for an H-1B worker if he or she is dismissed before the end of the visa term and if he or she chooses to return home.[33] USCIS also expects employers to notify the agency if they terminate employment.[34] These provisions presume that there is no legal obligation to keep the worker for the full term of the visa.

As a practical matter, H-1B workers at universities tend to be versatile about finding another job if their current position ends. Thus, while the authors are aware of a few examples where schools have been held to the return transportation provision, such instances are rare. Therefore, the possibility of paying for a plane ticket home must be balanced against the expense and effort involved in submitting a new H-1B petition each year.[35] Complications because of processing delays also arise every time a new petition is filed if the individual wants to travel outside the United States.

In light of this, the only remaining legal issue is whether the visa petition itself creates or modifies the employment contract. This is a matter of employment law, and requires a basic grasp of "at will employment."

Since the late 1800s, the "American Rule" has stated that oral employment contracts of indefinite duration are assumed to be "at will." In other words, there is no fixed term, and the employee can be dismissed or can quit at any time and for any bona fide reason (*e.g.*, not discrimination). The courts and legal treatise writers of the time felt that the American Rule was necessary to facilitate business in the growing economy. Over the years, several exceptions have been created, but the basic assumption in most states remains that if nothing is said about terms, the employment is "at will."

Employment law varies state by state in both terminology and details. However, the most important exception is called "promissory estoppel." If the employer (1) makes the employee believe that it is for a fixed term *and* (2) the employee acts to his or her detriment on that belief, the employer may be held to the fixed term. For example, in the hypothetical above, if the college tells the instructor in his or her interview that it will reappoint him or her twice unless his or her course evaluations are poor, and the instructor buys a house in the area based on that conversation, the college may be bound to keep him or her for three years. (Keep in mind that we are simplifying a very complex topic that is the subject of many legal treatises and articles.)

How does this relate to visa petitions? Would the instructor "reasonably believe" that he or she will be kept on for three years if he or she is sponsored for a three-year visa? The answer, absent other representations, is "No." First, most "employment at will" disputes arise out of oral contracts, where extensive testimony is required to reconstruct what was said and promised. In most college settings, employees have

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[33] 8 C.F.R. § 214.2(h)(4)(iii)(E).

[34] 8 C.F.R. § 214.2(h)(11)(i)(A). Note, however, that DOL is stricter on the notification standards. It holds an employer liable for payment to an employee until the date the employer sends notification of termination to USCIS, whereas USCIS itself has no sanctions if notification of termination is delayed. *See* Amtel Group of Florida v. Rungvichit Yongmahapakorn, ARB Case No. 04-087 (2006); 20 C.F.R. § 655.731(c)(7)(ii).

[35] Note also that if the employee does leave before the expiration of the visa, the school must notify USCIS. 8 C.F.R. § 214.2(h)(11)(i)(A). This creates an additional responsibility for the "gatekeeper" at the school to keep track of employees who leave or change jobs. Some schools now allow the visa office to have access to personnel databases, which facilitates searches for changes in employment of those on visas.

written contracts drafted by lawyers. These contracts usually address the question of reappointment with language, such as "reappointment is not guaranteed, and is subject to staffing and funding needs of the department. No reappointment is currently contemplated for this position." Therefore, there should not be any misunderstanding about the intended length of the contract.

Second, colleges are increasingly requiring employees to sign a waiver or other statement acknowledging the terms of employment. This can be in the form of a statement that the employee has been given a copy of the college's employment handbook, or a basic waiver explaining that reappointment is not guaranteed. Again, the basic safeguards that already have been put in place by the college's employment lawyers should avoid any alteration of the employment relationship by the visa petition.[36]

Courts have found that a visa petition by itself does not create or modify an employment contract, even where there is no written contract.[37] A clearly worded employment contract or waiver should avoid confusion and litigation about the terms of employment. The courts should not have to review a visa application or petition to decide terms of the employment contract.

Overall, colleges and universities should review blanket policies of sponsoring faculty and staff for less than the maximum term allowed in a visa category. If six H-1B petitions (instead of two) are filed in six years for each employee, there is a much greater chance one of the petitions may be lost, delayed, or subjected to unreasonable requests for additional evidence. Also, while a petition is pending, travel abroad is complicated. Finally, the cost associated with filing multiple petitions (filing fees and possibly legal fees) may discourage counsel from doing so. In general, best practice is to seek an approval for the maximum period permitted (usually three years).

Practice Pointer: In a similar vein, nonimmigrant visa sponsorship might lead an employee to assume he or she will be sponsored for a green card by the school. To avoid sending the message that nonimmigrant visa sponsorship—no matter its duration—automatically implies lawful permanent residence sponsorship, colleges and universities should have a clear legal policy to this effect.[38] Each individual's situation and amenability for a green card would be better determined on a case-by-case basis through a gatekeeper, since some individuals may obtain a green card with minimal expense and difficulty, whereas others' cases may involve complicated and arduous green card application processes that schools might not wish to pursue.

Most universities have developed sponsorship guidelines for green cards, such as only sponsoring in certain categories or for certain types of positions. This type of analysis should be done by each institution based on resources, cost, importance of green card sponsorship for recruitment and retention, etc. Many universities have their green card sponsorship policies in writing or on their website, so that it is relatively easy to get templates to work from.[39] We advise that the sponsorship request review practices are written into this policy, so that the process is transparent and consistently followed.

Issue #5: Defining *Permanent* Employment

Many colleges go through written contortions in permanent residence applications to avoid having the beneficiary think that he or she is being promised a "permanent" job. For example, consider a Special Handling labor certification application being prepared for a non–tenure-track faculty member. The college's employment lawyer often drafts a key piece of the application, the job offer letter, to avoid liability.

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[36] *See*, *e.g.*, Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257, *modified*, 101 N.J. 10, 499 A.2d 515 (1985) (disclaimer on company policy manual about employment terms is valid if clear and conspicuous).

[37] *See generally* Stanley Mailman and Stephen Yale-Loehr, *The Intersection of Employment and Immigration Law*, N.Y. L.J. (Aug. 23, 1999); Dan Berger, *Does a Visa Petition Create a Legal Employment Contract?*, 5 Bender's Immigr. Bull. 1026 (Dec. 15, 2000). *See also* Edwards v. Geisinger Clinic, 2012 U.S. App. LEXIS 1291 (3d Cir. Jan. 23, 2012) (employment was at will even though medical clinic filed H-1B petition for employee); Canovas v. Univ. of Mass. Med. Sch., 2011 Mass. Super. LEXIS 290 (Sup. Ct. Mass. Dec. 8, 2011) (same).

[38] *See generally* William A. Stock, Corporate Immigration Policy Development: A Checklist for Employers and Counsel (2007), http://www.klaskolaw.com/library/files/corporate_immigration_policy_development_a_checklist_for_employers_and_counsel.pdf.

[39] *See, e.g.*, Office of International Affairs, University of Chicago, University Sponsorship for Lawful Permanent Residence (LPR) or the "Green Card," https://internationalaffairs.uchicago.edu/page/university-sponsorship-lawful-permanent-residence-lpr-or-green-card; Office of the Provost, Boston University, Sponsoring Foreign Nationals for Permanent Residence, http://www.bu.edu/provost/faculty-affairs/instructions/pr/; Center for Global Services, Rutgers University, Permanent Residence Sponsorship Based on Employment at Rutgers, http://globalservices.rutgers.edu/content/For_Rutgers_Departments/Sponsoring_Faculty_and_Research_Scholars/Permanent_Residence_Sponsorship.html.

Therefore, the letter may state that there is no guarantee a job will be available for the individual after the term of the current contract ends.

However, for immigration purposes, the offer must be of "permanent employment."[40] As a result, an extended cover letter or other documentation often is necessary to attempt to show DOL and USCIS that the job is permanent under the INA.[41]

Although the regulations governing permanent labor certifications do not define what is meant by a permanent position, it was never contemplated that such position must have always existed or that the job was guaranteed for life. The term temporary is defined, and the default rule is that jobs that are not temporary are therefore permanent.

DOL has adopted the rule in the H-2 visa context that "job opportunities of 12 months or more are presumed to be permanent in nature."[42] In defining the difference between permanent and temporary, see 8 C.F.R. § 214.2(h)(5)(iv)(A) ("Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.").

In contrast, a permanent job offer for USCIS purposes may be viewed differently.[43] In the "outstanding professor/researcher" context, the position must be tenured or tenure-track, or "a comparable position with a university or institution of higher education to conduct research in the area."[44] In recent years, research institutions have been able to sponsor outstanding researchers for lawful permanent residence based on a USCIS memo,[45] which stated that even a term-limited position can meet the regulatory requirement of permanence if the position normally continues beyond the term (*i.e.*, if the funding grants are normally renewed).

Issue #6: Ensuring Compliance with DOL Recruitment Requirements

Academic institutions, especially large ones, are increasingly doing lawful permanent residence sponsorship work in-house. The Department of Labor's Special Recruitment is a streamlined category for college-level teachers that requires a "test of the labor market."[46] Special recruitment can be slower than the Outstanding Researcher category, but it is much less work for a busy new hire. Once DOL approves the labor certification application, the institution can file an I-140 green card petition with USCIS. Filing a labor certification application with DOL is like filing taxes online - the institution reports data about the recruitment, but does not send any hard evidence. Some labor certification applications (like taxes) are audited to review the actual ads run, search committee reports, etc. A DOL audit could add significant time to the labor certification process. Therefore, it is important to draft the online application carefully, and avoid suspected audit triggers to the greatest extent possible.

Practice Pointer: The online Labor Certification system is extremely sensitive to typographical errors, and relies on phrases that may not be intuitive. Whoever is overseeing labor certification for the institution should be well trained in this type of application.

The initial recruitment for a teaching position can count as the "test of the labor market" if it follows all DOL guidelines. If the initial recruitment does not meet DOL specifications, the institution must re-advertise or move into a different category.[47] It is well worth the

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[40] INA § 101(a)(31) (permanent is "a relationship of continuing or lasting nature, as distinguished from temporary").

[41] *See* Francis v. Gaylord Container Corp., 837 F. Supp. 858, 861 (S.D. Ohio 1992) ("vague statements" offering to sponsor the employee for permanent residence do not form a binding employment contract. "[T]o rely on such statements as promises of either continued employment … would be unreasonable."), *aff'd*, 1993 U.S. App. LEXIS 27731 (6th Cir. Oct. 22, 1993). *See also* Mortensen v. Magneti Marelli U.S.A., Inc., 470 S.E.2d 354 (N.C. App. 1996) (court rejected the argument that the employee is guaranteed permanent employment because the company said he would be sponsored for permanent residence).

[42] Notice of Department of Labor, Employment and Training Administration, 54 Fed. Reg. 33,098 (Aug 11, 1989); Matter of Emerald Gardens Landscaping, Inc., 92-INA-170B (Sept. 29, 1994).

[43] *See* INA § 101(a)(31).

[44] INA § 203(b)(1)(B)(iii)(II).

[45] Memorandum from Michael Aytes, Acting USCIS Director for Domestic Operations, Guidance on the Requirement of a "Permanent Offer Employment" for Outstanding Professors and Researchers (June 6, 2006), *available at* http://www.uscis.gov/sites/default/files/USCIS/ Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/eb1visa060606.pdf, reprinted at 11 Bender's Immigr. Bull. 742 (Appendix E) (July 1, 2006).

[46] 20 C.F.R. § 656.18(b); Dgebaudze and McKinney, *Special Recruitment Provisions: New Developments*, in AILA Immigration Options for Academics and Researchers 271-79 (2d ed. 2011).

[47] *See generally* Loveness Schafer et al., NAFSA, Electronic and Print Advertisements for College and University Teachers, http://www.nafsa.org/findresources/Default.aspx?id =31479.

effort to try to get at least one ad in each recruitment effort to meet DOL guidelines - training of department chairs and administrators only lasts as long as their memory or tenure in the position. DOL requires at minimum one print advertisement or one thirty-day electronic advertisement in an online national professional journal.[48]

Special Handling grew from a 1976 congressional amendment to the Immigration and Nationality Act. The congressional committee report notes that Congress was:[49]

> particularly troubled by the rigid interpretation of this section of law as it pertains to research scholars and exceptional members of the teaching profession. More specifically, the Committee believes that the Department of Labor has impeded the efforts of colleges and universities to acquire outstanding educators or faculty members who possess specialized knowledge or a unique combination of administrative and teaching skills.

As a result, PERM Special Handling was created to allow colleges and universities to sponsor foreign nationals as permanent employees in teaching positions, as long as the foreign national is deemed *best qualified* for that position (rather than the standard for all other jobs from dishwasher to doctor, which is that the employer cannot find a minimally qualified U.S worker). This category is an excellent option for academics who do not qualify for Outstanding Researcher or other employment-based categories, or for those who do not want to prepare a research portfolio.

Note, however, that the employer must pay all costs and fees associated with the PERM labor certification stage. This includes attorney's fees and the costs of any advertisements or audit response.[50] For this reason, some institutions only sponsor in the Outstanding Researcher category so the employer is not required to pay. Institutions will have to balance the cost of labor certification and the ability of its employees to reach the relatively higher Outstanding Researcher criteria.

There are many ways that the recruitment in the labor certification context differs from traditional recruitment for academic institutions. In our experience, private sector employers do not hesitate to "test the labor market" for green card purposes. However, some academic departments react viscerally to any kind of re-advertisement, and we have heard the term "sham search." In these cases, we encourage institutions to review its regular recruitment carefully to avoid re-recruitment, and we also note that the "test of the labor market" is part of the federal regulations to protect U.S. workers.

To use the original recruitment, the special handling labor certification application must be filed within eighteen months of the date on the job offer letter.[51] Therefore, the institution's immigration gatekeeper should screen all new hires for permanent residence sponsorship to avoid having to re-recruit.

A Few Simple Guidelines for Advertising:

- Make sure the ad is run in at least one national professional journal. If not run in print, online advertisements must be posted for at least thirty calendar days on the journal's website.
- Keep evidence of the start and end dates of the advertisements placed and the text of the ad by printing a copy of the ad from the journal's website on the first and last day of position, or by saving copies of invoices or receipts that show the ad text and detail the length of time that the ad was posted.
- For print ads, save copies of all tear sheets. The tear sheet must contain the name of the publication and the date it was published.
- If you may be hiring more than one person, put "Multiple Positions Available" in the ad.
- Think carefully about the minimum requirements before listing them in the ad.
- Would you ever hire someone with fewer qualifications? Have you had someone in the position before with fewer qualifications? If you would consider a candidate who is A.B.D. ("All But Dissertation") for a position where a Ph.D. is preferred, make sure to put Ph.D. or A.B.D. in the ad. The individual must be qualified for the job described in the ad at the time they begin work.
- The ad MUST contain classroom teaching as a part of the job description.

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[48] 20 C.F.R. § 656.18(b).

[49] H.R. Rep. No. 94-1553, at 6083 (1976), *discussed in* Dearborn Public Schools, 91-INA-222, 5 (BALCA Dec. 7, 1993) (en banc), *available at* www.oalj.dol.gov (input "Dearborn Public Schools" in "Employer/Respondent" field).

[50] 20 C.F.R. § 656.12(b).

[51] 20 C.F.R. § 656.18(c).

- Be cautious concerning the usage of the word "preferred." If the ad stated the minimum requirements to be "Ph.D. in Education preferred," the Department of Labor may treat this preference as a requirement, and deny an application on this technicality for an employee who was hired without having completed a Ph.D. first.
- The advertisement must be less restrictive rather than more restrictive.
- DOL regulations do not require that the ad be very long or detailed. The ad must contain only the job title, teaching duties, minimum requirements, work location, employer name, and specific address or method by which to send applications.

Issue #7: How Do Federal Tax Issues Fit into Institutional Immigration Policy?[52]

Perhaps the only area counsel avoids as readily as immigration is international taxation of foreign nationals (or nonresident alien taxation). The frequency and results of recent IRS audits suggest that many academic institutions do not comply with the complicated reporting and withholding issues in connection with payments to nonresident aliens. In the current environment, tax issues for foreign students and scholars can impact their immigration situation. Given the interplay between tax and immigration rules affecting foreign nationals, institutional counsel should ensure that the institution has an international tax office or international tax manager who is well-versed in international tax regulations specifically as they apply to international students, scholars (in any visa category), vendors and visitors.

Practice Pointer: The issue of nonresident alien tax compliance can become complicated quite quickly. Because the institution's tax liability can be substantial when making payments to foreign nationals who may be nonresident aliens, a comprehensive plan for tax compliance must be in place that focuses on: (i) identification of nonresident aliens; (ii) review of tax withholding and reporting issues; (iii) effective communication among departments/programs within a decentralized institution; and (iv) fair and cross-culturally sensitive treatment of the foreign nationals to whom payments will be made.

Issue #8: Volunteering

Volunteering often triggers a complex intersection of workers' compensation law, state wage and hour rules, and immigration law. Common examples include a foreign professor inviting family or friends to "work" in a lab in the United States for a summer, or a dependent spouse who does not have work authorization. Colleges and universities must be cautious of volunteerism as a means to circumvent paying a productive worker. Certain nonimmigrant visas are amenable to volunteering—*e.g.*, B-1 and visa waiver-based training or observation for a brief time—but whether volunteering is acceptable really is based on the underlying nonimmigrant status. In general, volunteering will not be acceptable under state wage and hour law if the activity would ordinarily have been a paid position.

The J-1 intern category is one possible solution. If the university does not have that classification as part of its own J-1 program, a nonprofit intermediary can be used.[53] The J-1 intern category involves some expense and paperwork, but is a much cleaner solution to the volunteering question.

Issue #9: Employee benefits issues

Institutional counsel should maintain interactive relationships with human resources departments for the purpose of compliance with employee benefit requirements. Eligibility for employee benefits can vary based on a foreign national's visa status and the position the individual holds at the institution. This section provides some important examples related to specific requirements impacting H-1B and J-1 status holders.

The American Competitiveness and Workforce Improvement Act (ACWIA)[54] provides explicit guidance related to H-1B visa holders' eligibility for employment benefits. The act requires employers to offer benefits to H-1B nonimmigrants on the same basis, and in accordance with the same criteria, as to the employer's U.S. workers. The regulations require that employers retain, as documentation of the benefits attestation, a copy of benefit plan descriptions provided to employees, a copy of the benefit plans themselves

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[52] This section is an overview of materials that are treated more fully in Eleanor Pelta & Donna E. Kepley, Immigration and Tax – At the Crossroads: Immigration Issues for Tax and Payroll Professionals, Arctic International LLC (2d ed. 2004), and Donna E. Kepley, Nonresident Alien Tax Compliance: A Guide for Institutions Making Payments to Foreign Students, Scholars, Employees, and Other International Visitors, Arctic International LLC (13th ed. 2008).

[53] J-1 intern programs are listed at http://j1visa.state.gov/participants/how-to-apply/sponsor-search/?program=Intern.

[54] American Competitiveness and Workforce Innovation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681–641.

and any rules used for differentiating benefits among groups of employees, evidence as to what benefits are actually provided to U.S. workers and H-1B nonimmigrants, and the benefit elections made by those employees.[55]

In practice, the regulations referenced above relate to welfare benefits like medical, dental and vision insurance as well as leave benefits. Although institutions generally must pay H-1B employees the prevailing wage, even during non-productive time, no payment is required during a worker's voluntary absence from work or during a hospitalization.[56] However, an employee's entitlement to pay during a period of family and medical leave is to be determined by the employer's established policy for providing pay when the employee is on other forms of leave (paid or unpaid, as appropriate).[57] It is important to draw the distinction, though, that if the leave is employer-initiated (i.e., the leave is related to a suspension or other disciplinary action), the employer must pay the full salary during the leave period.[58]

Counsel should also be aware of welfare benefit requirements as they specifically relate to employees in J-1 status. Effective May 15, 2015 J-1 program participants and their dependents must maintain insurance coverage that meets the following minimums: $100,000 per accident or illness; repatriation of remains in the amount of $20,000; coverage of expenses associated with the medical evacuation of the exchange visitor to his or her home country in the amount of $10,000; and a deductible not to exceed $500 per accident or illness. In addition, the insurance policy must be underwritten by an insurance corporation with a specific industry rating.[59]

Recently, in consideration of changes impacting employers under the Patient Protection and Affordable Care Act,[60] many institutions have begun to include high deductible health plans into the available medical insurance options that are offered to their employees. Individuals in J-1 status are not eligible to participate in these plans because the deductibles exceed the $500 limit imposed by the J-1 regulations. Enrollment in a high deductible plan could jeopardize an individual's J-1 status.

The aforementioned examples constitute only a few of several distinctions impacting foreign national employees. Counsel should actively participate in the institution's benefit renewal and policy creation processes to ensure that human resources departments are maintaining compliance with a myriad of interwoven federal regulations related to employment and immigration.

Conclusion

This article has identified some of the most important issues that arise in the context of handling immigration cases for academic institutions. While this is by no means a complete list, it provides college or university in-house counsel some guidelines on creating solid policies related to immigration sponsorship that will avoid potential liability.

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[55] 20 C.F.R. § 655.730.

[56] *See* Wage and Hour Division, U.S. Dep't of Labor, Fact Sheet #62I: *Must an H-1B employer pay for non-productive time?*, http://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62I.pdf.

[57] 29 C.F.R. § 825.209.(h).

[58] 20 C.F.R. § 655.731(c)(7).

[59] 22 C.F.R. § 62.14(b). The insurance policy must be underwritten by an insurance corporation with a specific industry rating: McGraw Hill Financial/Standard & Poor's Claims paying ability rating of A- or above, or a Moody's Investor Services rating of A3 or above; an A.M. Best rating of "A-" or above; an Insurance Solvency International, Ltd. (ISI) rating of "A-1" or above; a Standards and Poor's Claims Paying Ability rating of "A-" or above; or a Weiss Research, Inc. rating of B+ or above. Alternatively, the policy must be backed by the full faith and credit of the government of the exchange visitor's home country.

[60] Pub. L. No. 111-48, 124 Stat. 119 (2010).

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