

TOPIC:

Foreign Faculty in H-1B Status: Understanding the Basics

INTRODUCTION:

Colleges and universities often hire foreign nationals to fill faculty positions. Most foreign nationals who enter the United States for this purpose enter as nonimmigrants in temporary status. There are more than twenty types of nonimmigrant status, each having its own rules about length of stay and permissible activities [1]. The most commonly used for university faculty is H-1B status.

This NACUANOTE addresses the questions commonly raised in connection with applying for and maintaining H-1B status, and discusses policy decisions inherent in the decision to hire foreign faculty in this status.

DISCUSSION:

Hiring Foreign Faculty

Foreign nationals must have approval from at least one U.S. government agency to be present in the United States, usually the United States Citizenship and Immigration Services (USCIS) and/or the Department of State (DOS). This approval specifies the person's status, usually visitor, student or employee [2].

H-1B status is reserved for individuals who fill professional-level jobs in specialty occupations that require a minimum of a bachelor's degree [3]. Most H-1B faculty come to a university either from their PhD or masters degree program as an applicant for "change of status" from student (F-1 or J-1, to H-1B) or from employment at another university (or from industry as an "extension of status" applicant).

H-1B work authorization is strictly limited to employment by the sponsoring university [4]. Thus, the fact that an individual is already employed by another university in H-1B status does not relieve a new employer from taking the necessary steps to assist the foreign national with maintaining this status. The employing university must file several forms with the U.S. Department of Labor (DOL) and USCIS [5], in addition to paying all of the fees, including government filing and attorney fees, if one is used [6].

Universities do not have to hire a foreign national who requires immigration status sponsorship. While universities cannot discriminate on the basis of citizenship or national origin, they are not required to either hire an employee who is not authorized to work in the United States or assist the employee in obtaining such authorization. In fact, an employer may indicate in a position announcement that it will hire only applicants authorized to work in the United States.

Once the decision has been made to hire a foreign national, a university must make sure that the individual is eligible for H-1B status [7]. The university can do this by reviewing the prospective faculty member's immigration

documents, as follows:

Visa. A visa is a document that allows an individual to enter a particular country in the status and during the period identified on the visa. In most cases, a U.S. visa must be issued at a U.S. embassy or consulate in the individual's native country. It is attached to the passport using high tech security procedures. A person whose visa has expired is often in the United States legally, because the visa expiration date signifies the last date the person may enter the United States, but not the date by which he must leave.

I-94. The I-94 is a small white card inserted in the foreign national's passport upon entry to the United States. It indicates the date of and status upon entry, as well as the authorized period of stay.

I-20. An I-20 is a form issued to a foreign student by a Student and Exchange Information Visitor Information Service (SEVIS) officer, indicating details of the student's matriculation, including expected graduation date, and specifying any authorized employment.

Notice of Action. A Notice of Action is a document printed on 8-1/2 x 11 safety paper. Several types of USCIS "Actions" are memorialized on these documents; most relevant for determining immigration status is an "Approval Notice," which indicates the name of the employer, the employee, and the authorized status and period of stay. The authorized period of stay indicated on the Approval Notice supersedes, and usually extends, the dates listed on the visa and I-94 [8].

Policy Implications

Colleges and universities should formulate consistent policies with respect to hiring foreign nationals who need assistance with employment authorization. Issues to be resolved include: (1) At which point in the faculty search process should inquiry be made about whether such assistance will be necessary? (2) Should the decision whether to sponsor new hires for H-1B status be made globally or on a case-by-case basis? (3) Should the necessary fees and expenses be allocated to the new faculty member's department or elsewhere within the university system? (4) Will the application process be done internally, or through outside counsel?

Hiring arrangements should not be finalized, nor should human resources or other personnel begin the H-1B application process, without knowing a foreign national's immigration status, as the status or lack thereof may have significant bearing on the application's approval.

H-1B Status Limitations

H-1B status imposes certain limitations on the foreign national's length of employment, ability to perform duties not listed on the original job description, and ability to travel abroad on business or for pleasure. It also impedes the university's ability to furlough or terminate the foreign national's employment as a cost-cutting measure.

A. Duration Limitations

Generally, the government grants H-1B status in three year increments. But an employee cannot remain in H-1B status for a period exceeding six consecutive years [9]. Once an employee exhausts his six-year period and is ineligible for any extensions, he must spend a year outside of the U.S. before being eligible to re-enter the U.S. in "H" status. However, the employee can often remain in H-1B status and avoid leaving the U.S. if he begins the process of applying for permanent residence no later than his fifth anniversary in H-1B status [10].

Policy Implications

To avoid the risk that faculty members will have to leave the United States, employers should keep a close eye on H-1B employees' status expiration dates, and begin assisting these employees with the permanent residence application process well before the fifth anniversary of the H-1B status.

B. Multiple Employers/Changing Employers

Most foreign nationals employed in H-1B status may change employers and even work for more than one employer at the same time. But each employer must separately petition and obtain approval for the employee to work at its institution. The employee may begin working for the new employer as soon as the new employer files an H-1B petition with USCIS [11].

This means that, if College A, within a public higher education system is the named employer of an H-1B employee, and College B within the same system hires her to do a similar job, College B must still file a separate H-1B petition with USCIS.

Policy Implications

Employers must be certain that human resources personnel are well-trained with respect to the intricacies of preparing I-9 Employment Eligibility Verification forms. Untrained personnel are likely to misunderstand that the authorized dates of employment on an Approval Notice are employer-specific, and are only transferable under the strictly defined circumstances of H-1B portability. Repeated I-9 violations can lead to serious consequences, up to and including criminal prosecution, for the university and its personnel.

C. Volunteer Work

Sometimes researchers in H-1B status volunteer to teach a course, without salary, in order to gain teaching experience. Although this practice seems to benefit both the researcher and the university, if teaching was not listed in the job description approved by DOL and USCIS, the researcher is not authorized to engage in this activity [12]. The university must then file an amended application, and again pay all the associated fees.

Policy Implications

If the H-1B employee's department often assigns teaching duties to researchers, these duties should be listed in the original H-1B application package in language indicating that the teaching will be intermittent or "may be" required. In the alternative, supervisors need to know that H-1B employees may perform only the duties listed in their application package, and that any change in duties requires a new application package.

D. International Travel

Foreign nationals who hold unexpired H-1B visas will be readmitted to the U.S. after international travel, with only rare, national-security-related exceptions. But international travel is an issue fraught with perilous complexity and each individual's situation should be carefully evaluated on a case-by-case basis before embarking.

Both the employer and the foreign national must be made aware that only an H-1B visa, and not an H-1B approval notice, will allow the employee to return to the United States in H-1B status [13]. With an approval notice in hand, many foreign nationals can obtain an H-1B visa fairly quickly by visiting the U.S. consulate in their home country. But foreign nationals run the risk of having their visa applications denied or held up past the desired date of return at the U.S. consulate in their home country [14]. One thing universities can do in these situations is try to

engage the U.S. Senator or Congressman from the university's state to make direct contact with the U.S. State Department. Another possibility is reaching into the university's social network to determine whether it has a connection to the U.S. ambassador or charge d'affaires at the embassy involved who can sometimes, but not often, help resolve the problem.

Another issue that can arise with respect to international travel occurs when individuals in H-1B status have pending applications for permanent residence. In many cases, these individuals can easily apply for and obtain "advance parole" documents, which allow international travel without a visa. For example, a faculty member from Asia or Africa may wish to travel to Europe to attend a professional conference. Obtaining an advance parole document as a part of the permanent residence process will eliminate this employee's need to return to the U.S. consulate in his home country to obtain a visa.

This ability to travel freely while the application for permanent residence is pending can often lead to misunderstandings about an employee's eligibility to work in the United States. Once the employee returns to the United States using an advance parole document, and not an H-1B visa, that employee is not in H-1B status, even though the approval notice he obtained through the H-1B application process indicates a term of approval beyond the date of return to the United States. The employee who has returned using an advance parole document is now in the United States as an "adjustment applicant", that is, as an applicant for permanent residence. He may work only if he has obtained an EAD, for which he is eligible through his status as an adjustment applicant, not as an individual in H-1B status [15].

Policy Implications

Since universities cannot bar their employees from traveling abroad because of immigration status, they should put procedures in place that ensure that the employer and employee fully understand the immigration consequences of the trip. Human resources or other personnel must be trained to spot the issues that may delay or prevent visa issuance, and be prepared to consult with immigration counsel when these issues are present.

In addition, all H-1B employees should be counseled, in writing, that they should seek immigration advice before international travel, so that the university can avoid blame for consequences of the employee's poorly thought out decisions.

E. Furloughing/Terminating H-1B Employees

The economic downturn has forced many colleges and universities to reduce their payroll by furloughing and, in some cases, terminating their employees. In an economic climate in which all are being asked to sacrifice, it may seem ironic that foreign nationals with H-1B status are in some ways insulated from the impact of these cost cutting measures. H-1B faculty can be furloughed, or even terminated, but these actions may not result in the cost savings initially sought. Universities must notify USCIS of most changes in an H-1B employee's employment circumstances, including furloughs and terminations, by filing a new application package, including all applicable fees [16]. If the employer fails to do so, the DOL can hold the employer liable for the employee's salary [17].

If the employee is terminated prior to the end date of his H-1B status, the employer is liable for the employee's transportation back to his home country [18]. But, if the employee finds another position in the United States and does not return to his home country, the employer is not required to pay associated transportation costs.

Policy Implications

As noted above, applicable regulations make it much more expensive to furlough or terminate an H-1B employee

than a US employee. Each university must make its own cost-benefit analysis when considering a policy for the current economic circumstances.

Either way, an H-1B employee's supervisor must document, for both DOL and USCIS, most changes in the employees' employment circumstances.

TN versus H-1B Status

TN status is available to Canadian and Mexican citizens under NAFTA [\[19\]](#). The chief advantage for an individual in TN status is that he may make brief visits of less than thirty days to his home country as many times as desired without having to obtain a new TN or other nonimmigrant visa. Other advantages include:

Duration: TN status is available for up to three years at a time, and can be renewed indefinitely [\[20\]](#); and

Ease of Acquisition: TN status can be quicker and less expensive than H-1B status to obtain, especially for Canadians, who, armed with the appropriate documentation, can get TN status approval almost instantly at any major Canadian airport or land crossing into the United States [\[21\]](#).

TN status has no real disadvantages, except that it cannot be renewed once the faculty member applies for permanent residence, so the timing of a permanent residence application, if desired, must be carefully considered.

CONCLUSION:

Petitioning for H-1B status on behalf of foreign nationals is usually the best way for universities to employ them as faculty members. The status can be obtained for up to six years, and can be followed by permanent residence if the employer wishes to continue to sponsor the employee's status in the United States. Applications on behalf of faculty members are fairly straightforward, as their positions are easily characterized as specialty occupations. Universities should set policies for the issues that commonly arise during the H-1B application process and while faculty members are employed in H-1B status.

FOOTNOTES:

FOOTNOTES

FN1. Mark B. Rhoads & Helen L. Konrad, [Immigration Law: Issues for Faculty and Staff, 2007 Update](#) NACUA, 2007, at 1. Other types of immigration status sometimes used for university employees are: B-1 status for paying honoraria to foreign nationals lecturing or attending meetings of university boards or committees; F-1 student status for allowing students to obtain practical training in their fields of study; J-1 status for exchange visitors, short-term scholars, medical residents, and others; O-1 status for individuals of extraordinary ability; and TN status for citizens of Canada and Mexico under the NAFTA Treaty.

FN2. The approval also specifies an ending date, except in the case of F-1 (student) or J-1 (trainee) status. Instead of a specific ending date, students and trainees generally have permission to remain in the

United States for the “duration of status,” a term of art loosely meaning making “reasonable progress towards their degree”. The university’s Student and Exchange Visitor Information System (SEVIS) officer must report a student’s departure from the school to USCIS, whether the reason for leaving is graduating, transferring to another school or dropping out. Once the report is submitted, the former student is no longer in status, and therefore no longer allowed to remain in the United States, unless he has taken steps to remain through some other means. Students have a 60-day grace period to leave, but can usually be authorized to remain for a year beyond graduation by obtaining an optional practical training employment authorization document (OPT EAD). The OPT EAD may only be obtained with the assistance of the graduating student’s SEVIS officer. An individual with an OPT EAD is still in F-1 status, subject to continuing supervision by the SEVIS officer. [Appendix A](#).

FN3. An H-1B classification may be granted to an alien who will perform services in a specialty occupation which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree or its equivalent as a minimum requirement for entry into the occupation in the United States, and who is qualified to perform services in the specialty occupation because he or she has attained a baccalaureate or higher degree or its equivalent in the specialty occupation. 8 CFR [§214.2\(4\)\(i\)\(A\)\(1\)](#).

FN4. See, generally 8 CFR 214.2(h).

FN5. First, the employer must submit an online Labor Condition Application (“LCA”) to the Department of Labor (DOL), available at <http://icert.doleta.gov/>.

Once the LCA application has been certified, the university must fill out and submit to USCIS the Petition for Nonimmigrant Worker (Form I -129), available at <http://www.uscis.gov/files/form/i-129.pdf>, with the H Classification and H-1B Data Collection and Filing Fee Exemption Supplements attached. These forms provide information about the employer, employee and position to be filled, and help the employer determine whether it is exempt from a portion of the filing fees. The university must also post a notice for 10 days announcing that it is hiring an H-1B worker in two conspicuous places.

FN6. The current fee for filing the Form I-129 is \$320, plus an additional \$500 “fraud detection” fee. These should be filed as two separate checks, rather than a single check for \$820. USCIS charges \$1,000 for expedited processing, which is necessary only if the application must be processed within fifteen (15) days. 8 CFR [§ 103.2\(f\)](#).

FN7. A foreign national’s H-1B application will be denied if the person has failed to maintain immigration status. A person fails to “maintain status” if he has overstayed or otherwise violated his status. If he has overstayed his F-1 or any other status, he will have to leave the United States and obtain an H-1B visa in his home country before he will be able to return to the United States in H-1B status. If he has overstayed between 181-364 days, he is statutorily barred from returning to the U.S. for at least three years. If he has overstayed by a year or more, he is statutorily barred from returning for at least ten years. Even if his overstay is less than 180 days, he must demonstrate good cause for the overstay to the consular officer, or the officer may refuse to exercise the discretion necessary to issue a visa. See INA § 212(a)(9)(B)(i).

FN8. See redacted samples of a visa, I-94, I-20 and Notice of Action Appendix [B](#), [C](#), [D](#) and [E](#).

FN9. For example, an H-1B employee may work as a visiting professor at a foreign university, staying outside of the United States for six months or so. If he keeps careful track of this time, he will be able to demonstrate that even though USCIS authorized him to be in H-1B status for a total of six years, he in fact was only present in the United States in H-1B status for five and a half years. He will then be eligible for an additional six months of H-1B status after the ostensible six year period.

FN10. H-1B status can be extended in one-year increments beyond the normal six-year maximum if the

employee has started the permanent residence application process at least 365 days before his sixth anniversary in H-1B status. See Section 106(a) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. No. 106-313, §§101–16, <http://history.nih.gov/research/downloads/PL106-313.pdf> 114 Stat. 1251, 1251–62 (8 U.S.C. 1184 note). If the employee cannot complete the permanent residence process because he is from a country such as China or India that is affected by quotas, the H-1B status can be extended in three year increments. See INS Memorandum, M. Pearson, “Initial Guidance for Processing H-1B as Affected by AC21” (June 19, 2001), published on AILA InfoNet at Doc. No. 01062031 (posted June 20, 2001), at. 4. This memorandum sets forth policy regarding AC21, for which regulations have not yet been promulgated. A copy is attached as [Appendix F.](#), courtesy of the American Immigration Lawyers Association.

FN11. H-1B portability has limitations. A provision unique to H-1B extensions allows the employee to work for 240 days while awaiting approval of the new employer’s H-1B petition, with no adverse immigration consequences. But, if USCIS ultimately denies the H-1B application, the employee will be deemed to have been “out of status” during the 240 days, and must immediately leave the country. While this “innocent” overstay is not be a bar to re-entry, it will always be an issue listed in the employee’s immigration history, and will cause inevitable delays during the employee’s consular processing and return from international travel.

FN12. See, generally 8 CFR [§214.2](#) (h).

FN13. See discussion of various immigration documents under [Hiring Foreign Faculty](#), *supra*.

FN14. This is particularly true for individuals with degrees in the fields of chemistry or engineering, for whom security checks by the U.S. consulate, called “Visa Mantis” checks, can delay the issuance of visas for weeks or sometimes months.

FN15. A foreign national can hold both “adjustment applicant” and H-1B status at the same time. A university might adopt this “belt and suspenders” approach to ensure that the foreign national remains legally employed. But this approach can be costly because the regulations require the university, not the faculty member, to absorb the cost of renewing the faculty member’s H-1B status during the pendency of the adjustment application.

FN16. 8 CFR [§ 214.2\(h\)\(11\)\(i\)\(A\)](#).

FN17. 20 CFR § 665.731(c)(7)(i); 8 CFR 214.2(h)(11)(i)(A); see also [Administrator, Wage and Hour Division v. Ken Technologies, Inc.](#), 2003-LCA-00015 July 18, 2003.

FN18. 8 CFR [§214.2](#) (h)(4)(iii)(E).

FN19. 8 § CFR [§214.6](#)(d).

FN20. 8 § CFR [§214.6](#)(e).

FN21. Canadians do not have to get a visa in advance. They can apply at the U.S. port of entry, which is actually in Canada at certain Canadian airports, with an employment offer letter, detailed job description, and documentation of the required education and experience. Mexicans must take the extra step, before they travel, of obtaining a visa from one of the U.S. consulates in Mexico. 8 CFR §214.6(d) (3).

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RESOURCES:

Statutes:

- [Immigration and Nationality Act \(INA\)](#)

Regulations:

- [8 CFR § 214\(h\)](#)

U.S. Government Resources:

- [US Citizenship & Immigration Services](#)
- [US Department of Labor](#)
- [US Department of State](#)

Forms

- [USCIS Forms](#)
- [Labor Condition Application \(LCA\) Form](#)
- [O*NET Online \(occupational information\)](#)
- [Foreign Labor Certification Data Center Online Wage Library](#)

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- [Immigration Law: Issues for Faculty and Staff, 2007 Update](#)

Other Resources:

- [American Immigration Lawyers Association website](#)

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