Imigration Dos and Don'ts

IMMIGRATION “DO’S” AND “DON’TS” – INDEPENDENT SCHOOL SETTING

U.S. immigration laws impact schools in many ways, some of which school administrators may not necessarily be aware. The Department of Homeland Security's Bureau of Immigration & Naturalization Services ("BCIS", f/k/a "INS") administers the immigration laws and regulations relevant to school administration. The following is a brief discussion of some of the immigration-related matters of which administrators should be aware.

Acceptance of foreign-born students

Foreign born students are permitted to attend private schools, and, under some circumstances, public schools. For purposes of this discussion, we will focus on private schools. The following is a list of visa holders which private school administrators may encounter:

- dependents of individuals authorized to work in the U.S. in L-1 visa status (inter company transferees)
- H-4: dependents of individuals authorized to work in the U.S. in H-1 or H-2 visa status
- J-2: dependents of individuals authorized to study in the U.S. in J-1 status
- F-1: students
- F-2: dependents of individuals authorized to study in the U.S. in F-1 status

Other visa classifications exist, but these are the most common you may encounter.

Becoming a Designated School authorized to issue Form I-20 Certificate of Eligibility

Some of you may already be designated by the BCIS with authority to issue Form I-20 “Certificate of Eligibility.” Form I-20 certifies the admission of a student to a program of study, and, in conjunction with evidence of financial ability and an unabandoned permanent residence abroad, establishes eligibility for the student visa (F-1 visa classification) or for student status in the U.S. Schools that may be approved for attendance by F-1 students include colleges, universities, some community or junior colleges, and seminaries, conservatories, academic high schools, elementary schools or institutions that provide language training, instruction in the liberal arts or fine arts, instruction in the professions, or instruction or training in more than one of these disciplines.

It should be noted that the absence of the BCIS' approval for a school to issue Form I-20s does not specifically preclude that school from enrolling a nonimmigrant student who holds another status or an individual who may even be out of status. Neither is it a specific violation of the regulations for an approved school to enroll individuals not otherwise authorized under the immigration laws for full- or part-time study. However, many schools have established administrative policies that preclude enrollment of such individuals or deny them certain benefits such as in-state tuition rates, the ability to live on-campus or acceptance into highly competitive academic programs.
Recruiting foreign-born workers

Foreign-born workers may apply for work with your organization; however, not all applicants may be qualified or authorized to commence work with your organization. U.S. anti-discrimination laws prohibit an employer's refusal to hire an individual (or any other adverse employment decision, for that matter) on certain bases, including, but not limited to, his or her race, sex, national origin, ancestry or religion. Accordingly, it is important to train all employees with interviewing and hiring authority on the basics of proper interviewing techniques and permissible questions. Any interview question which tends to elicit a person’s race, national origin, ancestry or religion could form the basis of a discrimination charge against the school or organization.

Hiring foreign-born workers

Form I-9. Did you know that every time a school or any other employer hires an individual, regardless of the position and expected duration of the employment, and irrespective of the employee’s country of origin, the employer is required by U.S. immigration laws to properly complete BCIS Form I-9 to confirm the employee’s authorization to work in the U.S.? The form is available on the BCIS’ internet website (www.bcis.gov) or from our offices. The form has specific instructions, and must be completed within 3 business days of the hire. It is designed to confirm whether the person is legally authorized to work in the U.S.

Failure to properly complete and maintain Form I-9 could result in grave consequences for employers, including monetary penalties (fines) and criminal penalties (imprisonment). The Department of Labor and the BCIS both have jurisdiction over I-9 compliance. Either has the authority to conduct a compliance audit of an employer’s I-9 records. Typically, the auditor will first contact the employer in writing to schedule a mutually convenient time for the audit. However, auditors have, on occasion, “dropped in” on an employer and asked to review the employer’s I-9s on-the-spot. In such a case, if the auditor does not have a warrant, the employer may invoke its statutory right to 3 days’ prior notice and reschedule the audit with the auditor. In some cases, the 3 day period can be invaluable, affording the employer time to contact legal counsel and organize and review all I-9s prior to their disclosure to the critical eye of the auditor.

The employer-sponsored immigration process

Some foreign-born individuals seek employment as a means to remain in the U.S. on a permanent basis. Typically, an employer will be asked to sponsor the "nonimmigrant" or "immigrant" visa of a skilled worker possessing at least a bachelor’s degree (such as teachers, administrators and the like). The following is a brief overview of the typical progression of employment-sponsored immigration:

F-1: Students in F-1 nonimmigrant status often have the option of pursuing “Optional Practical Training” for up to twelve months after graduating with their bachelor's or higher degree. The F-1 status of a student engaging in Optional Practical Training is extended beyond the graduation date for up to twelve months, and the student receives employment
authorization from BCIS to work in his or her field of study for that extra period of time. Accordingly, you may receive job inquiries from students seeking teaching experience with your organization as their Optional Practical Training. Prior to the expiration of the Optional Practical Training, an F-1 student must find a sponsor for his or her change to a new employment-based nonimmigrant visa classification in order to remain in the U.S. past the F-1 expiration. Without the timely filing of a petition to change nonimmigrant status, the individual must leave the U.S.

H-1B: The most common type of visa sought by nonimmigrant workers in the educational field may be the H-1B. To be eligible for an H-1B, an individual must possess a bachelor's degree or its equivalent in a given field, and the job offered must legitimately require that particular type of degree. This category is especially useful for recruiting foreign-born teachers with bilingual skills or other unique certifications such as special education.

If an F-1 student engaging in Optional Practical Training desires to change to H-1B status in order to continue working, the application must be filed in plenty of time to allow for its prosecution and approval. BCIS’ adjudication of H-1B petitions can take from 2 weeks to 4 months. Once the F-1 status expires, the individual cannot continue to work until the H-1B petition is approved.

You may also encounter an individual who is seeking work but who is already in H-1B status. Be careful in such a situation. H-1B status is employer-specific. This means that the individual in H-1B status is only authorized to work for the petitioning employer. If the H-1B holder seeks to change jobs, the new employer must file a new H-1B petition before the individual may start working for the new employer. If the H-1B holder starts working for the new employer before the new petition is filed, he or she may be considered to have violated his or her status, and will likely need to leave the U.S. in order to obtain a new H-1B visa once the new petition is approved.

Overall, aliens are limited to a maximum eligibility period of 6 years in the U.S. in H-1B status. At the end of the 6 years, the person must either adjust status to that of permanent resident or leave the U.S. for at least one year to re-set the clock and once again become available for H-1B nonimmigrant status. The H-1B status may be extended in additional one-year increments past the 6th year of eligibility in limited circumstances.

Permanent residency: Aliens employed by U.S. employers will often seek employment-based sponsorship for permanent residency. U.S. employers are not obligated to sponsor an alien for permanent residency, but it may be a necessary or desirable step in order to retain talented workers. Permanent residency is a process consisting of three separate stages which can take, in the aggregate, between 2 and 5 years to complete: Permanent Labor Certification, the Alien Petition, and the “Adjustment of Status” process. Permanent residency may be difficult to obtain for foreign-born teachers of subjects which are not difficult to fill in the U.S. However, permanent residency may successfully be obtained for any type of teacher if the employer can demonstrate an inability to attract a sufficient number of qualified and willing U.S. workers for a particular job category.
Immigration services available from Hinshaw & Culbertson

This firm operates a full-service business immigration practice, and is available to assist all employers with immigration-related issues, including, but not limited to, the following:

- Assistance with becoming a school designated to issue Form I-20
- Internal auditing and consulting with respect to proper I-9 procedures
- Assistance in the event of an BCIS or Department of Labor raid or audit
- Application and processing for nonimmigrant visas, including but not limited to H-1B petitions
- Application and processing for permanent residency
- Obtaining visas and extensions of nonimmigrant visas for family members of employees
- Day-to-day counseling with respect to any immigration-related questions or issues which may arise in the workplace

For more information or to discuss a particular case, please call:

LEO J. ATHAS, ESQ.
Hinshaw & Culbertson
(312) 704-3246

This material was prepared by:

PENELOPE M. LECHTENBERG, ESQ.
Hinshaw & Culbertson
(815) 490-4916

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