



NACUANOTES

National Association of College and University Attorneys September 28, 2017 | Vol. 16 No. 1

TOPIC:

TEN KEY IMMIGRATION CONCEPTS FOR COLLEGE & UNIVERSITY COUNSEL

AUTHORS^[1]:

Dan Berger, Partner, Curran & Berger, LLP
James DiStefano, Director of Human Resources, Sanford-Burnham Medical Research Institute
Stephen Yale-Loehr, Professor of Immigration Law Practice, Cornell Law School
Dahlia French, Managing Director, Int'l Employment Services, TTU Health Sciences Center
David Wilks, Business Immigration Attorney, Miller Mayer LLP
Ariel Dickerman, Paralegal, Curran & Berger, LLP

INTRODUCTION:

Academic institutions often delegate immigration matters to the international office, outside counsel, or the human resources (HR) office. For those who oversee them or need to understand their work, this NACUANOTE outlines ten of the most common immigration concepts.^[2]

DISCUSSION:

1. Identify an Immigration Gatekeeper

Many institutions have found it valuable to designate an “immigration gatekeeper,” with sufficient institutional authority and resources, to maintain a sound compliance program; keep track of changes to immigration laws and procedures; communicate those changes to the relevant officials on campus; and be the point person for government visits to campus. The gatekeeper is

usually an individual in Human Resources or the International Student/Scholar office who has some expertise and experience, and actually handles visa matters day-to-day.

While it is rare for the gatekeeper to be an attorney, it is almost always the case that the gatekeeper oversees the provision of legal services both to the institution and to individuals. A gatekeeper streamlines and makes more efficient a complex set of issues, and should be sensitive to the challenges of overseeing or providing legal or quasi-legal services. Visa services can involve complicated issues of unauthorized practice of law; financial obligations when visa petitions are signed; signed statements under oath; audits and site visits from a variety of U.S. government officials; and significant liability if a student, faculty, or staff member is present, studying, or working without proper authorization.

Visa processing involves a host of federal agencies, with three agencies performing primary functions:

- U.S. Department of Homeland Security through Immigration and Customs Enforcement (ICE) oversees the student visa program, Customs and Border Protection (CBP) regulates our borders at the airports and other points of entrance, and U.S. Citizenship and Immigration Services (USCIS) grants immigration benefits;
- U.S. Department of State issues visas at U.S. embassies and consulates and oversees the J-1 exchange visitor program;
- U.S. Department of Labor protects U.S. workers in some of the most common employer-sponsored work visas and permanent residence applications.

In particular, the gatekeeper should ensure that the person signing immigration forms on behalf of the institution is aware of the legal significance of the form. For example, the Form I-129 instructions^[3] refer to criminal penalties for “knowingly and willfully misrepresenting” any material fact.^[4] A signature also “certifies” compliance with the Department of Commerce’s export control and Department of State’s international traffic in arms regulations.^[5]

President Trump, in a series of Executive Orders, has called for more intense scrutiny of visa programs.^[6] Therefore, a robust compliance program, spearheaded by the immigration gatekeeper, is essential.

2. Ensuring I-9 Compliance and Proper Work Authorization

The Immigration Reform and Control Act of 1986 (IRCA) requires employers to verify that all employees have proper work authorization.^[7] The centerpiece of this system is the I-9 employment eligibility verification form.^[8] The employee must complete Section 1 any time after accepting a job offer and no later than the end of the first day of work. The employer must review the employee’s documentation and complete Section 2 by the end of the third day of employment.

In some institutions, the international advisers who coordinate visas for students and scholars are not the same people who check visa documents for all new hires for I-9 compliance. However, since each of these functions involves immigration law compliance, it is helpful for these two groups to coordinate periodically. And, as a practical matter, the international advisers will usually know more about what visa documents look like and have better access to legal resources if an uncommon document is presented.

Civil penalties for failing to comply with Form I-9 employment verification requirements recently doubled, and now range from \$216 to \$2,156 per form,^[9] and knowingly employing an unauthorized foreign worker will result in fine of \$375 to \$3,200 for a first offense,^[10] and up to \$21,563 for a third or subsequent offense.^[11] Fines stemming from I-9 non-compliance have reached several hundred thousand dollars. U.S. Immigration and Customs Enforcement (ICE) continues to assess employer fines and initiate removal of unauthorized employees, but has also added criminal sanctions such as “alien harboring” to its arsenal.^[12]

The employment verification regulations (“I-9 rules”) cover only true employees, not independent contractors, volunteers, or other unpaid individuals.^[13] Institutions need an effective process to ensure that individuals are properly categorized so that inadvertent I-9 violations are avoided.

Academic institutions may want to consider adopting an I-9 compliance plan.^[14] This should include a team of professionals on campus that interacts regularly to discuss compliance, training, and periodic internal immigration compliance audits. The team should also ensure that I-9 non-discrimination standards are being met.^[15] I-9 compliance is more complicated than it seems, especially since there are separate penalties for national origin discrimination or asking for specific documents.^[16] Generally, the minimum goal is for employers to exhibit “good faith/reasonable” efforts at compliance.^[17]

If your institution participates in E-Verify, additional rules apply to the I-9 process.^[18] Currently, federal contractors must enroll in E-Verify, and the program will likely be added as a requirement to other types of jobs.^[19] Some universities limit their E-Verify participation only to employees on federal contracts, and some colleges do not have federal contracts and do not participate at all.

3. Should the University Pay for Visa Petitions?

Many academic institutions sponsor both temporary (nonimmigrant) and permanent (immigrant) visas and may finance some or all of the USCIS and legal representation costs.^[20] To sponsor an employee, academic institutions will prepare immigration applications and petitions (discussed *infra* at 4.). Paying for visa costs may be used as a recruitment tool for attracting faculty or staff, and funding visa fees for family members can be a recruitment and retention tool. However, an overly generous policy may lead to excessive costs and/or frustration if an employee leaves soon after the visa or green card is approved.

A clear policy should be established concerning which immigration benefits the university will or must fund. Employers must pay for any fees related to Department of Labor (DOL) processing – most commonly H-1B visas and labor certification for green cards. DOL regulations at 20 C.F.R. § 655.731(c) describe the wage requirement for H-1B purposes.^[21] Having the employee pay would be an unauthorized deduction from the wage.^[22] DOL audits are usually employee-complaint driven and can be extensive when they happen.^[23] The employer may also have to pay for labor certification,^[24] the first step in most employer-sponsored permanent residence applications.^[25] DOL forbids payback agreements if the employee leaves within a certain time period.

One gray area is the \$1225 expedite fee for some temporary work visas (e.g., H-1B, E-3, O-1, TN). Who pays may depend on institutional policy, and also the purpose of the expedite (whether to facilitate the personal needs or desires of the employee (e.g. vacation, personal anxiety) or to assure that the employee begins employment on time or continues employment without interruption.^[26]

4. Creating a Visa Sponsorship Policy

Once the institution has determined that it will pay for certain immigration costs, it is wise to have a clear policy about which immigration filings are supported by the institution, how costs will be borne, who will do the work, etc. As noted above, academic institutions will have to prepare immigration applications and petitions in order to sponsor employees. Most of these filings will require the employee or employee's family members to file a companion, personal application for a dependent or derivative visa status.

At a minimum, there should be a clear, written policy about whether the institution will provide immigration assistance to family members for personal immigration filings, and to what extent. As an example, Texas Tech University Health Sciences Center (TTUHSC)'s visa intake questionnaire provides a link to the I-539 form for dependents, and a clear statement that TTUHSC is not serving as legal representative and will include the I-539 in the same envelope with a temporary visa petition as a courtesy only.^[27] A university could refuse to assist with personal applications, such as work cards, the employee's steps of a green card, visas for spouses and children, or applications for visa stamps at a U.S. consulate abroad. Institutional responses range from providing general guidance with broad disclaimers to hiring an attorney to support these services.

Some applications are always the employer's responsibility by law.^[28] However, filing or giving advice about forms that are not the responsibility of the employer could raise concerns of unauthorized practice of law or create an unintended attorney-client relationship.^[29] This is a complicated area, and should be part of a regular discussion organized by the immigration gatekeeper and the office of general counsel.

A visa sponsorship policy should also include:

- What types of positions can get sponsorship for temporary visas or permanent residence;
- The types of temporary visa and permanent residence categories used;
- Whether the institution pays all or part of the expenses;
- When outside immigration attorneys can represent the institution and/or the employee; and
- When and how exceptions to the policies are made.

Policies regarding using outside immigration counsel are the same as those used for hiring outside counsel in other legal areas, and are usually based on the complexity of the legal filing and/or staff size and ability. Outside counsel represents the institution signing the immigration forms even if the employee is paying the attorney (and/or USCIS)'s fees. The role of the immigration gatekeeper as the institutional representative to outside counsel should be clarified.

Each campus will come up with its own guidelines based on workload, in-house expertise, and need. These policies are often public, and examples can be found through searches of "visa sponsorship policy" on university websites.

5. Is Signing a Visa Petition Equivalent to Creating an Employment Contract?

Consider a foreign language lecturer on a year-by-year contract. Most hold H-1B visas that can be sponsored for up to three years at a time. If the lecturer might be re-appointed, then a three-year H-1B visa saves time and money versus annual renewals. Courts have found that a visa

petition by itself does not create or modify an employment contract, even where there is no written contract.[\[30\]](#)

Moreover, an employer may withdraw an immigration petition at any time. However, in the event that the employer terminates employment prior to the stated ending date of an H-1B or O-1 petition, the employer must pay the worker's return transportation costs if he or she decides to return home,[\[31\]](#) and the case withdrawn with USCIS.[\[32\]](#)

6. Defining *Permanent* Employment for Permanent Residence

Visas are either temporary or permanent. For academics, obtaining lawful permanent resident status (also called a "green card") can be critical to obtaining funding for their research, as well as providing a stable future for their families. For green card sponsorship, the job must be for "permanent employment."[\[33\]](#) Describing a position as permanent can be concerning, especially if the position is tied to funding or at-will. However, the immigration regulations do provide leeway.

In ordinary employment contexts, DOL regulations state that "job opportunities of 12 months or more are presumed to be permanent in nature."[\[34\]](#) In other words, an at-will or renewable position with no fixed end date would meet the definition of "permanent" for green card purposes.

USCIS follows its own standard. Generally, while positions may be considered at-will, the employer and employee must have the expectation of continued employment.[] In the "outstanding professor/researcher" green card category, the position must be tenured or tenure-track, or "a comparable position."[\[35\]](#) In addition, research institutions may sponsor non-tenure-track researchers if the position normally continues beyond the appointment term (i.e., funding is normally renewed).[\[36\]](#)

As discussed in 5., *supra*, visa sponsorship does not overrule the terms of the employment contract. Sponsorship policy involves the intersection of employment law and immigration law, so HR and employment counsel should be involved in setting that policy.

7. Ensuring Compliance with DOL Recruitment Requirements

The most common employer-sponsored green card path outside higher education is through labor certification, which involves testing the labor market to show that there are no other able, willing, and qualified U.S. workers for the position.[\[37\]](#) This process requires "testing the labor market" by advertising for the position in accordance with DOL guidelines. There is a six-month window to use ads run for the position originally, but this rarely happens. It usually takes time to commit to green card sponsorship, the ads are generally not written to comply with DOL guidelines, and even one qualified U.S. worker makes the test of the labor market unusable for Labor Certification. This "regular" Labor Certification process is common in the corporate world, but less so at academic institutions.

Colleges and universities typically take advantage of "special handling" for a teaching job, and sponsor the **best** qualified candidate, even over U.S. workers.[\[38\]](#) DOL has very specific requirements for the job advertisement language, so to avoid re-recruiting for a special handling position, schools can make sure that at least one ad in each search is DOL-compliant and do not contain specific requirements that are not essential.[\[39\]](#) For example, if a faculty search requires a Ph.D. in Classics, but the new hire is ABD ("All but Dissertation") in History, then the ads cannot be used for green card sponsorship. DOL has a strict 18-month deadline from the

date on the job offer letter to file for special handling, so green card sponsorship policies should take this into account.[\[40\]](#)

8. Volunteering

Volunteering often triggers a complex intersection of workers' compensation law, federal and state wage and hour rules, and immigration law. Common examples include a professor inviting family or friends to spend time in a lab for a summer and students seeking to volunteer off campus. Certain temporary visas may allow volunteering, but most do not.[\[41\]](#) Volunteering during a gap between work visas may be seen as unauthorized employment.

USCIS generally interprets unauthorized work to include volunteering (or performing tasks) for an employer in a position that would normally be paid or for which the foreign national would ultimately derive some benefit. If there is any expectation of compensation, reward, or future benefit, then the volunteer work (or performance of tasks) probably violates status.[\[42\]](#) Undertaking volunteer work without proper authorization can thus jeopardize their ability to get a green card down the road.

9. Employee Benefits Issues

A foreign national's visa status may give rise to particular employee benefits requirements. The American Competitiveness and Workforce Improvement Act requires employers to offer benefits to H-1B nonimmigrants on the same basis as U.S. workers.[\[43\]](#) Employers must keep copies of the benefit plan and rules used for differentiating benefits among groups of employees, evidence as to what benefits are provided to U.S. workers and H-1B nonimmigrants, and the benefit elections made by those employees.[\[44\]](#)

J-1 exchange visitors (including dependents) must maintain health insurance coverage that meets specific U.S. State Department minimums that go beyond standard campus plans.[\[45\]](#) The visitor is responsible for having insurance, but the employer must keep documentation of the coverage.

10. The Current Political Climate and the Idea of a Sanctuary Campus[\[46\]](#)

After the 2016 presidential election, international students and scholars have expressed concern and uncertainty about the political climate. A series of Executive Orders[\[47\]](#) and state actions[\[48\]](#) have heightened these concerns. The situation is evolving, but at the time of publication of this NACUANOTE, the prior administration's policy of not conducting immigration enforcement at "sensitive locations"[\[49\]](#) such as campuses appears to be intact. Recently, the administration has announced the "wind down" of President Obama's Deferred Action for Childhood Arrival (DACA) program, which provides protection from deportation and work authorization for some 800,000 students and graduates.[\[50\]](#) The scheduled end date is March 5, 2018, meaning that those with DACA expiring after March 5 will not be able to renew their two year DACA grant.

There are various efforts in the courts and in Congress to support current DACA beneficiaries. For now, younger undocumented children who would have applied for DACA at age 15 are now unable to do so as they consider the college application process. Some universities are helping to coordinate legal consultations for affected individuals (prospective students, current students and graduates) as some may have immigration remedies of which they are not aware.[\[51\]](#)

This continued uncertainty is creating considerable unease, especially among DACA beneficiaries who had outstanding removal orders that could be enforced after their DACA expires. And, unpredictable and extended security delays continue for some people from predominantly Muslim countries, and searches and questioning at airports and land borders are reported anecdotally to be increasing.[\[52\]](#) It also appears that recent changes to DHS and DOS guidance is starting to slow visa processing and add additional scrutiny - for example, calling for adherence to the President's Buy American/Hire American Executive Order,[\[53\]](#) or for extreme vetting.[\[54\]](#)

Some students and faculty have called for their institutions to declare a "sanctuary campus," while some administrators have legitimate concerns about the legal implications of "sanctuary" status under federal law and whether the term creates a false sense of security.[\[55\]](#) Overall, schools are exploring what kinds of support to provide international students and scholars. For example, one increasingly popular (and quite practical) support is providing individual legal consultations for students with uncertain immigration status to help find options for them and allow good legal advice to flow back to their families. Public universities, if they cannot do this as expenditure of state funds for a private purpose, can partner with local law firms or immigration clinics to offer these services. This can take many forms, and involves a broader discussion of how much additional legal advice the international advisers on campus can and should offer (both to those on sponsored visas and others) and whether there is a law school clinic or legal service agency nearby that can be a partner.[\[56\]](#) If a private law firm is retained to offer individual legal consultation, the terms of representation need to be clearly spelled out, including confidentiality and potential liability.

Regardless of the approach, campuses have become sensitive to the issues and aware of international travel restrictions or limitations. Admissions, Athletics, Financial Aid, Study Abroad, Alumni Relations, Campus Security, Residence Life, and Media Relations offices should all be part of this "top to bottom" effort to create a unified campus response.[\[57\]](#)

Government agency visits to campus have a particular sensitivity these days. Best practice is to refer any government official to a small group of people who are trained on such issues. Campuses conducted a wave of training and awareness as government visits increased after the terrorist attacks of September 11, 2001, and many are doing so again now.[\[58\]](#)

For those institutions that consider advocacy and engagement on immigration issues, individual stories can be illustrative, and some schools have chosen to include those affected in meetings with government officials.

CONCLUSION:

This NACUANOTE has identified some of the most common immigration concepts at academic institutions. While this is by no means a complete list, it provides college or university in-house counsel some guidelines on creating procedures and policies to support international students and scholars.

END NOTES:

[1] **Dan Berger** (dhb@curranberger.com) is a partner at Curran & Berger, LLP in Northampton, MA. Dan was editor-in-chief of the American Immigration Lawyers Association (AILA)'s *Immigration Options for Academics and Researchers* (2005 and 2011 editions), and various other publications, including an American Council of Education issue brief on immigration issues for universities after the 2016 presidential election. He is an Honorary Fellow of the American Academy of Adoption Attorneys, Regulatory Practice Coordinator for NAFSA: Association of International Educators, and a co-founder of the US Alliance for International Entrepreneurs (usaie.org).

James DiStefano (jdistefano@sbpdiscovery.org) is the Director of Human Resources at Sanford-Burnham Medical Research Institute, where he provides leadership to the HR function at the Lake Nona, FL campus. James came to Sanford-Burnham from the University of Massachusetts Medical School, where he served as senior human resources manager of compliance and immigration. He earned a J.D. from the University of Connecticut School of Law, an M.B.A. from the University of Massachusetts, Amherst, and a B.A. in Economics and Spanish from Union College in New York.

Stephen Yale-Loehr (swy1@cornell.edu) is co-author of *Immigration Law and Procedure*, the leading 21-volume immigration law treatise. Steve teaches immigration law at Cornell Law School and practices immigration law at Miller Mayer LLP in Ithaca, NY. He graduated from Cornell Law School in 1981 *cum laude*. He received AILA's Elmer Fried award for excellence in teaching in 2001, and AILA's Edith Lowenstein award for excellence in the practice of immigration law in 2004. Like Dan Berger, Steve is a co-founder of the US Alliance for International Entrepreneurs (usaie.org).

Dahlia French (dahlia.french@tuhsc.edu) practices exclusively in the areas of immigration and nonresident alien taxation with a special focus on higher education immigration (international students, scholars and employees), medical immigration and the intersection of immigration and tax laws for these populations. Dahlia has over twenty years of US and global immigration experience. Dahlia serves as the Chair of AILA's Students & Scholars Committee and is an active member of various professional immigration and international tax organizations. She received a B.A. from the University of Toronto and a J.D. from Howard University School of Law.

David Wilks (djw@millermayer.com) is a business immigration attorney at Miller Mayer LLP in Ithaca, NY. He currently serves on national leadership committees with AILA, and has spoken both nationally and internationally on business immigration. He is a graduate of Cornell Law School.

Ariel Dickerman (ariel@curranberger.com) is an immigration specialist at Curran & Berger, LLP in Northampton, MA.

[2] For general background on immigration law in the academic context, see Association of International Educators (NAFSA), [NAFSA Adviser's Manual Online](#); see also American Immigration Lawyer's Association (AILA), [Immigration Options for Academics and Researchers](#) (Dec. 1, 2011).

[3] Form I-129 is used for employment-based nonimmigrant petitions, and is commonly used by universities.

[4] Dep't of Homeland Sec., U.S. Citizenship and Immigration Servs., *Instructions for Petition for a Nonimmigrant Worker Form I-129*, [OMB No. 1615-0009](#) (2017).

[5] For more information, see [15 C.F.R. §764.5](#) (Export Administration Regulations); [22 C.F.R. §127.12](#) (International Traffic in Arms Regulations).

[6] Most recently, the President signed Executive Order 13788, "Buy American and Hire American," which called for more oversight of the H-1B professional work visa program that campuses commonly use. See "Buy American and Hire American," Proclamation No. 13788, [82 Fed. Reg. 18837](#) (Apr. 18, 2017).

[7] Immigration Reform and Control Act, [Pub. L. No. 99-603, 100 Stat. 3359](#) (1986) (codified in scattered sections of the Immigration and Nationality Act (INA)).

[8] Form I-9 and the list of acceptable documents can be found through the U.S. Citizenship and Immigration Services *Handbook for Employers*. See U.S. Citizenship and Immigration Servs., [Handbook for Employers M-274: Guidance for Completing Form I-9 \(Employment Eligibility Verification Form\)](#) (updated Jul. 14, 2017).

[9] [8 C.F.R. 274a.10\(b\)\(2\)](#). For the most recent increase in penalties, see [49 C.F.R. § 1503](#); U.S. Citizenship and Immigration Services, [Penalties](#) (last visited Sept. 9, 2017).

[10] [8 C.F.R. 274a.10\(b\)\(1\)\(ii\)\(A\)](#); see [49 C.F.R. § 1503](#) (providing the most recent increase in penalties).

[11] *Id.*

[12] U.S. Immigration and Customs Enforcement, [Worksite Enforcement](#) (last visited Sept. 9, 2017).

[13] U.S. Citizenship and Immigration Servs., [Who Needs to Complete Form I-9?](#) (2017); U.S. Citizenship and Immigration Servs., [Penalties](#) (2017) (providing a chart with penalties for I-9 violations).

[14] See, e.g., Univ. of Mich. Human Res., [Form I-9 and E-Verify](#), (last visited Sept. 6, 2017) (compilation of I-9 and E-Verify Resources).

[15] [8 C.F.R § 1274a](#). The non-discrimination provision of the INA is enforced by the US Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER). Various guidance documents and best practices for employers in connection with work authorization matters are provided on IER's website. See U.S. Dep't of Justice, [Employer Information](#), (last visited Sept. 6, 2017).

[16] Immigration and Nationality Act, [8 U.S.C. § 1324b](#) (2011) (detailing Unfair Immigration Related Employment Practices). See generally, Leslie Dellon, "[Department of Justice Issues Final Rule About Unfair Immigration-Related Employment Practices](#)" (American Immigration Council Immigration Impact, Jan. 5, 2017).

[17] [8 C.F.R § 1274a.4](#).

[18] U.S. Citizenship and Immigration Servs., [E-Verify](#) (last visited Sept. 6, 2017). 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. Joining E-Verify is sometimes required by state law or federal contract, and brings with it additional compliance requirements.

[19] U.S. Citizenship and Immigration Servs., [For Federal Contractors](#) (last visited Sept. 6, 2017).

[20] E.g., Boston Univ. Off. of the Provost, [Sponsoring Foreign Nationals for Permanent Residence](#) (last visited Sept. 6, 2017) (laying out the key issues regarding sponsorship and payments).

[21] [20 C.F.R. § 655.731\(c\)](#).

[22] *Id.* at [§ 655.731\(c\)\(9\)\(iii\)\(C\)](#). See generally U.S. Dep't of Labor, [elaws – H-1B Advisor](#) (last visited Sept. 8, 2017) (DOL online tool for employers to understand wage obligations).

[23] [20 C.F.R. § 655.731\(c\)\(11\)](#); see *Kutty v. U.S. Dep't of Labor*, 764 F.3d 540 (6th Cir. 2014) (showing an employer's liability for back wages); see also Immigration and Nationality Act, [8 U.S.C. § 1184\(c\)\(12\)\(C\)](#) (2012) (imposing a \$500 fee on every H-1B for fraud detection and specifically requiring the employer to pay).

[24] Labor certifications involve a test of the labor market to show that no U.S. workers are available for the foreign national's position. For university teachers, the test of the labor market need only show that

the foreign national is the best available worker for the position. Successful labor certifications usually eventually result in permanent residence.

[25] [20 C.F.R. § 656](#); see also U.S. Dep't of Labor, [Prohibition on Substitution](#) (Jan. 15, 2009).

[26] E.g., Texas Tech Univ. Health Sciences Ctr., [International Employment Services](#) (last visited Sept. 6, 2017) (providing a table of immigration services within the public university); see also Georgetown Univ., [Permanent Residency Sponsorship Policy](#) (last visited Sept. 6, 2017) (providing the private university's sponsorship policy).

[27] Texas Tech Univ. Health Sciences Ctr., [International Employment Services](#) (last visited Sept. 6, 2017).

[28] Forms that are the responsibility of the employer include Forms I-20, DS-2019, I-129, I-907, I-140, I-9, ETA Form 9089, ETA Form 9035, and any employer sponsorship letters. A G-28 is a general form designating an attorney-client relationship to USCIS - a G-28 for representation of the employer is also the employer's responsibility.

[29] E.g., Forms I-539, I-485, I-765, I-130, I-131, and DS-160.

[30] See generally Stanley Mailman & Stephen Yale-Loehr, *The Intersection of Employment and Immigration Law*, N.Y.L.J. (1999); Dan Berger, *Does a Visa Petition Create a Legal Employment Contract?*, 5 BENDER'S IMMIGR. BULL. 1026 (2000); see also *Edwards v. Geisinger Clinic*, No. 11-1528 (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.*, No. 12-P-449 (Mass. App. Ct. Apr. 10, 2013) (stating the same).

[31] [8 C.F.R. § 214.2\(h\)\(4\)\(iii\)\(E\)](#). Paying transportation costs is rare, as foreign nationals generally find a way to stay in the United States. See U.S. Citizenship and Immigration Servs., [What is an Employer Liable for Once an H-1B, H-2B, O-1 or P-1 Nonimmigrant Ceases Employment?](#) (last visited Sept. 8, 2017).

[32] [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 *Mohammed Rehan Puri*, [ARB Case No. 13-022](#) (Dep't of Lab. 2015); [20 C.F.R. § 655.731\(c\)\(7\)\(ii\)](#).

[33] Immigration and Nationality Act, [8 U.S.C. § 1101\(a\)\(31\)](#) (2012) (defining permanent as "a relationship of continuing or lasting nature, as distinguished from temporary").

[34] See [20 C.F.R. § 655.102\(g\)](#) (1989); [8 C.F.R. § 214.2\(h\)\(5\)\(iv\)\(A\)](#) (2017) (defining temporary employment as "where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year").

[35] Immigration and Nationality Act, [8 U.S.C. § 1153\(b\)\(1\)\(B\)\(iii\)\(II\)](#) (2012).

[36] U.S. Dep't of Homeland Security, Interoffice Memorandum from Michael Ates to Regional Directors and Service Center Directors, regarding "[Guidance on the Requirement of a 'Permanent Offer Employment' for Outstanding Professors and Researchers](#)" (June 6, 2006).

[37] [20 C.F.R. § 656.17](#).

[38] [20 C.F.R. § 656.18\(b\)](#); Alexander Dgebuadze & William P. McKinney, "[Special Recruitment Provisions: New Developments](#)," 271-79 (American Immigration Lawyer's Association, 2d ed. 2011).

[39] [20 C.F.R. § 656.18\(b\)](#) (2017). Some general guidelines for special handlings ads are:

- The ad MUST contain classroom teaching as a part of the job description.
- 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 30 calendar days on the journal's website.
- Employers should 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 which 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 less? Have you had someone in the position before with less? 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 ABD in the ad. The individual must be qualified for the job described in the ad at the time they begin work.
- Note to 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.
- It is essential for the advertisement to 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.

Perm Special Handling, Curran & Berger LLP, <http://curranberger.com/employment-based-immigration/perm-special-handling/> (last visited Sept. 8, 2017).

[40] [20 C.F.R. § 656.18\(c\)](#). The 18-month clock can be re-started with additional advertising for the position - this is an established work-around but can create an awkward situation if there are applications received.

[41] One option for temporary visitors could be a J-1 intern or trainee program sponsored by the institution, or if the institution does not have one, then by a nonprofit third party such as the American Immigration Council. See American Immigration Council, [Cultural Exchange](#), (last visited Sept. 8, 2017).

[42] See 89-05 Immigr. Briefings 1; 95-05 Immigr. Briefings 1; Lawrence J. Weinig, INS Deputy Assistant Commissioner for Adjudications, 66 NO. 19 Interpreter Releases 539.

[43] American Competitiveness and Workforce Innovation Act, [Pub. L. No. 105-277](#), 112 Stat. 2681-641 (1998); [20 C.F.R. § 655.730](#).

[44] [20 C.F.R. § 655.730\(d\)1](#).

[45] [22 C.F.R. § 62.14\(b\)](#).

[46] For a more detailed analysis of these issues, see the American Council on Education's (ACE) Issue Brief, [Immigration Post-Election Q&A: DACA Students, "Sanctuary Campuses" and Institutional or Community](#) (last visited Sept. 8, 2017). See also Dan Berger and Stephen Yale-Loehr, ["Tips for Schools and Students on How to Survive a Time of Immigration Uncertainty," ILW](#) (follow-up Q&A)(last visited Sept. 8, 2017).

[47] Association of International Educators (NAFSA), [Executive Order Travel Ban: NAFSA Resources](#), (last visited Sept. 8, 2017) (excellent and frequently updated guide to the executive orders); see also [National Immigration Law Center](#), (last visited Sept. 8, 2017) (providing general updates on immigration policies and enforcement).

[48] E.g., [Ga. Code Ann. § 1-3-20](#) (2017) (restricting funding to private universities that do not cooperate with immigration enforcement actions).

[49] U.S. Immigration and Customs Enforcement, [FAQ on Sensitive Locations and Courthouse Arrests](#) (last visited Sept. 8, 2017).

[50] <https://www.dhs.gov/news/2017/09/05/frequently-asked-questions-rescission-deferred-action-childhood-arrivals-daca>

[51] http://www.e4fc.org/images/E4FC_BDAGuide.pdf.

[52] See U.S. Citizenship and Immigration Servs., INSPECTION OF ELECTRONIC DEVICES, [CBP PUB. 0204-0709](#); Sophia Cope, et al., *Digital Privacy at the U.S. Border: Protecting the Data on Your Devices and in the Cloud*, ELECTRONIC FRONTIER FOUNDATION (last visited Sept. 8, 2017); Esha Bhandari, et al., "[Can Border Agents Search Your Electronic Devices? It's Complicated.](#)," AMERICAN CIVIL LIBERTIES UNION (last visited Sept. 8, 2017).

[53] <https://www.uscis.gov/laws/buy-american-hire-american-putting-american-workers-first>.

[54] <https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants>; <http://thehill.com/homenews/administration/348092-trump-rolls-out-extreme-vetting-for-some-green-cards-report>.

[55] The Harv. Law Sch. Immigr. Clinic, [Sanctuary Campus Frequently Asked Questions](#), (last visited Sept. 8, 2017) (outlining a useful summary of issues).

[56] E.g., Cornell Univ., [Resources for DACA and Undocumented Students](#) (last visited Sept. 8, 2017); Cornell Univ., [Resources about the U.S. Immigration Travel Ban](#) (last visited Sept. 8, 2017).

[57] See Dan Berger and Stephen Yale-Loehr, "[Tips for Schools and Students on How to Survive a Time of Immigration Uncertainty.](#)" *ILW* (last visited Sept. 8, 2017).

[58] E.g., Univ. of Mich. Off. Of the Registrar, [The University of Michigan Student Rights and Student Records](#) (last visited Sept. 8, 2017) (providing the University's policy statement on student records); see also Association of International Educators (NAFSA), [Releasing Records to the Government: FERPA and Other...-Re, NAFSA](#), (last visited Sept. 8, 2017) (E-learning seminar on FERPA compliance and addressing government visitors on campus).

[NACUANOTES Issues](#) | [Contact Us](#) | [NACUA Home Page](#)

NACUANOTES Copyright Notice and Disclaimer

Copyright 2017 by Dan Berger, James DiStefano, Stephen Yale-Loehr, Dahlia French, David Wilks, and Ariel Dickerman. NACUA members may reproduce and distribute copies of NACUANOTES to other members in their offices, in their law firms, or at the institutions of higher education they represent if they provide appropriate attribution, including any credits, acknowledgments, copyright notice, or other such information contained in the NACUANOTE.

Disclaimer: This NACUANOTE expresses the viewpoints of the authors and is not approved or endorsed by NACUA. This NACUANOTE should not be considered to be or used as legal advice. Legal questions should be directed to institutional legal counsel.