

Scholar Update

NAFSA Region I Conference

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Corvallis, Oregon

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Travel and Admission Issues

- DOS Raises (MRV) Visa Fee Effective 07/13/2010
 - H, L, O, P, Q, R: was \$131, now \$150
 - E was \$131, now \$390
 - K was \$131, now \$350
 - All other NIVs (i.e., B, F, J): was \$131, now \$140
 - Remember, in addition to MRV, there are “reciprocal fees”
- Slow-down in “administrative processing” (security checks)
 - In recent NAFSA-DOS liaison call, DOS admitted that SAO processing time doubled this summer, primarily due to slow processing by “an inter-agency partner,” explained new efforts to eliminate “false positives” and plan for next summer’s applications (happens every year, so not unexpected)
- DHS eliminates “paper I-94W” for Visa Waiver admissions (http://www.dhs.gov/ynews/releases/pr_1274366942074.shtm)
- Effective 09/01/10 , “U. S. Visa Service,” new system for visa appointments in Canada replaces NVARs – US Visa Service/visa applicants in Canada (http://www.usvisa-info.com/en-CA/selfservice/ss_country_welcome)

Exchange Visitor Program

- 10/01/2010 DOS proposed modifying the fees it charges for Exchange Visitor Program services (comments are due 11/30/2010):

SERVICE	Current Fee	Proposed Fee	Change
Designation/Redesignation	\$1,748	\$2,700	+\$952
Other services	\$246	\$233	-\$13
- including extension, reinstatement, category change			

- *Site Visits* are part of the initial designation process for new exchange visitor programs, but apparently DOS plans to expand the kinds of visits it makes to ongoing programs:
 - Liaison Visits
 - Redesignation Reviews
 - Compliance Reviews
 - DOS explains that "The On-site Review travel cost estimate is based on visiting the top 20 Private Sector Program Sponsors and the top 20 Academic and Government Program Sponsors according to Program Sponsor activity (exchange visitor participant) levels as documented in SEVIS."

Exchange Visitor Program

■ SEVIS issues:

- SEVIS batch errors due to new VeriSign 2048-bit standard
 - 10/10/2010 VeriSign migrated its public root certification authorities for Digital IDs for Secure Email Certificates from 1024-bit RSA keys to 2048-bit RSA keys. Valid VeriSign 1024 RSA keys will continue to operate correctly and securely until they expire, but all new and renewal certificates issue on or after 10/10/2010 will be 2048-bit RSA key certificates.
 - NAFSA has notified SEVP of the issue, and SEVP is working on a response. See <http://www.nafsa.org/resourcelibrary/Default.aspx?id=22855> for updates
- Transition from CIP 2000 to CIP 2010 codes in SEVIS
 - Transition from CIP 2000 to CIP 2010 codes planned as part of SEVIS Release 6.6, scheduled for 10/29/2010. See resource for managing the transition at <http://www.nafsa.org/resourcelibrary/default.aspx?id=22754>

Exchange Visitor Program

■ General updates:

- SEVIS release 6.2 limited the amended Program Begin Date: it cannot be earlier than the date the Amend Program function is used.
- SEVIS II continues to be developed after “rebaselining” the project with its developer. No official timeline has been published but SEVP said it is likely to be released sometime after 2011.
- SEVP temporarily suspended the reporting of departure information in SEVIS as the source data used to update SEVIS was found to be unreliable. The Arrival and Departure Information System (ADIS) office makes the changes.

Exchange Visitor Program

- Final Rule for J Trainee & Intern categories
- Some of the changes effective 10/10/2010:
 - Removal of the field of aviation from the occupational categories
 - Phone interviews to assess English language proficiency acceptable in place of video conference
 - Internships must be in the field of education currently being pursued by intern
 - Removing the requirement for sponsors to obtain Dun & Bradstreet identification number of host organizations and third parties
 - Clarifying that 12-month training programs in the field of agriculture may be extended to 18 months only if the T/IPP supporting the original 12-month program included at least 6 months of classroom participation and studies
 - Clarifying rules for repeat participation

See full text of final rule at

<http://www.nafsa.org/uploadedFiles/TraineeInternRuleFinal.pdf>

E-verify

■ E-verify/17-month OPT STEM Extensions

- Federal Contractor E-verify rules effective 09/08/2009, requiring employers to enroll in E-verify if and when they are awarded a federal contract or sub-contract that requires participation in E-verify as a term of the contract.
- What does this mean for us? Even if your university is a limited E-verify employer for E-verify contracts, ALL of your OPT STEM employees qualify for the 17 month STEM OPT extension. See USCIS Q&A for E-verify/Federal Contractors (revised April 2010):
 - Question: Must the F-1 OPT STEM student work on a Federal contract and be classified as an "employee assigned to the contract" to qualify for the 17-month extension?
 - Answer: No. The student does not need to be assigned to a Federal contract with the E-Verify clause to be eligible for the 17-month extension. The student still must meet the OPT eligibility criteria regardless of how the university is enrolled.

H-1B Issues - DOL

- New National Prevailing Wage System –
“National Prevailing Wage Center” (formerly NPWHC)
 - Centralized processing at national office, effective 1/1/2010, electronic filing option within DOL’s iCERT system implemented 1/21/10.
 - New Application for Prevailing Wage Determination (ETA Form 9141). DOL generally uses OES survey to make determination.
 - Guidance to review (see NAFSA documents):
 - DOL November 2009 Prevailing Wage Determination Policy Guidance.
 - National Prevailing Wage Helpdesk Center FAQ March 2010
 - NAFSA Summary of DOL Stakeholders Conference – 3/25/10

H-1B Issues - DOL

■ National Prevailing Wage Center

– Growing Pains

- Long processing times – varies, but around 4 weeks now
- Erroneous use of “all industry” wages vs. ACWIA
 - Per March 2010 FAQ, state “***This employer is an institution of higher education or a research entity under 20 CFR 656.40 (e)***”
- Leveling and occupational classifications (more specific than SWAs; leveling off at first, but has improved after NAFSA advocacy)

H-1B Issues - DOL

■ National Prevailing Wage Center

– Private Surveys – still allowed

- To request that NPWC base wage on wage data other than OES (e.g., employer-provided wage information, private survey), (1) specify on Form ETA Form 9141/item D.a.6 (Job Duties) the name, edition and publication date of specific source, surrounded by three asterisks; and (2) after entering employer's job title, in item D.a.1., enter title or occupation name/code in square brackets.
- Must mail to DOL supplementary information about the survey. (See DOL March FAQ for more details)

– Redetermination Process

- At bottom of prevailing wage case details screen in iCERT, click the "Redetermination" button

H-1B Issues - DOL

- Bypassing the new system - making your own PWD
 - Pros: immediate prevailing wage determination for H-1B cases
 - Cons:
 - No safe-harbor in case of an audit – get university counsel's approval?
 - Required to have DOL PWD for labor certification applications
 - Must understand DOL's leveling process and DOL's rules don't always make sense for jobs in academia (Job Zone 4 occupation generally requires only a Bachelor's while entry level postdoc position requires a PhD). See DOL's November 2009 Prevailing Wage Determination Policy Guidance and Klasko Webinar:
[http://www.klaskolaw.com/library/SBS%20-%202010%20Prevailing%20Wage%20\(00798237\).PPT](http://www.klaskolaw.com/library/SBS%20-%202010%20Prevailing%20Wage%20(00798237).PPT)
 - May need to document rationale for audit purposes

H-1B Issues - DOL

- New Labor Condition Application Process/iCERT (07/01/2009)
 - New, longer form/employer registration required
 - DOL takes approx. 7 days to certify, must include certified LCA in H-1B filing
 - OK to submit LCA with your own prevailing wage determination based upon OES OR private survey (ex: AAVMC)
 - Watch out for how DOL wants the form filled out (i.e., “OFLC Online Data Center” when you use OES survey) or else denied

H-1B Issues - USCIS

- President signed into law H.R. 6080/PL 111-230 on 08/13/10
 - Increased filing fee and fraud prevention and detection fee for H-1B and L-1 petitions for petitioners who employ 50 or more employees and more than 50% of the petitioner's employees are H-1B or L-1 nonimmigrants. Fees increased by \$2,000 for subject H-1B petitioners and by \$2,550 for subject L-1 petitioners
 - What does this mean for us? Until new Form I-129 comes out, include attestation with each H-1B filing: "I attest that "UNIVERSITY NAME" currently employs approximately [5,000] persons in the United States, of whom fewer than FIVE PERCENT (5%) are H-1B or L nonimmigrants. As such, "UNIVERSITY NAME" is not subject to the additional fees required under PL 111-230."

H-1B Issues - USCIS

- USCIS memo on Employer-Employee relationship - January 8, 2010, USCIS memo states that "employer who seeks to sponsor a temporary working in H-1B specialty occupation is required to establish a valid employer-employee relationship."
 - Petitioner "must be able to establish that it has the right to control over when, where and how the beneficiary performs the job," and lists 15 factors that adjudicators can consider when evaluating the employer-employee relationship.
 - Guidance primarily developed to address "problems" that have arisen with "independent contractors, self-employed beneficiary and beneficiaries placed at third party worksites.
 - " What does this mean for us? Might be scrutinized for third party worksites (i.e., national labs or hospitals); be ready to show some of the 15 factors listed in memo.

H-1B Issues - USCIS

- USCIS Proposes Adding Deemed Export Compliance Attestation to Form I-129 (06/30/10 – still no final rule)
 - Would for the first time require petitioners to attest that “deemed export” control rules have been complied with in relation to the beneficiary.
 - NAFSA’s position – attestation on Form I-129 would unnecessarily burden both schools active in sensitive technology fields and those that aren’t.
 - Note that international scholar/student services offices typically do not handle deemed exports (usually office of research or office of legal counsel).
- USCIS Fraud Unit Site Visits (late 2009/early 2010)

H-1B Issues - USCIS

- New Fees, effective 11/23/10
 - H-1B: is \$320, will be \$325
 - H-4 I-539 application: is \$300, will be \$290
 - Premium Processing: is \$1,000, will be \$1225
- Increase in strange RFEs at CSC?
 - HR 6080 attestation required
 - Paycheck stubs to prove current employment, even on extensions?
 - Formal credentials evaluation required vs letter from Chair?
- Increased case processing times
 - 4+ months for regular cases (does not correspond to CSC reported processing times)
 - 15 full days for premium processing cases

H-1B Issues – Review

■ **Review: H-1B extensions during LPR process**

- May recapture time spent outside of U.S. while approved for H-1B (no longer have to show “meaningful interruption”)
- Post-6-year “extensions”
 - **One year extensions**, indefinitely, if more than 365 days have passed since filing of ETA-9089/ETA-750 or I-140
 - Can be pending or approved, and H-1B employer doesn’t have to be LPR employer
 - If LC expires before I-140 filed, LC cannot serve as basis for extension
 - Denied or revoked LC or petition cannot serve as basis for extension
 - Unless there was a timely-filed “appeal” to DOL/BALCA or AAO
 - **Three-year extensions**, indefinitely, if I-140 approved and priority date is not current
 - Premium processing of I-140 can be useful

H-1B Issues – Review

- Post-6-year extensions, ctd.

- Available regardless of whether employee is in U.S. or abroad, so not really an “extension of stay” but rather an additional period of H-1B authorization
- May request remainder of 6-year period year plus 7th with one petition
- May file extension petition 6 months prior to extension start date, and employee—if not eligible at filing—must become eligible (meet 365 day requirement) before requested extension start date
 - For example, if LC for employee filed 6 months ago, she/he has 3 months of H-1B eligibility remaining and can recapture 3 more months, then you can file one petition now for remainder period (including recapture period) and 7th year (so 18 months)
 - *Except—USCIS seems to have taken the strange position that if beneficiary is outside of U.S., 365-day requirement must have been met before AC21 petition can be **filed***
- But total of 3 years with one I-129
- 240 days work authorization while extension petition pending
- H-4s granted extension based on principal's

Permanent Residency - PERM

- New National Prevailing Wage Center (NPWC) – see H-1B section. MUST obtain DOL prevailing wage determination before filing labor certification application. Assistant Professor usually = Level I (position requires PhD+ no work experience)
- Special Handling Case Adjudication Times – if in normal queue, 6 months or less
- Remember – re-selection is okay (starting PERM recruitment/re-test after faculty member has been in position for years)
- DOL's timeline for new Form ETA 9089?

Permanent Residency - PERM

■ Unusual Special Handling Denials/Audits

– Print publications

- **MLA Job Listing** — denied b/c not circulated to membership - at least one denial subsequently certified.
- **Diversity Issues in Higher Education** — not a journal which would normally be used to advertise for a Lecturer of Mathematics, the job opportunity listed on the ETA Form 9089 for which certification is being sought, nor is it a journal most likely to bring a response from able, willing, qualified, and available U.S. workers. Therefore, the application is denied — at least one denial subsequently certified.
- **Asian Studies Newsletter** - The employer's use of Asian Studies Newsletter to advertise the job opportunity is not appropriate. This publication is specifically for the field of Asian Studies. It is determined that the Asian Studies Newsletter is not a journal which would normally be used to advertise for an Assistant Professor of Art History, nor is it a journal most likely to bring a response from able, willing, qualified and available US workers. -- WSU has recv'd certification using this journal for Chinese foreign language instructor.
- **Lesson:** given current climate, try to steer depts to use Chronicle of Higher Ed, Science, Nature, other very reputable, nationally circulated PRINT journals.

Permanent Residency – PERM

■ Denials/Audits Cont'd

- Denial based on inconsistent information in Items H.6, H.10 and H. 14. so be very careful: “The employer's submitted application fails to represent the actual minimum requirements for the offered job opportunity due to inconsistent information provided in the ETA Form 9089. Specifically, Item H.6 indicates that the employer requires no experience in the offered job opportunity and Item H.10 indicates that there is no acceptable experience in an alternative occupation. However, Item H.14 lists training and experience requirements for the offered job opportunity that exceeds the actual minimum requirements listed in Items H.6 and H.10.”
- BALCA reopened and vacated decision in the Eastern Tennessee State University case, which held that a faculty labor certification case did not get the benefit of the "most qualified" standard if the college opted to use the "basic" recruitment process rather than the "special handling" process. Briefing before the whole Board was due September 2010.

Permanent Residency - PERM

- Denials because positions did not seem “academic” enough (i.e., coaches or librarians who teach). Still no DOL guidance on how DOL defines “classroom teaching,”/how much classroom teaching is necessary for a special handling case.
- Recent BALCA decision, Matter of Il Cortile Restaurant, 2010 PER 683 (Oct. 12, 2010) states that Notice of Filing requirement (10 “business days”) can be met on federal holidays if employer open for business, but proceed carefully unless/until DOL issues updated FAQ (as NAFSA and AILA have asked)
- *Important appeals of denials pending at BALCA, AILA has filed amicus briefs, so watch for news*

Permanent Residency - PERM

■ What to do when case denied/audited?

- If audited, respond to audit.
- If denied, request for reconsideration and appeal OR if recruitment and posting still valid, re-file (with clarifications on Form ETA 9089 and audit file, if necessary).
- If audit/denial due to DOL's erroneous reading of Special Handling regulations, contact NAFSA to report the issue.

Permanent Residency I-140/I-485

- Fee Increase, effective 11/23/10
 - I-140 was \$475; will be \$580
 - Premium Processing was \$1,000; will be \$1,225
 - I-485 was \$1010 (\$930 + \$80), will be \$1065 (\$985 + \$80)
 - I-765 was \$340, will be \$380
- I-140/I-485 Filing Location Change as of 08/03/10- Was Nebraska Service Center; now Texas Lockbox (although ultimately goes to NSC for adjudication)
- Remember premium processing is available for many I-140 categories

Permanent Residency – I-140

■ Outstanding Professor/Researcher

- Kazarian 9th Circuit Decision
 - In short, sets forth a two-part approach: (1) evidence is first “counted” and then (2) its persuasiveness considered in “a final merits determination”
- USCIS 08/20/10 Interim Guidance for Comment/Evaluation of Evidentiary Criteria for Certain I-140 petitions
<http://www.nafsa.org/uploadedFiles/InterimKazarianGuidance.pdf>
- NAFSA’s comments:
<http://www.nafsa.org/resourcelibrary/default.aspx?id=22173>
- Draft USCIS RFE template:
<http://www.nafsa.org/uploadedFiles/Draft%20EB-1%20RFE%20Template.pdf>

Permanent Residency – I-485

- On 5/14/10, the “green card” became green again
- I-485 Case processing times - relatively fast (under 6 months)
- Retrogression – see November 2010 Visa Bulletin
 - Still retrogression for EB-2 (labor certification cases)/persons born in China/India; EB-2 “current” for all other countries
 - EB-1 “current” for all countries

Visa Bulletin

EMPLOYMENT-BASED PREFERENCES

First: Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.

Second: Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.

Third: Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers".

Fourth: Certain Special Immigrants: 7.1% of the worldwide level.

Fifth: Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

November 2010 Visa Bulletin

Employment-Based	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
1st	C	C	C	C	C
2nd	C	01JUN06	08MAY06	C	C
3rd	22JAN05	22NOV03	22JAN02	01MAY01	22JAN05
Other Workers	01APR03	01APR03	22JAN02	01MAY01	01APR03
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C
5th Pilot Programs	C	C	C	C	C

Questions?