

IMMIGRATION MANUAL



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Immigration Manual
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I.

INTRODUCTION

Since September 11, 2001, immigration questions have become a much more significant concern within CSU. This Manual provides general advice concerning employment and student immigration issues. Necessarily, it is a summary of only the major issues. Campuses are encouraged to direct specific questions to the Office of General Counsel.

The Homeland Security Act of 2002 created the Department of Homeland Security and, among other things, reorganized and replaced the Immigration and Naturalization Service. The old INS was abolished entirely and in its place, several new agencies within the Department of Homeland Security were created to address different phases of the immigration process.

The U.S. Citizenship and Immigration Services (USCIS) now has the legal authority to issue visas to arriving aliens and admit them into the country. Most of the documentation used to verify a non-citizen's lawful presence in the United States is issued by this agency. Deporting and removing aliens from the U.S. and canceling an order of removal or deportation are the primary responsibility of the U.S. Immigration and Customs Enforcement. Border control is under the U.S. Customs and Border Protection.

II.

EMPLOYMENT

A. Recruitment

1. CSU Employment Policy

The Immigration Reform and Control Act of 1986 makes it unlawful to hire, recruit, or refer for a fee, any person who is not authorized to accept employment in the United States. In HR 94-29 (dated October 14, 1994) CSU established as policy the consideration of *all* applicants for employment -- United States citizens and noncitizens alike -- irrespective of work authorization status at the time of the job application. This CSU policy allows campuses to consider unauthorized applicants, and then to assist them in obtaining appropriate work authorization before beginning their employment.

There is one exception to this CSU policy to consider all applicants for employment, for situations where a campus needs to hire immediately and cannot risk the delay that may be associated with procuring work authorization. In those instances, the campus may for *a particular position* restrict consideration only to those who already have work authorization. In these instances, the campus is then, of course, prohibited from considering or selecting any applicant who does not possess work authorization.

2. Recruitment Inquiries Regarding Work Authorization

Given the CSU policy to consider *all* candidates for employment, regardless of their work authorization status, questions regarding a job applicant's authorization to work in the

United States during a recruitment are irrelevant and can later be the basis for claims of discrimination. They are therefore strongly discouraged.

However, in a recruitment under the *exception* to the CSU policy, the campus may ask the following question:

Are you currently authorized to work in the United States?

This is the *only* acceptable question under the exception. The campus must refuse to consider all candidates who respond “no” to this question.

B. Employment Eligibility Verification

1. The I-9 Employment Eligibility Verification Process

Verification of work authorization status is mandated by the Immigration Reform and Control Act before every prospective employee can begin work. The appropriate form which must be completed is Form I-9. The steps involved in the I-9 employment eligibility verification process are:

- a. The campus provides the employee with the list of documents acceptable to establish authorization to accept employment in the United States.
- b. The employee completes Section 1 of the I-9 form.
- c. The employee presents documentation to establish his/her authorization to accept employment in the United States.
- d. The campus examines the documentation presented by the employee and completes Section 2 of the I-9 form.

Section 1 of the I-9 must be completed by the employee no later than the date on which his/her employment begins. Section 2 of the I-9 must be completed by the campus within three business days of the date on which the employment begins. The campus has the responsibility to ensure that both sections are completed in a timely and appropriate manner. The failure to complete, retain, and/or make I-9 forms available for inspection carries monetary penalties for each impropriety.

Appointment letters should indicate that all employment is subject to the prospective employee verifying that s/he has the authority to work in the United States.

2. The Necessity of Employment Authorization

If a prospective employee does not have proper work authorization on the date that s/he is scheduled to begin employment, s/he cannot be hired or begin work. This applies even where an appropriate application for work authorization is pending. Knowingly hiring an individual who does not have work authorization will subject the campus to monetary penalties or other sanctions.

3. Expiration of Employment Authorization

Some individuals have work authorization with a time restriction. If a campus continues to employ such an individual after his/her work authorization has expired, the campus will also be subject to monetary penalties and/or other sanctions, because such continued employment is a violation of the Immigration Reform and Control Act's paramount purpose of restricting the employment of unauthorized noncitizens.

Questions on how to terminate an employee who lacks work authorization should be directed to the Office of General Counsel.

C. Common Visas Used to Gain Employment

1. The H-1B Visa

The H-1B visa is issued to noncitizens in "specialty occupations." The campus applies for the visa and the prospective employee is named as the "beneficiary." The visa then authorizes the employee to work only for that one employer. The visa petition must establish full licensure of the prospective employee to practice in the occupation, and completion of any degree required for entry into the occupation in the United States or experience in the specialty through progressively responsible positions.

The following steps are required to obtain an H-1B visa:

- a. The campus must gain approval by the Department of Labor of a labor condition application (LCA), by attesting that the hire of a noncitizen will not adversely affect the wages and working conditions of citizens, and that the working conditions of the noncitizen are not exploitive.
- b. The campus must gain approval by the USCIS of the visa petition, supported by the approved LCA.
- c. The visa must be issued by a U.S. consulate.

The USCIS takes from 45-60 days to process an H-1B visa petition. It is possible to use "premium processing" to expedite the application. This processing requires payment of an additional fee.

The H-1B visa may be approved for a maximum initial three year period. Extensions of that stay may be obtained for a total maximum period of six years. In computing whether a noncitizen has held an H-1B visa for the maximum period of six years, the USCIS looks at all employers of the noncitizen under which s/he held an H-1B visa, not just the current employer. An employee holding an H-1B visa may be employed in a permanent position as long as s/he departs the United States at the end of the authorized stay.

There is no obligation for CSU or a campus to obtain this non-immigrant visa status for any noncitizen employee. The CSU or a campus may facilitate the visa application

process based upon employment, but the CSU cannot become responsible if a visa is denied or if the employee falls out of status. The CSU campuses should not volunteer to pay for an employee's attorneys fees or visa processing fees, other than the Fraud Detection and Prevention fee. Payment of these fees would likely constitute an illegal gift of public funds.

H-1B visa holders may seek permanent residence status (see Section D below) concurrently with petitioning for or holding the H-1B status.

2. The TN Visa

The TN classification was developed as part of the North America Free Trade Agreement to facilitate the entry of Canadian and Mexican professionals to the United States, including research assistants, vocational counselors and university teachers. The TN visa applies to persons: (1) working for a U.S. employer in a designated professional category; or (2) working for a Canadian or Mexican company doing business in the United States.

Canadians are not required to petition the USCIS for prior approval to obtain a TN visa. They can be obtained *at the port of entry* by providing proof of the requisite educational credentials, a letter of offer from a U.S. employer or an employment letter from a Canadian or Mexican company doing business in the U.S. and proof of Canadian citizenship. Mexicans must petition the USCIS for prior approval.

The TN visa holder is permitted to stay for one year in the United States and may renew annually for additional one year periods without limitation. The holder of a TN visa must not have the intent upon entering the United States to immigrate. The USCIS may therefore question a TN visa holder who has obtained a number of successive extensions as to his/her intent.

Filing for permanent residence status would indicate a lack of nonimmigrant intent and thus may invalidate the TN visa.

3. The O-1 Visa

The O-1 visa is for used for individuals of “extraordinary ability”. This is defined as a person who is at the very top of his/her profession. To qualify for this visa, the individual must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise, through a record of publications and awards.

A campus must file a petition with the USCIS that includes a statement from an appropriate peer group or labor organization with expertise in the specific field regarding the work to be done and the person’s qualifications. Following the approval of the petition, the O visa is issued by a U.S. consulate.

A person holding an O visa may apply for permanent resident status (see section D below.)

4. The J-1 Visa

The J-1 visa applies to foreign students and scholars who enter the United States in an approved Exchange-Visitor Program. The purpose of the J-1 Exchange Visitor Program is to provide noncitizens with opportunities to participate in educational and cultural programs in the United States and to return home to share their experiences.

Campuses can become sponsors of an exchange program by submitting an application to the Department of State, Bureau of Cultural Affairs. Application is limited to eight types of programs which include students, short-term scholars, business trainees, teachers, professors, research scholars, specialists, and other visitors. Every exchange program must have: (1) participation of at least five exchange visitors in the program per calendar year; and (2) a duration of at least three weeks.

The program sponsor issues a Certificate of Eligibility (DS-2019 form) that is taken by the prospective exchange visitor to a U.S. consulate to apply for issuance of the J-1 visa. (See Section III below “International Students and Exchange Visitors”.)

Students are admitted for one year on the J-1 visa. College and university professors and research scholars are usually admitted for up to five years.

Because the J-1 visa is available for noncitizens coming temporarily to a campus to participate in research or teaching activities, it is not appropriate for an individual who wishes to enter the United States permanently. It also prohibits the visa holder from being hired into any tenure track position and from applying for permanent resident status.

A two year foreign residence requirement is imposed on most J-1 visa holders, which requires that at the end of the authorized stay, the exchange visitor must return to his/her home country for a period of at least two years before being eligible to apply for permanent residence status or any other visa. Waivers of this requirement are granted in limited situations (e.g., return to home country would create an undue hardship on the noncitizen and/or his/her family).

5. The F Visa

F visa holders are students, who can be employed during pursuit of, or after completing, an educational program. While pursuing a full course of study, F visa holders may hold two types of employment *without* authorization from the USCIS:

- a. Employment that will not displace a U.S. resident; or
- b. Employment pursuant to the terms of a scholarship, fellowship, assistantship or postdoctoral appointment.

Neither employment may exceed 20 hours per week (except during holidays and recesses) without prior authorization from the USCIS.

After completing an educational program, an F visa holder may engage in “practical training,” the purpose of which is to provide the student with work experience in his/her field of study. This training is permissible:

- a. when the student is in a bachelor’s, master’s or doctoral program and has completed all course requirements for the degree (excluding a thesis or its equivalent); or
- b. when the student has completed his/her course of study.

A student is eligible for practical training for a total period of twelve months, which must be completed within fourteen months of the completion of study. The student must have held the F visa for at least nine months. Permission to engage in practical training is obtained from the foreign student advisor on campus.

D. Permanent Residence Status Based on Employment

Permanent residence status enables a noncitizen to reside and work in the United States without limitation. The process to obtain permanent residence status is highly regulated and extremely complex. It can take several years. Permanent resident status is **personal** to the employee and there is no obligation for CSU or a campus to obtain this status for any noncitizen employee. The CSU or a campus may facilitate the application process for permanent resident status based upon employment, but the CSU cannot become responsible if a visa is denied or if the employee falls out of status.

The Department of Labor regulations state: "An alien may pay his or her own costs in connection with a labor certification, including attorneys' fees for representation of the alien, **except that where the same attorney represents both the alien and the employer, such costs shall be borne by the employer.**" This has caused some to believe that the CSU now has a responsibility for additional immigration fees and/or that the employee and CSU should share a lawyer. These new regulations do not require a campus to hire or share the employee's attorney nor pay any attorney's fees, and the CSU campuses should not volunteer to do so. Payment of these fees would likely constitute an illegal gift of public funds. The only fee the campus must pay for is the Fraud Detection and Prevention Fee required for an H-1B application (see section C above).

It is recommended that prior to deciding whether to attempt to obtain permanent residence for any noncitizen employees, the campus consult with the Office of General Counsel.

III.

INTERNATIONAL STUDENTS AND EXCHANGE VISITORS

A. Student Visas

Students generally come to the United States on a J or F visa.

1. The J visa applies to foreign students and scholars who enter the United States as exchange visitors selected by a sponsor, such as a CSU campus, to participate in an

Exchange-Visitor Program approved through the U.S. Department of State. To get a J visa, a potential student must obtain from the campus a DS-2019 form, which indicates that s/he is qualified for an approved Exchange-Visitor Program on the campus.

2. The F visa applies to students who intend to study in the United States at an approved school and then return to their home country. They may be employed while pursuing their education. The F visa is obtained with an I-20 form, which indicates that the student is qualified for admission to the CSU.

While a campus issues the DS-2019 and the I-20 forms to the foreign student, both visas are issued by the United States embassy or consulate in the foreign country where the student is located. Students on F or J visas cannot establish permanent residence in the United States, nor can they qualify for in-state tuition.

The U.S. Department of Homeland Security, the U.S. Department of State, and the Social Security Administration have taken steps to ensure that foreign and exchange visitors who will be pursuing employment in the United States can be assigned Social Security Numbers. Campuses must provide a fact sheet about the new procedures to international students and visitors prior to their arrival in the United States.

B. Student and Exchange Visitor Information System (SEVIS)

The USCIS requires campuses that enroll international students to be certified. Campuses must also use the new USCIS internet-based system, Student and Exchange Visitor Information System (SEVIS), to track, monitor and report information about international students.

Following are the key aspects governing the campus certification process required by the USCIS:

1. To enroll international students or host exchange visitors, each campus must apply for certification and approval by the USCIS. This is accomplished by submitting an electronic form to the USCIS and paying the required filing fees. Historically, public schools were exempt from this filing fee, but CSU campuses must now pay the filing fee.
2. Each campus must be reviewed again every two years thereafter. A new fee must be paid with every recertification.
3. The USCIS will conduct on-site visits as a part of the certification process. These site visits may include a tour of the campus, interviews with campus officials, and a review of selected school records demonstrating campus compliance with applicable regulations.

After August 1, 2003, all F visa and J visa students must be entered into the SEVIS system and SEVIS must be used to issue I-20 and DS-2019 forms, and to monitor, track and report information to the USCIS for all non-immigrant students. At the present time, SEVIS must be used to issue I-20 forms (for F visa students) and DS-2019 forms (for J visa students), and also to report "reportable actions" (e.g., extension of status, practical training, employment authorization or new non-immigrant visas) for any current non-immigrant student.

IV.

CONCLUSION

Immigration laws are numerous and complex. The issues they raise have become even more complicated in the post September 11, 2001 world. The discussion in this Manual is necessarily general in nature. The Office of the General Counsel is available to respond to any immigration questions.