

## **H-1B WORK AUTHORIZATIONS AND APPLICATIONS FOR PERMANENT RESIDENCY Background Information and Basic Legal Requirements**

Attracting and retaining the highest quality faculty and staff is presumed to be an institutional priority of SIU. As a university with an international presence, SIU applicant pools for faculty and staff positions routinely contain well-qualified alien<sup>1</sup> scholars who, if offered a position at SIU, will require sponsorship by SIU for temporary (nonimmigrant) and/or permanent (immigrant) employment authorization from the U.S. Citizenship and Immigration Service (USCIS – the successor agency of the Immigration and Naturalization Service and part of the Department of Homeland Security). Such sponsorship usually involves legal representation of both the alien and SIU before federal agencies. In general, SIU does sponsor alien faculty and staff identified through the search process for H1B nonimmigrant status. Furthermore, SIU then sponsors those H1B workers in tenure-track appointments for lawful permanent residence (LPR) status within the first 18 months of employment, a timeframe required by regulations of the U.S. Department of Labor (DOL).

The Immigration and Nationality Act requires that an alien be legally authorized to work in the United States by the USCIS prior to commencing employment. Persons with LPR status, holders of the so-called "green card," are immigrants with complete access to U.S. job market (i.e., they are work authorized for any position with any employer at any time). Attaining LPR status involves a complex and lengthy process and is usually based on an employment relationship with a U.S. employer or on family relationship to a U.S. citizen. Persons without LPR status may work in the U.S. on a temporary basis pursuant to a nonimmigrant employment visa. Although there are several types of nonimmigrant visas serving different purposes, the H1B visa is particularly well-suited to employment in higher education. A brief description of the H program requirements and employment-based LPR follows.

### 1. H1B Visas

The H nonimmigrant (temporary) visa program is reserved for "specialty occupations" in positions requiring a college degree and is ideally suited for faculty positions and other professionals. The employer must petition the USCIS for H1B status on behalf of the alien employee and, when approved, the H1B worker may work only for the petitioning employer. The petitioning process takes approximately 2-4 months, but an expedited USCIS "Premium Processing" procedure is available for an additional \$1,000 filing fee. The maximum period of employment in H status is limited, with a few exceptions, to a total of six years, although the employer can petition for a shorter period of time. If the employment relationship with the H employer ends before the expiration of the authorized period of H status, the employer is obligated to pay the transportation costs of the former H employee to his or her country of origin. In the usual case, however, the H employee arranges to have a new employer petition the USCIS to transfer the H status to the new employer, thus releasing the former employer from all H obligations.

The laws, rules, and procedures to secure H1B status are complex and have been subject to constant change since the late 1990s. Non-profit institutions of higher education, however, receive more favorable treatment than private sector petitioners on certain requirements; i.e., waiver of some fees and no H1B numerical limits. A partial list of employer responsibilities

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<sup>1</sup> "Alien" is the definitive term used by the USCIS for a non-citizen foreign-national and will be used throughout this document.

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when petitioning for H1B on behalf of an alien including the following:

- Pay the H employee at least the prevailing wage for the geographic area of employment as determined by the Illinois Department of Employment Security.
- Pay \$690 filing fee for initial petition and \$190 for subsequent extension petitions. The employer is not responsible for fees associated with H4 petitions (non-employment) for dependents.
- Pay attorney fees, if any, for preparation of employer's petition. If the H employee pays attorney fees, the amount paid may impact the prevailing wage.
- Submit a Labor Condition Application (LCA) to the U.S. DOL evidencing the employer is paying the employee an amount not less than the prevailing wage in the area of employment so as not to undercut American workers.
- Post the approved LCA at two locations at the work place for ten days.
- Establish and maintain a "public access" inspection file containing specific documentation for each LCA submitted.
- Submit petition to USCIS, including all supporting documentation.

Once an H1B approval notification is issued to the employer by the USCIS, it is the H1B employee's responsibility to procure the necessary visa. If the alien is already in the U.S. in a different visa status, the H1B visa will have to be procured by the alien at a U.S. Consulate abroad on the next trip outside of the U.S. If the alien is not in the U.S., he or she will have to go through visa processing at a U.S. Consulate before entering the U.S.

Do note that one limitation of the H1B is that the degree must be related to the job. That is, a person with a master's degree in business administration will not be considered by the USCIS to meet the "specialty occupation" requirements for a job as a swimming coach.

### 2. Employment-Based LPR

Alien faculty employees generally commence employment for SIU in nonimmigrant status, typically H1B, and then adjust their status to LPR with SIU sponsorship. The LPR process has multiple steps and is currently taking two to three years to complete, although the alien employee can remain in valid H1B status much of the time during the process. Although there are several employment-based permanent resident categories, referred to as "preferences," only two are widely used by academic institutions to support faculty: the first preference is for "outstanding" professors and researchers and for those with "extraordinary ability" in the sciences, arts, and education and the second preference is for advanced-degree professionals or those with "exceptional ability" in the sciences and arts.

#### A. First preference Employment-Based

Proceeding under the first preference is relatively straight forward, but the filing requires a voluminous evidentiary showing to establish that the alien meets the "outstanding" or "extraordinary" standard. The first preference is primarily aimed at well-published and well-recognized researchers and full professors. The voluminous body of evidence necessary to qualify for this status is assembled by the attorney representing the alien in this application procedure. Since this requires additional "attorney time" it is a much more expensive process (starting at \$4,000.00).

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**B. Second Preference Employment-Based (Special Handling)**

Proceeding under the second preference is complicated by the additional step of the employer filing an Application for Permanent Employment Certification, ETA Form 9089, with the U.S. Department of Labor (DOL). No filing fees are required and payment of attorney fees by the alien employee is permissible. Labor certification is a document-intensive process that includes obtaining a prevailing wage determination from the Illinois Department of Employment Security, posting a specific notice of the available position for ten days at two locations, and documenting the entire recruiting effort to fill the position. A file on each case must contain the prevailing wage documents, the notice postings, records of all job advertisements, a written explanation of the search procedures, the full credentials of the alien, and supporting statements of the hiring authority.

The electronic filing of Form 9089, pursuant to the new PERM regulations, has arguably simplified second preference (special handling) processing by eliminating the physical submission of documents to DOL, but DOL has the right to demand production of documents at any time and more frequent DOL audits of records and enforcement actions may be anticipated. PERM requires that each employer register for an electronic account and all filings by the employer must be filed under that one account.

Labor Certification for faculty positions receives "special handling" and tests whether the employer conducted a legitimate, good faith national search and selected the best qualified person for the available position. Availability of U.S. workers for a teaching position is not necessarily relevant for purposes of labor certification. However, the standard for non-teaching positions, such as researchers and other professionals, is whether a qualified U.S. worker was available to fill the position. The second preference (special handling) is generally considered the best fit for new assistant professors and is used in the vast majority of cases sponsored by SIU.

Following approval of the Form 9089 by DOL, the employer must file an Immigrant Petition for Alien Worker (Form I-140) with USCIS on behalf of the alien. The employer must present the credentials of the alien, the approved Form 9089, a description of the position, and a showing of the ability to pay the prevailing wage. The current filing fee for Form I-140 is \$195. Concurrently with the filing of the Form I-140, the alien is authorized to file an Application to Register Permanent Residence or to Adjust Status (Form I-485), which is the final step in the LPR process. The filing of Form I-485 is not an employer responsibility, and includes, among other requirements, medical history, immigration history, and extensive background checks.

Lastly, the USCIS and the DOL regulatory scheme provides a host of penalties for non-compliance/violations including, in worst case scenarios, fines (up to \$35,000 per LCA violation), civil penalties (back pay judgments for prevailing wage violations), criminal penalties, and a bar against future filings, effectively prohibiting employment of aliens by the non-compliant employer.