

**Office of the VP and General Counsel
The George Washington University**

**LEGAL ADVISORY BACKGROUND DOCUMENT
for**

**University Sponsorship of Foreign Nationals for the H-1B Nonimmigrant and
Permanent Residence Immigrant Visas**

Posting Date: October 2, 2002

**I. Rationale for this Legal Advisory: Legal Requirements for H-1B, PR or J
Status, and Other Considerations**

A. H-1B Nonimmigrant Visa

GW may only petition the INS for the H-1B nonimmigrant who is coming to GW temporarily to perform services in a specialty occupation. A University position is a specialty occupation only if it requires theoretical and practical application of a body of highly specialized knowledge in fields such as architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts. As a general rule, the GW specialty occupation (position) must require that the H-1B prospective employee (“the beneficiary”) possess a bachelor’s or higher degree in a specific field of endeavor as the minimum entry-level requirement. In practice, specialty occupations at GW often require a level of experience that is higher than a bachelor’s degree. The H-1B beneficiary also must actually possess a bachelor’s degree or higher in the field required for the position. The GW position that an H-1B worker will fill may be a permanent position, but H-1B visa holders must depart the U.S. at the end of their authorized period of stay.

Prior to filing the H-1B petition, the University must also file and obtain approval for a Labor Condition Application (LCA) with the U.S. Department of Labor (DOL). The University makes various attestations in the LCA, including, among others, that the hiring of the foreign national will not adversely affect the working conditions of workers similarly employed and that it will pay the foreign worker the higher of the prevailing and actual wage and benefits comparable to those provided to similar employees of the employer in the same occupation. GW must be able to ensure that its LCA attestations are accurate and that the beneficiary otherwise qualifies for the H-1B, or it may incur legal liability.

The foreign national must be qualified to perform services in the specialty occupation and evidence of such requirements must be provided with the H-1B petition. Assuming all qualifications and requirements are met, INS may authorize the H-1B for up to three years. The employer may petition the INS for one three-year extension. With limited exception, INS will not extend the H-1B beyond the maximum period of six years, including time spent with other employers. However, a GW petition may not exceed the duration of the official appointment or period for which funding is guaranteed.

Under the doctrine of Dual Intent, H-1B regular faculty, research faculty, research scientists, senior research scientists and lead research scientists may legitimately come to the U.S. with the short-term intention to remain temporarily as an H-1B and, at the same time, lawfully seek to become a permanent resident of the U.S., provided that they intend to depart voluntarily at the end of their authorized stay. As mentioned in the Legal Advisory, GW employees in these positions are eligible for GW permanent residence sponsorship subject to certain conditions and criteria.

H-1B Sponsorship: Why are some GW employment classifications ineligible for GW sponsorship?

This Advisory bars H-1B and PR sponsorship for Students because Students are admitted to the U.S. for the sole purpose of pursuing an educational objective, not to obtain permanent employment in the U.S. Staff are also barred from sponsorship because they support the educational and research objectives of GW, but are not fundamentally engaged in GW's mission to train and educate workers. In addition, their positions do not usually rise to the level of "specialty occupation" within GW. Research Assistants, Senior Research Assistants, Research Associates and Senior Research Associates are barred because their positions also do not rise to the level of "specialty occupation" within GW. Persons holding a Postdoctoral Scientist position do not qualify because this position is intended to provide temporary, short-term training opportunities. Generally, the University does not sponsor Instructors because they are still considered to be students until they obtain the terminal degree. Visiting and Limited Service Faculty are not eligible for sponsorship because their involvement with the University is limited and temporary. Foreign resident physicians are not eligible for H-1B sponsorship in accordance with recommendations from the American Medical Association and the American Association of Medical Colleges.

B. Permanent Resident Status

Whereas the H-1B is a temporary employment classification, PR status confers on foreign nationals the right to live and work in the U.S. without time limitations. PR status is commonly known as the "green card." Congress established an annual quota system for permanent immigration that includes preferences for individuals with specialized skills. Employer sponsorship for PR requires an offer of full-time, permanent employment.

GW sponsorship of an employee for PR status is likely to be based on one of the two highest employment-based PR "preferences:" (1) Priority Workers, under the category of Outstanding Professor/Researcher or (2) Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability (normally "Special Handling" for teaching faculty chosen as the best qualified applicant through a national competitive recruitment process). GW must be able to meet strict evidentiary requirements in order to establish that the employee appropriately falls within one of these employment-based preferences. Foreign national employees who are not in truly unique or specialized occupations are unlikely to meet the standards for employer-sponsored PR.

Labor Certifications are required for most cases, including those filed under Special Handling for teaching faculty, and must be approved by the DOL before the University may file an employer-sponsored immigrant petition with the INS. Immigrant petitions filed for Outstanding Professors/Researchers are not subject to the Labor Certification requirement since such persons must qualify as Priority Workers who have achieved a level of experience and achievement recognized internationally as outstanding in the academic field. A tenure-track teaching or comparable permanent research position is required. If the individual case does not qualify under the Outstanding Professor/Researcher category or Special Handling for teaching faculty, the University usually has to file a Labor Certification with DOL to demonstrate that there are no qualified U.S. citizens or permanent resident workers available who meet the University's official minimum qualifications for the position. This standard is high and can be hard to meet, particularly when the employer is a university providing advanced education in a variety of fields.

Universities generally do not sponsor foreign nationals for PR under the third employment preference category of Professionals, Skilled Workers and Other Workers, because it is virtually impossible to certify that GW is unable to find any minimally qualified workers for positions classified under this employment preference.

PR Sponsorship: Why are some GW employment classifications ineligible for sponsorship?

Students, Staff, Research Assistants, Senior Research Assistants, Research Associates and Senior Research Associates are ineligible for PR sponsorship because normally it is not possible for the University to certify accurately to the federal government that no minimally qualified U.S. workers are available for jobs in these GW employment classifications. Postdoctoral Scientists are typically employed on a temporary basis for the purpose of furthering the employee's scholarly research skills and experience beyond the Ph.D. They are ineligible for PR sponsorship because such positions are not intended for long-term, indefinite, or career appointments. Foreign resident physicians are not eligible because their positions are temporary and for training purposes.

C. The J Exchange Visitor Program

GW is a designated sponsor of the J exchange visitor program. As such, GW may sponsor foreign nationals to come to GW to register as students (for example, through an affiliation agreement with a foreign university) or to work as employees in the capacities of professor, researcher or short-term scholar ("scholars"). This classification is appropriate for most faculty and advanced researchers who do not hold tenured or tenure-track appointments. The J visa is also used sometimes to bring certain scholars to GW as visiting scholars, for example, to conduct research independently. Such scholars are not considered University employees. The J regulations differ by category. Some J scholars are subject to a two-year home residency requirement, meaning that such scholars must return to their country for two years before being eligible to apply for an immigrant visa (permanent residency) or a nonimmigrant H or L visa. Assuming funding is assured for

the entire period of stay, foreign national J scholars may receive approval from the U.S. government to stay in the U.S. for three years. The government has proposed, but not yet finalized, a regulatory change to extend the time limit for professors and scholars from three to five years. It is important to note that many leading research institutions find the J visa to be more appropriate than the H-1B for hiring foreign national researchers on a temporary basis because it offers certain flexibility and is easier and less costly to obtain. Unlike most other immigration classifications (e.g., H-1B), J-2 dependents may apply to the INS for work authorization after arrival in the U.S.

D. Other Considerations

Like all universities and other employers, GW has made a decision as to the immigration-related services it will offer. GW sponsorship of foreign nationals for the H-1B and PR is limited to those positions that contribute to the University's mission as a teaching and research institute. Persons filling administrative, technical or library (including professional librarian) positions are essential to the **support** of the educational and research objectives of GW, but are not fundamentally engaged in that mission. Therefore, as a general practice, GW sponsors for the H-1B only foreign nationals in **full time** academic/faculty positions and advanced research staff and for PR, only foreign nationals in **full time, permanent** academic/faculty positions. In all cases where GW sponsors a foreign national for a particular immigration status, GW sponsorship must be motivated primarily by its mission and not by a desire to conveniently staff positions with foreign nationals when those positions could be filled by American citizens or permanent residents.

As stated in the beginning of this Advisory, the H-1B is not the only method available to GW to employ foreign nationals temporarily in faculty and advanced research staff positions. Departmental supervisors should consult with ISO for a determination as to the appropriate visa category for a particular University position and foreign national current or prospective employee.

II. Consequences to the University for Failure to Comply

Under the Immigration Reform and Control Act of 1986 (IRCA), employers may be sanctioned for knowingly hiring or continuing to employ individuals who are not authorized to work in the United States.

The University is also subject to potential penalties for violating regulations pertaining to the Labor Condition Application (LCA), submitted to the U.S. Department of Labor (DOL) as part of the H-1B process, and for making misrepresentations in the Labor Certification, submitted to DOL as part of the PR process. For example, depending upon the level of LCA violation, the University is subject to civil monetary penalties ranging from \$1,000 to \$35,000; to payment of back wages if the violation is wage-related; and to a University-wide bar on filing H and PR petitions ranging from one year to more than three years, depending upon the level of the violation.

In addition, employers receiving government grants and contracts who do not comply with INS employment provisions may lose their government contracts and be barred from applying for additional grants and contracts for at least one year.