To: Deans, Chairs, and Directors  
Re: Hiring and Immigration Issues  
From: Kathy A. Krendl, Executive Vice President and Provost

As a new hiring season begins, I would like to draw your attention to some important matters that relate to hiring foreign nationals for faculty positions. Please read this memo carefully and act on its contents. Share it with anyone in your unit who works with faculty hiring and/or immigration issues. If you have any questions contact Krista McCallum Beatty, Director, International Student and Faculty Services (ISFS) (mcallum@ohio.edu).

SUMMARY

- All faculty searches from the outset should meet the requirements needed to take advantage of the U.S. Department of Labor’s more efficient and less expensive immigration option (known as Special Recruitment) created specifically for faculty with teaching responsibilities. The specific requirements can be found in Appendix I, but there are two that need to be highlighted:
  - Departments and schools must place print advertisements for all searches in national professional journals, must keep a copy of the advertisements as they appear in the journal (not a copy of what was submitted to the journal), and the advertisements must be placed during the recruitment period.\(^1\) To better assist hiring managers with print advertising requirements, modifications to the online posting requisition process are being made through PeopleAdmin.
  - In the case of hiring a foreign national, the department/school must contact ISFS within 12 months of the offer letter to begin the Labor Certification process.

- In a departure from years past, Department of Labor regulations now state that employees cannot pay any of the employer’s costs associated with the filing of an H-1B petition or a Labor Certification.

In order to allow departments and schools the ability to hire the best candidates for faculty searches currently underway, the Office of the Executive Vice President and Provost has created a pool of funding to help defray costs for new faculty associated with the filing of H-1B petitions or Labor Certifications (costs to be covered include ISFS charges and federal application filing fees). Faculty eligible to receive funding are those who will begin their careers at Ohio University in AY 2009-2010. ISFS will “bill” EVPP for the costs (see, Appendix II). No additional financial paperwork will be required on the part of schools, departments, or colleges.

- In order to take advantage of the “safe-harbor” protection offered by the Department of Labor in conjunction with prevailing wage determinations for H-1B visas, Ohio University will obtain its

\(^1\) The language of the statute specifically asks for “a copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of publication; and which states the job title, duties, and requirements.”
prevailing wage determinations through state workforce agencies. What this means for you as a chair, director, or dean is that the use of state workforce agencies may slow down the processing of H-1B visas. It may take up to 20 days (or more during February and March) to receive a prevailing wage determination from a state workforce agency. Please plan accordingly.

**DEFINITIONS**

It is impossible to discuss employment-based immigration issues without using some technical terms.

**H-1B Temporary Worker** According to the Department of Labor, the “H-1B [visa] program allows an employer to temporarily employ a foreign worker in the U.S. on a nonimmigrant basis in a specialty occupation . . . . A specialty occupation requires the theoretical and practical application of a body of specialized knowledge and a bachelor’s degree or the equivalent in the specific specialty (e.g., sciences, medicine and health care, education, biotechnology, and business specialties, etc...).” H-1B status can be approved for up to three years initially, and “a foreign worker can be in H-1B status for a maximum continuous period of six years.” The procedure for acquiring an H-1B visa requires the completion of a Labor Conditions Application (LCA). Completion of the LCA is the responsibility of ISFS. Part of the LCA is a certification that the employee is being paid the prevailing wage for the type of job she or he is undertaking.

**Immigrant Petition** An Immigrant Petition is submitted to the United States Citizenship and Immigration Service (USCIS) by an employer to request that a designated employee be allowed to apply to immigrate to the US (obtain permanent residency). The petition is based on the employee’s eligibility for an immigrant category and the employer’s intent to employ the employee on a permanent basis. Common immigrant categories are EB-1 Outstanding Professor or Researcher and EB-2 Member of the Professions.

**Alien Labor Certification** Alien Labor Certification is a process required by the Department of Labor in the case of EB-2 immigrant petitions. It is designed to demonstrate that “there are no qualified U.S. workers able, willing, qualified, and available to accept the job at the prevailing wage for that occupation in the area of intended employment and that employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.”

There are two forms of Alien Labor Certification: Optional Special Recruitment and Documentation Procedures (Special Recruitment) and Standard Filing Alien Labor Certification (Standard Filing). Special Recruitment is less stringent and costly than Standard Filing and consequently it should be the aim of the university to utilize the former in all instances of hiring foreign nationals as faculty with teaching responsibilities. Completion of either labor certification requires a prevailing wage determination.

**Permanent Residency** The ability of a foreign national to reside permanently in the U.S. rests on the possession of a “green card” which is proof that lawful permanent residency has been granted. In most instances, the employment-based immigration process begins while the employee is in the country in H-1B status. The employee’s permanent residency application is adjudicated once the employer’s immigrant petition is approved.
IMMIGRATION SUPPORT COSTS

1. In a departure from years past, Department of Labor regulations now state that employees cannot pay any of the costs associated with the filing of an H-1B petition or a labor certification. These are viewed as business costs and must be paid for by the employer. In certain cases, regulations allow employees to pay the cost of premium (expedited) processing for an H-1B petition. The Director of ISFS will review these cases to determine whether or not the employee will be allowed to make the payment.

The shifting of the costs to the employer places an additional financial burden on schools and departments. In order to allow departments and schools the ability to hire the best candidates for faculty searches currently underway, the Office of the Executive Vice President and Provost has created a pool of funding to help defray costs for new faculty associated with the filing of H-1B petitions or Labor Certifications (costs to be covered include ISFS charges and federal application filing fees). Faculty eligible to receive funding are those who will begin their careers at Ohio University in AY 2009-2010. ISFS will “bill” EVPP for the costs (see, Appendix II). No additional financial paperwork will be required on the part of schools, departments, or colleges.

2. The university/departments/schools/colleges cannot require reimbursement of immigration fees, including in the event that an employee who utilized university resources to secure permanent residency leaves her or his position.

FACULTY SEARCHES

As you cannot know in advance if your top choice for a faculty position will be a foreign national, it is best to conduct all searches with an eye to Department of Labor employment-based immigration requirements. Exercising this kind of prudence means that if a foreign national ends up being the candidate of choice, the sponsoring of that individual for permanent residency can be pursued in the most efficient and cost effective manner.

In the typical situation, sponsorship of an individual for permanent residency begins with the filing of an Alien Labor Certification. There are two forms of this certification, Special Recruitment and Standard Filing. Of the two forms, the more efficient and cost effective way to sponsor a faculty member for permanent residency is to utilize the Special Recruitment process for the Alien Labor Certification. Fortunately the Department of Labor recognizes the unique selection process used widely in higher education and the need to hire the best-qualified person for a teaching position. If the search process resulting in the hire of a foreign national meets specific criteria, employers can utilize Special Recruitment which in effect becomes a ‘fast-track’ to permanent residency for the employee.

A second avenue is the EB-1 “Outstanding Researcher/Professor” category. It requires no labor certification. In order to qualify an employee for this process, a university must document that an individual has received a permanent job offer, has three years of teaching or research experience in their discipline (usually beyond the terminal degree), and possesses a host of outstanding scholarly accomplishments. The EB-1 option may be appropriate if a department specifically recruits an outstanding scholar for a position and forgoes a competitive search process.
The bar is high when it comes to being successful in being granted permanent residency status under the EB-1 process and you cannot know at the outset of the search whether you will have a candidate who can qualify for residency under its auspices. Because you cannot know at the beginning of your search the degree to which a foreign national whom you might want to hire could successfully pursue an EB-1 application, all searches should be conducted in a manner which meets the Special Recruitment criteria. A list of what is required to be submitted by the employer to qualify the employee for Special Recruitment can be found in the Appendix I.

ISFS will provide guidance on meeting the criteria for a Special Recruitment application, but it is helpful for individuals involved in searches to understand the type of records that must be produced in case a school/department ends up hiring a foreign national. The two most common problems that can derail the chance to use Special Recruitment are:

- Failure to place a print advertisement in a national professional journal. It must be a print advertisement, you must provide a copy of that advertisement as it appears in the journal (not a copy of what you submitted to the journal), and it must be placed during the recruitment period.\(^2\)
- Failure to file the Labor Certification within 18 months of the offer letter. Departments and schools must contact ISFS within 12 months of the offer letter to begin the Labor Certification process.

The Labor Certification comes into play after the hiring has taken place, but the printed advertisement is something that should be done for all searches at the outset of search process. Please make sure that this action is taken in all of the faculty searches that you will be undertaking this year.

To better assist hiring managers with print advertising requirements, modifications to the online posting requisition process are being made through PeopleAdmin. In the past, recruitment and advertising information was required to be submitted as a part of the Affirmative Action Recruitment Report near the end of the search process. Starting immediately, information about active recruitment and advertising plans will now be requested during the posting approval process. This will allow for the opportunity to review recruitment and advertising plans to ensure that they meet the requirements necessary to use Special Recruitment.

If the printed advertisement requirement or any other requirement for Special Recruitment is not met and you hire a foreign national, the university will be unable to use the Special Recruitment option to obtain permanent residency status. Unless the individual qualifies under the “Outstanding Researcher/Professor” process, Standard Filing would have to be pursued.

Departments and schools that end up having to follow the Standard Filing process due to neglect in placing a print advertisement in a national journal and in maintaining a proper copy of that advertisement should anticipate that central resources will not be supplied to cover the costs of outside immigration counsel which is typically required to complete standard filing applications.

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\(^2\) The language of the statute specifically asks for “a copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of publication; and which states the job title, duties, and requirements.”
Similarly departments/schools that fail to contact ISFS within 12 months of the offer letter to file the labor certification should anticipate bearing the financial responsibility for having to use Standard Filing.

PREVAILING WAGES

The completion of a Labor Conditions Application (LCA) in support of an H-1B application and the completion of Alien Labor Certification require a prevailing wage determination.

In the past, ISFS obtained prevailing wage information for LCAs from a variety of sources including state workforce agencies. In the future, all prevailing wage determinations will be sought through the appropriate state work force agency.

The reason for this change in policy is that use of a state workforce agency triggers a “safe harbor” provision in the law. Under the “safe harbor” provision, the Department of Labor will unconditionally accept the state workforce agency’s determination of a prevailing wage and will not challenge it during an audit. The rejection of a prevailing wage on an LCA audit can expose the university to fines, back wages, and could undermine the university’s ability to hire foreign nationals in the future.

What this means for you as a chair, director, or dean is that the use of state workforce agencies may slow down the processing of H-1B visas. It may take up to 20 days (or more during February and March) to receive a prevailing wage determination from the state of Ohio. Please plan accordingly.

Unites will be required to pay the non-resident alien employees at least the prevailing wage as determined by the state workforce agency. In general, Ohio University salaries exceed the prevailing wage. The Director of ISFS and the Director of Compensation in Human Resources will review cases where the wage offered does not meet or exceed the prevailing wage.

PART-TIME POSITIONS

The university will no longer process H-1B applications for part-time positions. Not processing part-time H-1B applications is standard practice at most institutions of higher education due to the complexities that surround this type of employment. Part-time positions are also not eligible for employment based immigrant petitions (Labor Certification and permanent residency).

ROLE OF ISFS

ISFS is responsible for filing employment-based immigrant and non-immigrant petitions on behalf of Ohio University. These petitions include but are not limited to temporary worker (H-1B) petitions, Labor Certifications, and immigrant petitions. ISFS charges fees for these services. The fees cover application fees and administrative costs. A complete list of fees is attached; the fees have not increased from FY08. ISFS does not file adjustment of status applications (permanent residency applications) for employees but will provide limited guidance and resources for employees who are filing these petitions. ISFS does not prepare applications for employees’ dependents, but will provide limited guidance to the employee as needed.
APPENDIX I

Criteria for “Optional Special Recruitment and Documentation Procedures” for Labor Certification

In recognition of the special hiring needs of universities, the Department of Labor established “Optional Special Recruitment and Documentation Procedures” (Special Recruitment) for Labor Certification. Special Recruitment allows a university to use its regular competitive selection process and select the best-qualified candidate for a position, regardless of the availability of US workers who meet the minimum qualifications for the position. This option is very advantageous to the university and in effect provides a fast track to adjustment of status (green card application) for the employee.

In order to take advantage of this option, the recruitment and selection process must meet the following criteria:

1. The position must be a permanent “college or university position, which involves some actual classroom teaching” and the intention must be that the individual will be continuously employed; typically, this will mean that the position is either tenured or tenure-track. The amount of teaching is not specified, however, the courses should be regularly scheduled classroom courses.

2. The recruitment and selection process must be a competitive process and the foreign national selected for the position must be the best-qualified candidate for the position.

3. The recruitment for the position must include at least one print advertisement in a national professional journal appropriate to the field. The print ad must contain the position title, duties (including classroom teaching), and requirements for the position (level of education, field of education, years of experience if any). A copy of the actual print advertisement including the name of the journal and the date(s) of publication of the ad is required.

4. Additional recruitment is required and must be documented. The regulations do not specify the nature of the additional recruitment, but it must be able to be documented. Human Resources can provide guidance on additional recruitment efforts. By way of example only, a typical additional recruitment effort would be an on-line position posting on a widely-known employment site.

5. At the end of the selection process, a statement must be prepared and signed by the hiring authority outlining in detail the complete recruitment procedure undertaken, the total number

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3 Resources used:
NAFSA Adviser’s Manual Online. NAFSA: Association of International Educators, Washington, DC.

of applicants for the job opportunity, and the specific lawful job-related reasons why the foreign national is more qualified than each U.S. worker who applied for the job. This requires the hiring authority to fully complete the university’s on-line recruitment report.

6. A final report from the search committee and/or administrative body making the recommendation or selection of the foreign national must also be completed at the end of the competitive recruitment and selection process. This report must include the date of selection/offer. ISFS can provide a template for the report.

7. The Special Handling Labor Certification MUST be filed within 18 months of the date of the offer letter for the position. Departments must contact ISFS no later than 12 months after the date of the offer letter to begin the process of filing a Labor Certification. Filing a Labor Certification can take several months of preparation work. For most new hires, the Labor Certification process will begin within the first year of employment.

Departments that fail to meet these requirements will need to pursue a Standard Filing Alien Labor Certification for positions supported for Permanent Residency. This process involves re-advertising the position to test the labor market for qualified US workers. The process is costly, time consuming, and does not guarantee the university will be able to file a Labor Certification.

Please direct questions to Krista McCallum Beatty, Director, ISFS, mcallum@ohio.edu.
**APPENDIX II**

**International Student and Faculty Services**

**Employment-based Immigration Fees**

Revised August 2008

*Amount of fee kept by ISFS to cover administrative fees, etc. in parentheses*

<table>
<thead>
<tr>
<th>Application</th>
<th>Fees</th>
<th>Payment</th>
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<tbody>
<tr>
<td>H1B Temporary worker in a Specialty Occupation*</td>
<td>$1800 ($980) ISFS ($820) App. Fee</td>
<td>MUST be paid by the employer</td>
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<tr>
<td></td>
<td><strong>$1800 ($1480) ISFS ($320) App. Fee</strong></td>
<td>May be paid by the employer or employee or shared by the two</td>
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<tr>
<td>O1 Alien Worker of Extraordinary Ability</td>
<td>$1800 ($1480) ISFS ($320) App. Fee</td>
<td>May be paid by the employer or employee or shared by the two</td>
</tr>
<tr>
<td></td>
<td><strong>$1800 ($1480) ISFS ($320) App. Fee</strong></td>
<td>May be paid by the employer or employee or shared by the two</td>
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<tr>
<td>H1B Extension*</td>
<td>$1300 ($980) ISFS ($320) App. Fee</td>
<td>MUST be paid by the employer</td>
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<tr>
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<td><strong>$1300 ($980) ISFS ($320) App. Fee</strong></td>
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<td><strong>$1300 ($980) ISFS ($320) App. Fee</strong></td>
<td>May be paid by the employer or employee or shared by the two</td>
</tr>
<tr>
<td>Premium Processing Service for H1B</td>
<td>$1000 (0)</td>
<td>May be paid by employee only in certain circumstances</td>
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<tr>
<td></td>
<td><strong>$1000 (0)</strong></td>
<td>May be paid by the employer or employee or shared by the two</td>
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<tr>
<td>Premium Processing Service for O1</td>
<td>$1000 (0)</td>
<td>May be paid by the employer or employee or shared by the two</td>
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<td></td>
<td><strong>$1000 (0)</strong></td>
<td>May be paid by the employer or employee or shared by the two</td>
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<tr>
<td>Labor Certification for teaching positions*</td>
<td>$1500 ($1500) ISFS</td>
<td>MUST be paid by the employer</td>
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<td></td>
<td><strong>$1500 ($1500) ISFS</strong></td>
<td>May be paid by the employer or employee or shared by the two</td>
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<td>Immigrant petition for EB1 Outstanding Researchers/Professors</td>
<td>$2200 ($1500) ISFS ($700) App. Fee</td>
<td>May be paid by the employer or employee or shared by the two</td>
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<tr>
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<td><strong>$2200 ($1500) ISFS ($700) App. Fee</strong></td>
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<td>Immigrant petition for EB2 Member of the professions</td>
<td>$700 ($225) ISFS ($475) App. Fee</td>
<td>May be paid by the employer or employee or shared by the two</td>
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*Costs and fees eligible to be covered by EVPP Immigration-Based Employment Fund. Other fees and costs will not be covered by the EVPP fund.*