EMPLOYMENT-BASED VISAS—THERE MAY BE A BETTER WAY

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Hearing clients' stories and assisting them to achieve their goals are some of the most rewarding and interesting aspects of the job of an immigration attorney. Each day we balance our interest in hearing about their work, family, and culture with the need to process cases and clear our desks. The point of this article is to remind practitioners not to short-change the initial interview, and to be open to other not-so-apparent strategies for handling a client's case early in the process.

The applicant may be able to skip a step or qualify under a different category than planned. For a variety of reasons, immigration attorneys tend to miss non–employment-based (EB) categories. Some attorneys process only EB cases as a matter of office policy, while others proceed with the visa category that the university suggests. Moreover, many institutions have streamlined procedures for a few visa categories and regularly guide both academic departments and beneficiaries into the pipeline due to resource and time constraints

However, in the university context, one sees a wide variety of countries of origin and family circumstances—more than we would expect in the corporate context. This can lead to a range of options for academics and researchers beyond H, O, TN, or EB permanent residence category. In addition, family members may offer separate paths to visa status.

Following is a basic guide to remind you and your staff to be aware of non-EB options. These options should also be presented as part of any visa talk to faculty, staff, or students.

The importance of looking beyond the EB categories cannot be overstated—it is becoming increasingly difficult to keep track of all areas of immigration law. Many practitioners are now highly specialized. At a recent conference, however, we were comparing stories about people who spent years applying for temporary visas and then permanent residence, only to realize later that they had a faster alternative. Therefore, it is worth the time to review all the nonimmigrant and immigrant visa categories available, and to get basic information about family members.

In the interest of keeping interviews to a reasonable period of time, we have provided a short list of basic questions to ask every prospective client:

- Do you or your spouse have any relatives who are, were, or may soon be U.S. citizens or permanent residents?
- What does your spouse do and where is he or she from?

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- Have you considered all of the categories of permanent residence, including lottery and family-based petitions?
- Do you fear returning to your home country? Why? Do you or your family have a history of problems in the home country?
- Are you from a country that is covered by Temporary Protected Status?

Below are some short case studies that illustrate why the answers to these questions can lead to alternative choices for clients.

1. Prof. Mackensie is a Canadian citizen who has been teaching on and off for years at Jones College in Tennessee. He uses a TN visa, but now wants an H-1B because he has been offered a tenure track job. He seems clearly eligible for the H-1B and Special Handling. However, in the course of conversation, it becomes apparent that both of his parents were born in Michigan. They lived in the United States for only a few years during the 1920s, then settled in Canada. Prof. Mackensie was born in Canada and never considered himself a U.S. citizen.

Citizenship law is complicated because it changes periodically and at times it is retroactive. However, some research reveals that he was a U.S. citizen at birth, lost his citizenship by not living in the United States, but can regain it simply by presenting proof of his parents' citizenship and taking an oath of allegiance at a U.S. consulate in Canada.[1] American Citizen Services at the consulate can help organize the minimal paperwork, and also help him apply for a U.S. passport once he has taken the oath. In this case, the time and expense of an H-1B visa and permanent residence application is unnecessary. As a U.S. citizen, he can also sponsor his wife and children for permanent residence. His wife can now get an EAD and a job immediately, and his children will soon be eligible for in-state tuition and financial aid.

2. Faisal is from Pakistan. He has an MBA, and works at a university-affiliated research institute as a market research analyst. He wants to apply for permanent residence, but does not qualify as an Outstanding Researcher, and does not teach (so no Special Handling). The job is an entry-level research position, and requires an MBA. Labor certification would be difficult (and certainly time-consuming) because there is no shortage of U.S. citizen MBAs who might apply. However, his parents have just become U.S. citizens. Instead of starting the labor certification process, Faisal's parents can sponsor him for permanent residence directly.

Faisal is married, so he would fit in the Family-sponsored third preference category (married adult son of a U.S. citizen). Although that category is now backlogged almost five years, his parents had the foresight to file an I-130 preference petition for him when they became permanent residents in 1994. Therefore, he can use the original filing date of that petition as his priority date, so that there will be no backlog for Faisal and his wife. In this case, asking whether Faisal has any relatives in the United States, *and* asking if they have ever filed anything for him before, averted the use of the labor certification with all its delays, expense, and uncertainty.

3. Jambha, from Tibet, has just begun working for your institution in an administrative position on F-1 practical training. She has an associate's degree in business management from a nearby community college. She would like to remain in the United States and her supervisor wants to retain her, but her educational background does not qualify her for the H-1B, and chances for permanent residence are limited given her field. Even without these difficulties, your institution has a policy barring employment-based immigration sponsorship for nonacademic positions.

After talking to her, you learn she is actually afraid to return to Tibet because her family was involved with advocating for independence from China. She is very reticent to talk about her family or the situation there for fear of hurting the chances of other Tibetans coming to the United States.

An application for asylum may be a real possibility if she can show that she has a well-founded fear of persecution on returning to China. Asylum applicants are often slow to divulge important information because of post-traumatic stress. It will probably take several interviews with an immigration attorney or nonprofit agency to determine the strength of her claim. However, if she does receive asylum, she will have work authorization and can file for permanent residence. Unlike most asylum seekers who are not in legal status and face removal if their case is denied, Jambha now has a valid F-1 visa so there is no danger in applying if she has a good case. Furthermore, the normal one-year filing deadline for asylum cases does not apply to the very small hand-

[1] INA §§301(c), 324(d).

ful of people who apply while still in valid nonimmigrant status.[2]

Note also that asylum is an option for even for those who are subject to §212(e)! An asylee can obtain a refugee travel document and is employment authorized incident to status. Furthermore, the asylee can go on to adjust (though not through INA §245) without satisfying the two-year home residence requirement through INA §209.

4. Friedrich is a visiting scholar from Germany on a J-1 visa (not subject to the two-year residence requirement). He has been offered a permanent research position at the university, and wants to talk about getting an H-1B visa and Outstanding Researcher classification. You learn that he is engaged to a registered nurse. If his fiancée is a U.S. citizen, she can sponsor him for permanent residence as soon as they are married, thus avoiding the Outstanding Researcher petition and maybe even the H-1B. Even if she is not a U.S. citizen, she can apply for permanent residence as a nurse once she gets a job in the United States. This may be a faster option since registered nurses are also exempt from labor certification, and this category (called Schedule A) is expedited.

Although these examples may seem like looking for a needle in a haystack, they show that asking very basic questions about the permanent residence categories and an applicant's family can have surprising results. Therefore, remember to consider all temporary and permanent visa options.

Temporary visas run the gamut from A-V and the list is growing. The E visa is for investors or certain employees of companies (large and small) engaged in international trade. Some students or researchers may be in a position to put money into a new business. If they are married, it may be possible to have the spouse be the principal investor and then the researcher would have an EAD as the spouse of an E-2 investor. U visas or battered spouse petitions may also be possible in the university context.

Unlike the myriad of different temporary visas, which do not fit neatly into broad categories, permanent visas fall into four basic groups: special programs of Congress, family sponsor, employer sponsor, and asylum. Be sure to consider all categories that may apply to your client, and realize that the client may be able to apply in more than one category at a time.

First, there are *special programs of Congress that benefit a particular group*. These include periodic amnesty programs and registry (a path to legal permanent residence for those who have been in the United States since January 14, 1972). The most important program for academics is the Diversity Lottery, which is held every year. The goal of the program is to encourage immigration from countries that are under represented in the United States. Therefore, natives of over-represented countries such as Mexico, China, the Philippines, and India are not eligible. Because of the wide variety of nationalities represented in universities, the lottery can be a useful tool.

Details of the lottery program appear on the State Department's Web page (*www.travel.state.gov*). Although the application appears simple, be sure to follow the directions carefully. *A winner does not automatically obtain a green card.* Rather, winners submit adjustment of status applications. Of the roughly 12 million entries last year, there were about 100,000 "winners," of whom only about half received permanent residence.

Keep in mind that some foreign student advisers feel that lottery applications may jeopardize a person's ability to obtain an F or J visa abroad because the State Department DS-156 form (used for all temporary visa applications at a U.S. consulate abroad) specifically asks whether a lottery application has been filed (for purposes of immigrant intent). Many lawyers still advise filing lottery applications because of the obvious potential benefit. We have not yet heard of denials of temporary visas at consulates because a lottery application has been filed. However, it may be one factor in determining temporary intent overall.

Second, one can apply for *permanent residence through a family sponsor*. There are various categories of family relationships that range from spouse of a U.S. citizen (the fastest) to sibling of a U.S. citizen (the slowest, now taking well over 10 years and getting worse). In between, there are several categories, including children and spouses of permanent residents. The specific groups, and the waiting times involved, are listed each month on the State Department Visa Bulletin, available on the State Department Web site, *www.travel.state.gov*.

[2] 8 CFR §208.4(a)(5)—maintaining lawful status is a category under the extraordinary circumstances exception to the one-year filing deadline.

The recent ruling by the Massachusetts Supreme Judicial Court has raised questions about the potential immigration consequences of entering into a same sex marriage. Immigration attorneys not only may be called on to advise on the immigration consequences of same sex marriage after the fact, but on the advisability of entering into a marriage before the marriage takes place.

It appears that the Federal Defense of Marriage Act (DOMA) would prohibit the same sex spouse from receiving an immigration benefit from a marriage. This Act will ultimately be challenged.[3]

Even if the beneficiary is applying for permanent resident status through employment rather than family, it is important for counsel to be aware of the family relationships, particularly of U.S. citizen or permanent resident relatives. Waivers pursuant to INA §§212(h) (waiver of crimes involving moral turpitude), 212(i) (waiver of past instances of immigration fraud), and 212(g) (waiver of health-related grounds such as HIV/AIDS) all require an anchor relative who is either a U.S. citizen or lawful permanent resident. If the appropriate relative does not exist, then the client may not be able to adjust status in any category and may have to remain in a nonimmigrant status or worse, leave the United States entirely.

Third, an alien can seek *asylum in the United States if he or she has a "well-founded fear of persecution" in his or her home country*. If you think your client might qualify for asylum, seek the help of an immigration lawyer or U.S. Citizenship and Immigration Services (USCIS)-approved nonprofit agency. Remember that fear of economic hardship or fear of general criminal activity is not a basis for asylum—it must be fear of persecution by the government (or a group that the government is unable or unwilling to control) on account of one's political views, race, ethnicity, membership in a particular social group, or religion.

Conclusion

Overall, it is important to keep in mind that not all visa cases proceed as planned. By incorporating a few basic questions into your intake interview, you can save some clients expense, effort, and delay in achieving their immigration goals.

[3] Same sex marriage also raises questions on how an applicant should complete USCIS or Department of State application forms. For example, should one disclose a marriage that one knows is not recognized by the federal government? The answers to this question are complicated. Marriage, even though not recognized, would likely be viewed as material by a USCIS or DOS adjudicator. If, for example, an applicant is not able to apply for permanent residence and needs to switch to another nonimmigrant category, the existence of a marriage to a U.S. citizen may indicate that the applicant has immigrant intent.