

# For International Advisors - Effective, Efficient Intakes

By Dan Berger and Laura Taylor\*

One of the best parts of being a foreign scholar advisor or immigration lawyer is that each person comes into our office with his or her own story. Each day we balance our interest in hearing about their work, family, and culture with the need to process cases and clear our desks.

However, it is important to keep in mind that in the person's story may be a key fact that will become important in the visa application. The applicant may be able to skip a step or qualify under a different category than planned, or worse, there may be something in the person's background that will prevent the visa being issued once it is approved. This advisory attempts to make a simple checklist that will catch as many of these facts as possible without turning every intake interview into a day-long event.

## I. Consider all immigration options

Usually, a person enters your office with a specific visa category in mind, or perhaps your institution has streamlined procedures for a few visa categories and regularly guides both academic departments and beneficiaries toward one of these. If the person appears to be a good candidate for the intended visa category, it may be tempting to forgo asking additional questions.

At a recent NAFSA conference, however, we were comparing stories with other participants about people who had spent many years applying for temporary visas and then permanent residence, only to realize later that they had a faster alternative. These cases are rare, but wonderfully satisfying when caught early. Therefore, it is worth the time to review the categories of permanent residence and to get basic information about family members. The following list of questions should cover most situations:

- Do you have any relatives who are US citizens or permanent residents?
- What does your spouse do?
- Have you considered all of the categories of permanent residence, including asylum, lottery, and family-based petitions?

Here are some examples of why the answers to these questions can be important.

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 comes out that both his parents were born in Michigan. They lived in the US for only a few years during the 1920's, then settled in Canada. Prof. Mackensie was born in Canada and never considered himself a US citizen.

Citizenship law is complicated because it changes periodically, sometimes retroactively. However, some research reveals that he was a US citizen at birth, lost his citizenship by not living in the United States, and gain re-gain it simply by presenting proof of his parents citizenship and taking an oath of allegiance at a US consulate in Canada. INA Sec. 301(c), 324(d). American Citizen Services at the consulate can help organize the minimal paperwork, and also help him apply for a US 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. 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 certain time-consuming) because there is no shortage of US citizen MBAs who might apply. However, his parents have just become US 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 US 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 residences 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 US, AND asking if they have ever filed anything for him before, led to avoiding 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 US and her supervisor wants to retain her, but her educational background does not qualify her for the H1B, 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 non-academic positions. However, 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. It turns out in talking to her that 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.

An application for asylum may be a real possibility for her 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 non-profit agency that represents asylum seekers 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.

4. Friedrich is a visiting scholar from Germany on a J-1 visa (not subject to the 2 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 US Army registered nurse whom he met in Germany. If his fiancée is a US 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 US citizen, she can apply for permanent residence as a nurse once she gets a job in the US. Depending on the strength of Friedrich's EB1-2 petition, this may be a faster option since registered nurses are also exempt from Labor Certification.

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.

## **II. Keep on the lookout for grounds for denial of a visa**

Once a plan has been made, it is important to be on the lookout for factors that could prevent the issuance of the visa once it is approved. This most commonly occurs at an interview for permanent residence, at a visa interview at a consulate abroad, or when the individual tries to enter the US. Again, a series of short questions can eliminate many of the most common pitfalls:

Have you ever been denied an immigration benefit or had any problem with the INS? Do you have any criminal history? If you ever held J status AND were subject to the 2-year home-country physical presence requirement, have you fulfilled the requirement?

These questions will avoid someone being denied a visa for "inadmissibility" based on a ground that may not be discussed in preparing a temporary or permanent visa application. For example, a distinguished professor from Switzerland is the beneficiary of an approved Outstanding Researcher petition, and has filed his I-485 adjustment of status application. As a teenager he was caught with some hashish in Switzerland. Although he explains that a minor possession offense in Switzerland (especially in the 1960s) was not significant, almost any controlled substance offense is a bar to entry in the United States. If the record comes up on his background check, his adjustment petition will be denied.

Similarly, an H-1B lecturer is stopped at the airport on entering the US. Five years ago, he had won the diversity lottery. At his adjustment interview, he presented a high school diploma from Togo (his native country) that had erasures on it. He explained that the school did not have the money to print a new certificate when there was a mistake. However, the INS made a formal finding that he had submitted a fraudulent certificate. At that time he had little money, and just dropped the case. Because of improvements in INS computers, that finding has now caught up with him. If this problem had been identified earlier, he could have postponed his travel until it was cleared up.

Finally, though it may seem an obvious question, asking about any previously held J status is critical, particularly for those seeking permanent residence. It is not uncommon for subjectivity to the 2-year home country physical presence requirement to be overlooked in the adjudication of an H-1B petition, particularly if the J status was held more than 6 years ago. Consider a professor in Agricultural Economics, who had been employed as an H1B worker for several years and had filed an adjustment petition, was notified of an intent to deny pending proof that he had spent 2 years in his home country, or obtained a waiver of the 2-year home residence requirement. He became subject to the requirement as a J-1 student 14 years ago, and though he had departed the US for nine years following the completion of his degree, only 18 months of those nine years were spent in his home country. His adjustment petition is denied. With advance warning, a waiver of the 2-year rule may have been possible.

Therefore, keep on the lookout for basic issues that could prevent visa issuance in the future. And above all, check the answer to EVERY question on the forms with the individual. It is tempting to answer "no" to the questions on page 2 of the I-129 (e.g., whether the alien has ever

held H status, whether she has applied for permanent residence), or the questions on page 3 of the I-485 (criminal history, moral character, etc.). Do not assume that you know the answers. People may surprise you.

### **III. 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 people expense, effort and delay in achieving their immigration goals.

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