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The Road to Legal Employment in the U.S.: Through the Eyes of a U.S.-Educated PhD with Non-U.S. Citizenship

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Each year, many individuals who hail from outside the U.S. receive their doctorates from U.S. institutions of higher education. In many instances, these U.S.-educated foreign PhDs also seek to begin their academic careers in the U.S. In this commentary, we provide a first-hand perspective on the extra hurdles that confront U.S.-educated PhDs with non-U.S. citizenship (henceforth referred to as foreign PhD's) before graduating with their degrees in hand and after being hired and arriving on the campus of an academic institution. These hurdles have to be overcome for individuals such as ourselves to be, and to remain, legally employable. We trust that this commentary will be informative not only for foreign PhD's but also to potential academic employers.

Before Graduation . . . Apply for Optional Practical Training

Generally speaking, the route to legal academic employment for PhDs with U.S. citizenship is relatively simple. One seeks an academic position, receives a job offer, defends his or her dissertation, moves to campus, files the necessary paperwork with human resources, and begins his or her transition from being a student to being a faculty.

For foreign PhD's, this route is more complicated. The challenge stems from the necessary paperwork that academic institutions must file with the Department of Justice and with U.S.

Citizenship and Immigration Services (USCIS) to seek approval to hire a non-U.S. employee under what is referred to as the H1-B. This is a legal status for non-U.S. citizens to be employed with a specific employer in the U.S. Because the H1-B approval process involves multiple stages and takes time, the process can last longer than the time between when a job offer is made to a foreign PhD and when the fortunate recipient arrives on campus. Without such approval, a foreign PhD will not be able to be legally placed on payroll and, hence, cannot begin his or her employment.

Optional Practical Training Guidelines and Requirements

There is, however, a legally viable option. A foreign PhD can pursue Optional Practical Training (OPT) to be legally employed while waiting for the H1-B. OPT is a work training program designed specifically to give foreign students pursuing a U.S. educational degree—bachelors, masters, or doctorates—an opportunity to work in the U.S. However, there are certain guidelines and requirements that are important to remember and to follow.

First, OPT must be applied for before a foreign student (irrespective of degree level) formally graduates with an academic degree. Therefore, a foreign PhD should apply for OPT before finishing the dissertation and scheduling the final defense (assuming the OPT

option is still available—see the discussion to follow). Because the approval process for OPT takes an average of 90 days, the application for OPT should be filed 90-120 days before the expected graduate date.

Second, to be eligible to even apply for OPT, a foreign student must have completed all coursework related to his or her degree. In addition, both the academic advisor and the international student advisor must sign the OPT application. A foreign PhD, as such, would not be able to apply for OPT until after all PhD coursework has been completed, and very likely, not before having successfully passed comprehensive exams and/or the dissertation proposal defense.

Third, OPT is intended to provide work experience directly relevant to a foreign student's area of study and education degree. A foreign student majoring in computer science would, therefore, not be able to receive OPT approval to work as a waiter in a restaurant. A foreign PhD in operations management, likewise, would not likely receive OPT approval to accept a faculty position in biology at another institution. In fact, such a request would most likely not be approved by either the dissertation advisor and/or the international student advisor.

Fourth, until recently, each foreign student had one and only one year of OPT time, regardless of the number of degrees he or she obtains during the period in the U.S. What this meant was that if a foreign PhD had previously applied and received authorization for OPT to work after a bachelor's or a master's degree, OPT will no longer be an available option for him or her to use during the transition from being a PhD student to being a faculty. In such a case, a foreign PhD can legally remain in the U.S. for no more than 60 days from the date of graduation, during which he or she will not be able to accept employment because an H1-B visa would be required. A recent and very favorable change to immigration law, however, now allows for one year of OPT for each degree level, as long as the request for

OPT beyond the previous request is tied to a degree that is higher than the highest and previously-obtained degree. For example, a foreign student working on a PhD degree can apply for OPT even though he had successfully applied for and received OPT for his MS or MBA degree. It is important to remember that if a foreign student receives approval for a one-year OPT but does not use the entire year (e.g., six months), the remaining OPT time is considered awarded and wasted.

In any case, a foreign PhD should carefully choose the start date of the OPT period. We advise having the start date on the job offer letter be the start of the OPT period. However, students should keep in mind that during the OPT period, a foreign PhD has an F-1 student visa and needs to continue reporting to the academic institution that granted the F-1 visa, that is, the institution where the doctorate is being obtained. For example, if travel outside the U.S. is required during the OPT time period, the foreign PhD would need to obtain relevant signatures from the doctorate degree-granting institution before travel can commence.

OPT Approval

To apply for OPT, Form I-765 (Application for Employment Authorization) needs to be completed and properly filed with necessary supporting documents. While Form I-765 can now be completed and filed electronically via the USCIS website at <http://uscis.gov>, all supporting documents will still have to be mailed to an appropriate USCIS service center, preferably via certified mail or with a return-receipt request.

In our cases, the e-filing option was not available at the time. Since the degree-granting institution for us was Ohio State University (Zhou) and University of Minnesota (Rungtusanatham), our OPT applications were mailed to the service center in Lincoln, Nebraska.

Once received, the processing service center will issue a receipt notice to the applicant. This receipt notice, typically arriving within two weeks and containing important tracking informa-

tion such as a case number and the date that USCIS received the OPT employment authorization application, should be kept in a safe place in case it is needed later. Using the case number, an applicant can track the progress of his or her application status online.

Temporary OPT Employment Authorization

As with any process, the OPT employment authorization application approval process has variability. While the request for OPT is rarely denied when the guidelines and requirements above have been followed, the actual time to receive such approval notification may well exceed the average of 90 days (hence, the advice to begin as early as 120 days before the expected graduation date). It is important to note that the 90 days is not 90 days from when an applicant sends in his or her OPT employment authorization application but 90 days from the date that the USCIS receives the actual application.

Should the wait time exceed this 90 day response, an applicant has the right to apply for temporary employment authorization so as to begin his or her OPT. This temporary OPT employment authorization is valid for 240 days and is automatically void once the actual OPT approval notice has been received by the applicant. To apply for temporary OPT employment authorization, one simply has to apply in person at a local USCIS office. The application itself takes only a few hours to process onsite. Note, however, that if OPT approval notification has already been sent by the appropriate processing center, then the local USCIS office will not issue temporary OPT employment authorization and will ask an applicant to wait instead.

After Arrival at Employing Academic Institution

Assuming that the OPT request has been approved and that the necessary document authorizing employment is in hand, a foreign PhD is now ready to begin his transition from being a student to being a faculty at the employing

academic institution. By the time a foreign PhD reaches campus, he or she should either have graduated or should have filed for graduation. Once on campus, there are several immediate business items to attend to before even worrying about applying for the H1-B.

Immediate Issues

One such business item is to file “change of address” notifications with the appropriate parties, notably the USCIS and the doctorate degree-granting academic institution. By law, a foreign PhD has to notify the USCIS of an address change within 10 days of relocation.

A second issue is to work with the human resources and/or payroll departments to fill out appropriate tax forms. Please be aware that the tax deduction issue for a foreign PhD, irrespective of whether the PhD is obtained in the U.S. or outside the U.S., is rather complicated and is closely tied to an individual’s immigration status. Ultimately, the responsibility for ensuring that appropriate taxes are being deducted from one’s paycheck resides with the individual and not the employing academic institution.

For example, during the authorized OPT period, Social Security and Medicare taxes (~ 5-10 percent) need not be deducted from the paycheck. If such taxes were deducted, then a refund can be requested. Note, however, that such taxes have to be deducted once the foreign PhD obtains his or her H1-B. Failure of the academic employer to do so could result in financial penalties, especially if a foreign PhD owes the Internal Revenue Service more than \$1,000 in taxes at the end of the calendar year.

Third, regardless of whether or not it is part of the employment orientation, a foreign PhD should meet with the international scholar advisor of the employing academic institution. During this meeting, the OPT employment authorization has to be verified and relevant documents copied for the personnel file. Furthermore, if the PhD degree has already been conferred, then a copy should also be provided.

H1-B Status and Visa

More importantly, since the maximum length of the OPT period is one year, a foreign PhD should get as much information as possible from the international scholar advisor as to how and when to apply for the H1-B, as well as who has what responsibilities. At the very least, the application for the H1-B should start no later than six months before the expiration of the OPT period, with the employing academic institution having the responsibility to apply on behalf of a foreign PhD

To do so, the academic institution has to go through several steps in order to meet the requirements to petition for an H1-B status on behalf of the foreign PhD. First, the academic institution has to post the faculty position in a public bulletin for at least 10 working days. Second, the academic institution has to verify the Department of Labor to ensure that the salary offered exceeds the prevailing wage, which differs across different disciplines. This step is necessary to ensure that the hiring of a non-U.S. citizen into a faculty position is truly due to the inability to fill the faculty slot with an appropriate U.S. citizen. Only after the verification of prevailing wage can an application for the H1-B be forwarded to the immigration centers.

As with the OPT employment authorization, once the immigration center receives the H1-B application, a receipt will be sent to the international scholar advisor with a case number. The entire approval process for the H1-B status, once submitted, takes approximately three to four months. Fortunately, in case of an emergency where the H1-B is needed quicker, the academic institution can pay \$1,000 extra for “premium” processing of the H1-B petition.

When an individual has been approved for the H1-B, this simply means that the foreign PhD can work for the sponsoring academic institution only. Legally, the status of the foreign PhD has been “adjusted” from that of an international student under an F-1 visa to that of an H1-B status. The original H1-B status approval notice will be for-

warded to the appropriate office at the academic institution, while a copy will be sent to the individual. As long as the individual does not leave the country, no additional steps are needed, and the foreign PhD can be legally employed for up to a total of six years. Please note that the H1-B is approved for three years but can be extended for another three years, hence the total of six years. The six-year period provides sufficient time for an individual to apply for permanent residency status (i.e., green card). Once an individual becomes a permanent resident, he or she can work legally anywhere in the U.S. with any organization. As such, the application of permanent residency is typically the responsibility of the individual and not the academic institutional employer.

Should a foreign PhD with an approved H1-B leave the U.S. (e.g., to visit home country), there is additional complexity involved. Before exiting the U.S., it is important that the individual obtain the original notice that was sent to the academic institution. This original notice is required in order for the individual to apply for the H1-B visa to re-enter the U.S. To apply for the H1-B visa, the individual must do so at the U.S. embassy or consulate in the country that he or she is visiting. There is, however, no guarantee that an H1-B visa will be granted. In fact, the embassy or consulate has the rights to review the entire H1-B petition and to grant or deny the H1-B visa, even if an individual has been approved for the H1-B status.

Disclaimer

This article provides the authors’ personal understanding and first-hand perspective on the immigration-related issues pertaining to academic employment. Because the authors are not legal or immigration experts, please be sure to verify the information provided in this article. ■

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