2018 VISA UPDATE

International Scholars Operations
http://ap.washington.edu/ahr/visas/
AGENDA

- Introduction
- Pre-existing Challenges
- New Barriers
- What’s In The Pipeline
- Q&A
Introduction

This presentation will cover regulatory and policy changes affecting UW sponsorship of foreign nationals for exchange programs and/or employment.

It will **not** cover other changes that do not directly affect UW sponsorship.
Hierarchy of Law

U.S. Constitution

Statute - laws enacted by Congress
  Ex: Per-country numerical cap on green cards

Judicial decision - interpretation of law by court
  Ex: Right to review of indefinite detention

Regulation - interpretation of law by agency
  Ex: H-4 employment authorization

Sub-regulatory guidance -
  internal or external guidance by agency
  Ex: Travel on H-1B visa for previous employer
Pre-existing Challenges

- Administrative Processing
- USCIS Processing Times
- Visa Backlog
The catchall name used for extensive delays in visa processing at U.S. consulates/embassies abroad, often related to additional security screening. Can take anywhere from a month to six months.

**ISO recommendation:** if administrative processing lasts over 60 days, you may be able to get Congressional liaison assistance through the Office of Federal Relations.
USCIS Processing Times

USCIS processing times for H-1B petitions can range from 2 to 10 months.

For employees coming from outside of the U.S., or changing status from another visa, long processing times may cause substantial delays to start dates or lapses in employment authorization.
The long wait for nationals of certain countries applying for green cards in certain sponsorship categories. Because there is an annual cap on how many people from any country can get a green card, countries with large high-skilled populations have longer waits than others.

For faculty born in India, this can be as long as 10 years; for faculty born in China, it can be up to 4 years.
NEW BARRIERS

> Policy Goals
> General Changes
  – Travel Ban on Certain Countries
  – Mandatory Visa Interviews
  – Longer Processing Times
  – NTA Memo
> Changes for F & J
  – Unlawful Presence Memo
> H-1B Changes
  – No Deference Memo
  – Increased Requests for Evidence
The changes that follow were implemented with the following stated goals:

> “to protect the American people from terrorist attacks by foreign nationals”
> “to protect the interests of United States workers [...] including through the prevention of fraud or abuse”
> “to better align with enforcement priorities”
> “to reduce the number of overstays”
Travel Ban on Certain Countries

Travel Ban 1: 01/27/2017 (revoked/replaced)
Travel Ban 2: 03/06/2017 (revised)
Travel Ban 3: 09/24/2017 (in full effect)

While litigation is ongoing, it mostly involves the waiver provisions; the rest of the ban remains in effect and permanent until it is revoked or superseded.

ISO Recommendation: Waivers are extremely rare. Employees who will need a waiver should contact a private attorney early in the process.
### Which Countries and How?

<table>
<thead>
<tr>
<th>Country</th>
<th>Nonimmigrant visas</th>
<th>Immigrant visas</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iran</td>
<td>F, M, and J only</td>
<td>Banned</td>
</tr>
<tr>
<td>Libya</td>
<td>B-1/B-2 banned</td>
<td>Banned</td>
</tr>
<tr>
<td>North Korea</td>
<td>Banned</td>
<td>Banned</td>
</tr>
<tr>
<td>Somalia</td>
<td>Okay with additional screening</td>
<td>Banned</td>
</tr>
<tr>
<td>Syria</td>
<td>Banned</td>
<td>Banned</td>
</tr>
<tr>
<td>Venezuela</td>
<td>B-1/B-2 banned for certain state officials and their families</td>
<td>Allowed</td>
</tr>
<tr>
<td>Yemen</td>
<td>B-1/B-2 banned</td>
<td>Banned</td>
</tr>
</tbody>
</table>
Who Isn’t Subject to the Ban?

> U.S. permanent residents
> Dual nationals with a passport from a non-listed country
> Foreign nationals already inside the U.S. on the effective date of the order (10/18/2017)
> Foreign nationals who had a valid U.S. visa on the effective date of the order

ISO Recommendation: There are exceptions to and exclusions from the travel ban; always ask us if you have someone from one of the affected countries.
Mandatory Visa Interviews

Historically, most people in the following classes were able to have visa interviews waived:

> Applicants for a new visa stamp in the same class
> Applicants for an employment-based green card

Mandatory visa interviews can drastically extend how long it takes to get a visa stamp or a green card.
## Longer Processing Times

Average processing times in months:

<table>
<thead>
<tr>
<th>Application</th>
<th>FY2015</th>
<th>FY2016</th>
<th>FY2017</th>
<th>FY2018</th>
<th>Current</th>
</tr>
</thead>
<tbody>
<tr>
<td>I-129 Petition (includes H-1Bs and TNs)</td>
<td>2.3</td>
<td>5.5</td>
<td>4</td>
<td>3.3</td>
<td>6.5-8.5</td>
</tr>
<tr>
<td>I-140 Immigrant Petition</td>
<td>5.1</td>
<td>5.7</td>
<td>6.9</td>
<td>7.9</td>
<td>5.5-7.5</td>
</tr>
<tr>
<td>I-485 Green Card Application</td>
<td>6.5</td>
<td>6.8</td>
<td>8.1</td>
<td>11</td>
<td>15-26.5</td>
</tr>
<tr>
<td>N-400 Naturalization Application</td>
<td>5.8</td>
<td>5.6</td>
<td>8.1</td>
<td>10.4</td>
<td>16-18</td>
</tr>
</tbody>
</table>

Limited closures of Premium Processing Service have not resulted in improvements in processing times.

**ISO recommendation:** Start H-1Bs early, and premium process if you can!
Notice to Appear ("NTA") Memo

This memo expands the set of circumstances in which USCIS may open removal proceedings against an applicant or beneficiary. Where a denial of a petition results in end of lawful status, the officer could issue a Notice to Appear opening removal proceedings in immigration court.

USCIS has stated that it is not implementing this memo in regards to employment-based petitions at this time.
Previously, F and J visa holders did not accrue “unlawful presence” until after an agency made a determination that they had violated their status.

Under this memo, F and J visa holders may accrue “unlawful presence” without even knowing it if USCIS later makes a finding that they violated their status.
For Example:

Then:

Student/Scholar violates status
This could be something as simple as working too many hours a week, or failing to report an address change.

Petition/Application filed with USCIS

USCIS determines status violation occurred

Unlawful presence runs from the date USCIS made the determination.

Now:

Student/Scholar violates status

Petition/Application filed with USCIS

USCIS determines status violation occurred

Unlawful presence runs from the date the violation occurred.
Why Does Unlawful Presence Matter?

> People who are unlawfully present are ineligible to change status (for example, F-1 OPT to H-1B).

> People who accrue over 180 days of unlawful presence have a three-year bar on reentry into the U.S.

> People who accrue over a year of unlawful presence have a ten-year bar on reentry to the U.S.

ISO recommendation: Premium Processing reduces the likelihood of long periods of unlawful presence.
No Deference Memo

This memo gives USCIS adjudicators greater latitude to deny H-1B extensions; they are no longer required to give “deference” to previous USCIS approvals.

This means that every petition must prove all elements of H-1B eligibility, every time.
Increased Requests for Evidence

When an H-1B petition is filed with USCIS, USCIS may contact the employer with a Request for Evidence ("RFE") to gather any additional information or documentation necessary.

An RFE stops the 15-day Premium Processing clock. Responding to an RFE can be time-consuming and costly. If the employer does not respond to the RFE, USCIS may deny the petition.
The Numbers

Statistics from USCIS show a marked uptick in RFEs in summer of 2017.

<table>
<thead>
<tr>
<th>FY 2017</th>
<th>H-1B RFE Rate</th>
<th>H-1B Denial Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Q1 (October to December 2016)</td>
<td>17.3%</td>
<td>19.8%</td>
</tr>
<tr>
<td>Q2 (January to March 2017)</td>
<td>13.5%</td>
<td>17.3%</td>
</tr>
<tr>
<td>Q3 (April to June of 2017)</td>
<td>22.5%</td>
<td>15.9%</td>
</tr>
<tr>
<td>Q4 (July to September of 2017)</td>
<td>68.9%</td>
<td>22.4%</td>
</tr>
</tbody>
</table>

ISO recommendations: Provide all evidence requested by ISO and include a detailed job description in the Employer Letter to USCIS.
What’s In The Pipeline

> Reality Check
> Public Charge Rule
> STEM OPT Modifications
> H-4 EAD Revocation
> Presumption Against 212(e) Waivers
> Other Unlikely Changes
Many of these changes have only been proposed. They may be enacted in a different form than proposed, or they may not be enacted at all.

But as with other changes, the uncertainty may be the goal.
Public Charge Rule

People likely to become a “public charge” (i.e. dependent on government benefits or charity) are not eligible for nonimmigrant or immigrant visas.

This rule would allow various agencies greater latitude in determining who is likely to become a public charge, and in what evidence they can consider, at any stage in the immigration process.

The proposed rule was published on October 10, 2018 and may be finalized after 60 days.
DHS says that an annual income of over 250% the federal poverty guidelines would “weigh heavily against” a public charge finding.*

<table>
<thead>
<tr>
<th>Household Size</th>
<th>2018 Poverty Guidelines</th>
<th>250%</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>$16,460</td>
<td>$41,150</td>
</tr>
<tr>
<td>3</td>
<td>$20,780</td>
<td>$51,950</td>
</tr>
<tr>
<td>4</td>
<td>$25,100</td>
<td>$62,750</td>
</tr>
</tbody>
</table>

* https://www.uscis.gov/legal-resources/proposed-change-public-charge-ground-inadmissibility
STEM OPT Modifications

In 2016, DHS implemented certain changes to STEM OPT, most notably the 24-month STEM OPT extension.

Those changes have been subject to ongoing litigation; the government has repeatedly requested stays of the litigation so that it can issue a new rule, but has not yet done so.
In 2015, DHS implemented a rule allowing certain H-4 dependents to apply for employment authorization. It particularly benefits spouses of Indian nationals subject to the visa backlog who have not been able to apply for green cards yet.

This rule is under litigation and the administration has repeatedly announced plans to revoke/replace it.
Presumption Against 212(e) Waivers

The 212(e) two-year home residence requirement applies to many researchers who come to the US on J-1 exchange visitor visas from certain countries (including India and China) and prevents them from applying for a change of status to another visa, or a green card.

The requirement can be waived on five grounds:

- **No Objection** letter from home country
- **Extreme hardship** to USC family member
- **Persecution**
- **Interested Government Agency (IGA)**
- **Conrad 30 Medical Waiver**
## How Many Waivers?

<table>
<thead>
<tr>
<th>Waiver type</th>
<th>Number granted in FY 2017*</th>
</tr>
</thead>
<tbody>
<tr>
<td>No objection</td>
<td>5166</td>
</tr>
<tr>
<td>Exceptional hardship</td>
<td>293</td>
</tr>
<tr>
<td>Persecution</td>
<td>92</td>
</tr>
<tr>
<td>Interested Government Agency</td>
<td>276</td>
</tr>
<tr>
<td>Conrad Waivers</td>
<td>1049</td>
</tr>
</tbody>
</table>

DHS has announced its intent to create a presumption against no-objection and hardship waivers.

*https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/waivers/INA%20212e%20Waiver%20Recommendations%20-%20FY2017.pdf*
Other Unlikely Changes

- Ban on Chinese students/researchers
- Changes to H-1B allocation
- Fee hikes at USCIS and SEVIS
- Longer processing times/more information required for LCAs
- Maximum period of stay for F-1 & J-1
- Termination of “birthright citizenship”
Questions & Answers