Visa Issues for Post-Docs

By H. Ronald Klasko, Esq.

Post-docs are a conundrum. Are they trainees? employees? students? Are they clinical researchers publishing cutting edge research and enabling principal investigators to accomplish significant research under federal grants? Or are they engaged in “mentored advanced training to enhance the professional skills and research independence needed to pursue his or her chosen career path” as defined by NIH and NSF?

These different views of post-docs lead to different treatment of post-docs for immigration purposes. This treatment is not at all consistent between universities and not even always consistent within any given university. There are political issues, legal issues, tax issues, benefit issues, and source of payment issues to be considered.

This author participated in a panel entitled “Visa Issues for Post Docs” at the NAFSA region VIII Conference in Baltimore in November 2007. In preparation for the conference, I did a survey of 19 institutions which have post-doctoral programs. This article contains the results of that survey. Four questions were asked of the survey participants:

1. How many different categories of post-docs does your institution have?
2. Do you generally utilize H-1B visas or J-1 visas for post-docs?
3. Do you sponsor J-1s for interested government waivers of the two year home residence requirement?
4. Do you ever sponsor post-docs for permanent residence status?

The article contains a summary of the responses of the institutions, specific quotations from certain institutions and the author’s comments and summary of the issues surveyed, as follows:
1. **How many different categories of post-docs does your institution have?**

1- 9 institutions  
2- 6 institutions  
3- 4 institutions  

Notes: Institutions with multiple categories of post-docs generally distinguish based on source of payment; i.e., paid by the university; paid by grant; paid by another institution (visiting).

2. **Does your institution utilize H1-B or J-1 visas for post-docs?**

J-1s only - - 2 institutions  
H-1Bs only - - 2 institutions  
H-1B or J-1 depending upon category of post-doc, source of funding, whether skills list is applicable, term of employment, employee or non-employee - - 15 institutions  

Comments from institutions:

- “Most of our Js are visiting fellows (not on staff) but the researchers on staff are on H-1Bs”
- “We only do Hs for our employees…the post doctoral research associates. We use the J for the other two who we do not consider our employees.”
- “We only sponsor post-doctoral fellows for the J-1 category. We reserve the H category for regular positions.”
- “We do Hs and Js for the scientists and scholars and not usually for the follows since “fellow” usually implies that the funding is outside the university.”
- “We do J when we can for our post-doc, H if the J is not advisable for some reason.”
- “We will process H-1s for post-doctoral research fellows, research fellows and research scholars. All others are J-1 or F-1 with CPT or OPT.”
- “The majority of our post-docs are sponsored for J-1s, and their positions are, by their very nature, temporary. And for most of them, the J-1 is perfectly adequate. There are some who we sponsor for H-1Bs: Those on practical training or who are from countries on the skills list and would become subject if we did Js. Most of them have been away from home for many years, and would likely not be able to prove nonimmigrant intent or get waivers. Other who have already filed for PR based on NIW we obviously can’t sponsor for the J.”
- The Office of International Programs and Studies only processes Js and the university hires outside counsel for Hs.
“We do Hs and Js for post-docs, usually Js for research scholars since they often don’t get paid (and probably wouldn’t meet the prevailing wage).”

“Only the post-doctoral scholar-employee is eligible for H-1B status. However, there are other criteria for H-1B sponsorship which must be satisfied before we will do the H-1B, including a three year full-time job offer. Occasionally, the payroll title “staff research associate” is used for an employee who may call himself or herself a “post-doc” informally. This title is eligible for J-1 status or H-1B status.”

“For the trainees we only do Js because they are not considered employees. For the post-doctoral fellow we do both Hs and Js.”

“Either one. Usually H-1B, but sometimes J-1 seems acceptable for employees coming directly from their home countries.”

“We do both, it is pretty much split down the middle.”

“If they are coming from overseas, we do the J usually and then we will change them to H later on if they run out of J time or if they have come to us on F-1 OPT.”

“We have Hs and Js for “research scholars;” Js for “short-term scholars.”

“We do Hs and Js for post-docs unless it is a straight fellowship and not considered employment.”

“Associates about 50/50. Fellows – majority J-1 and trying to get everyone in J category (the problem is individuals shift back and forth between PDAs and PDFs so if they started at PDA in H-1 we don’t insist a change to J if their positions shift to a PDF…but we recognize the problem and are working on it.”

“Post-docs are treated as employees, albeit temporary, which means we do apply for H-1Bs on their behalf.”

Author’s note:

In my experience, J-1s are often used for post-docs for the following reasons, among others:

- Post-docs are considered trainees and not employees;
- J-2 dependents are eligible to apply for employment authorization;
- No fees, as compared with H-1bs;
- J-1 time limits have now been increased to 5 years;
- Grants to pay post-docs are considered non-W-2 wages; and
Post-docs may not get all benefits that other employees receive.

On the other hand, my experience with universities that do sponsor post-docs for H-1Bs reveals the following reasons, among others:

- post-docs may want H-1B and may only choose universities that will file H-1B;
- Chinese and other country post-docs would be subject to the two-year return requirement if J-1;
- H-1Bs may have less risk of foreign travel; H-1B can be valid for up to six years.

Institutions filing H-1B petitions for post-docs should be aware of Department of Labor regulations that refer to “employer” and “employment relationship” and require payment of “wages” that must be “shown in the employer’s payroll records as earnings to the employee” and must be subject to “appropriate withholding for the employee’s tax.” The H-1B also requires payment of benefits. USCIS regulations state that the H-1B must be filed by an “agent” or “employer” with an “employer-employee relationship.”

3. Does your institution sponsor J-1 post-docs for IGA (interested government agency) waivers?

Yes- 11 institutions
No- 8 institutions

Comments:

- “We have not done an IGA waiver for any of our Js. But if a faculty member or a senior researcher had a two year requirement because of a J, I think we would support an IGA waiver.”
- “We have only had to sponsor two IGA waivers that the individual and the department along with the agency handled.”
- “We do not get involved in the IGA waivers although I know academic departments have done them.”
- “We provide information to any J and department. As an office we do not sponsor IGA waivers in the sense of preparing the application.”
- “Only staff physicians – HHS waiver.”
- “Only if they are candidates for tenure-track faculty or senior researcher position.”
- “Yes, depending on the department.”
- “On occasion we have had departments sponsor an IGA waiver for people who are working in the School of Medicine or in a research position at the hospital (but our office does not get involved).”
“IGA waivers are occasionally initiated by the departments, with the approval of a high-level person in the administration. The preparation of the waiver application is done by outside counsel. The international office is not involved, except to ensure compliance with the university policy and regulations, and to confirm institutional approval of the waiver process with the Waiver Review Board.”

“Aside from giving basic information to the J-1 visitors, we try to stay out of the waiver process. I try very hard NOT to use the J-1 program for long-term employees (more than five years), so we try to avoid the waiver issue as much as possible. The university might have tried to do IGA waivers in 1-2 cases, but we have the department do the applications - - not our office.”

“Yes, if needed. It has hardly happened.”

“This is considered an individual transaction and is usually done by the scholar with the assistance from his or her PI.”

Author’s note:

A waiver of the two-year home residence requirement is only necessitated if the post-doc has received direct funding from a U.S. Government agency or has been financed by the home country government or, alternatively, if the post-doc’s area of specialization is on the home country’s skills list. The fact that the post-doc is paid by a grant to the PI from NIH or other U.S. government agency does not subject the post-doc to the two-year return requirement. Some countries (such as China) include every skill on the skills list; some countries (such as India) have only selected skills; other countries (such as most of Western Europe) have no skills list.

There are four different possible types of waivers: no-objection statement from the home country; exceptional hardship to U.S. citizen of permanent resident spouse or child; persecution waiver; and waiver based upon recommendation from interested U.S. government agency. Only the latter (IGA) waiver requires sponsorship by the university. Although any U.S. government agency can recommend a waiver, most waivers for post-docs are recommended by the Department of Health and Human Services (NIH), National Science Foundation or Department of Defense. These agencies have formal programs. Some agencies have policies not to sponsor such waivers. Some agencies either do not know of the waiver options or have rather informal procedures.

Most agencies, including those listed above, require the waiver application to be filed by the employing university based upon anticipated future employment of a critical nature on a project of interest to the agency in question. For this purpose, institutions need to make case-by-case or blanket policy judgments regarding whether or not to sponsor exchange visitors for waivers and whether the sponsorship is done at an institutional level or at a departmental level.
4. Does your institution ever sponsor post-docs for lawful permanent residence?

Yes- 6 institutions
No- 16 institutions

Comments:

- “We do not sponsor post-docs with PR…we do not consider them as permanent employment. They are appointed annually for up to three years, up to five in molecular biology and chemistry. After that time passes, they can be promoted to the next rank and either be appointed with an annual end date or without end date. If without end date, we will look at PR.”

- “Up until July of this year, we sponsored anyone in a regular (permanent) position for LPR. The policy has now changed and we only sponsor individuals in faculty positions. Post-docs were not covered under the old policy (and much less under the new one) because they are not considered employees of the university. They are treated as students.”

- “In the past we have had attorneys file for LPR for post-docs. Now with PERM, it is increasingly harder to prove permanence.”

- “University policy is that the position must be a permanent position for our sponsorship, and a post-doc is not considered a permanent position. They are free to self-petition under extraordinary or NIW.”

- “Yes, some departments will sponsor a post-doc for LPR, but most transition them to something else first, like “associate scientist.”

- “Our experience is that these will be denied by USCIS and at our institution a person can only be a post-doc for a maximum period of five years.”

- “We do, under the outstanding researcher category.”

- “No, we ask that they be promoted to research faculty before we sponsor them.”

- “In extremely limited situations we might consider it for EB-1.”

Author’s note:

There are both legal and policy issues regarding the sponsorship of post-docs for permanent resident status. The university must decide as a matter of policy whether it has sufficient interest in the post-docs future ability to remain in the United States to want to consider permanent resident sponsorship. For example, if the post-doc completes five years on an H-1B, she only has one year remaining on her six-year maximum H-1B status to complete the permanent residence process. This is balanced against university policies that may consider post-docs to be trainees or, at best, temporary employees for whom the university has no ongoing interest beyond the post-doc period.
Assuming the university wishes, as a matter of policy, to sponsor the post-doc, there are also legal issues. The first issue is whether the post-doc is an “employee” of the university, which is necessary for sponsorship. This also impacts tax and benefit issues.

The second significant legal issue is whether a post-doc’s employment is “permanent” enough. The issues are different regarding sponsorship as an outstanding researcher versus sponsorship for a labor certification application. For purposes of outstanding researcher, the employment must be for a “term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is a good cause for termination.” This has been interpreted by USCIS as including employment relationships which are subject to no specific ending date but which are contingent upon continuation of grant funding, which the department or PI has a reasonable expectation of receiving.

For labor certification application purposes, the Department of Labor position is that “permanent” means more than one year. USCIS will generally not question a Department of Labor certification for “permanent” employment. Labor certifications are regularly filed successfully for, for example, medical residents whose employment is clearly for a limited duration but expected to be more than one year. On the same basis, a labor certification application can be filed for a post-doc, should the university choose to do so.

Of course, in addition to these employer sponsorship options, the post-doc has the option of self-sponsorship under either the extraordinary ability or national interest waiver category.

**Conclusion:**

As can be seen from the results of the survey, the immigration issues surrounding post-doctoral scholars are complex and varied. It is important for institutions to develop a consistent policy on treatment of post-docs that is consistent for immigration purposes, labor law purposes, benefits purposes, tax purposes and the multitude of internal policy issues that are impacted.