

**Success in the
Classroom: Hiring and
Retaining Teachers
Using Immigration
Strategies**

Melissa Azallion, Esq.
Jonathan Eggert, Esq.
February 22, 2020

1

Agenda

- The Challenge
- J-1 Visas/Waivers
- H-1B Visas for Teachers
- Immigrant Visas (Green Cards)
- Immigration Compliance



© 2019 Burr & Forman LLP

2

THE CHALLENGE: TEACHER SHORTAGES



360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

3

BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

3

TEACHER SHORTAGE

- Recent study found the U.S. is facing a teacher shortfall of more than 300,000 this year.
- Shortage increased from 112,000 in 2018.
- More than 6,600 teachers did not return to a teaching position after the 2018-2019 school year in SC.
- More than 500 vacant teaching positions at the beginning of this school year in SC.



360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

4

BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

4

WHY?

- Baby-boomer generation retiring at a high rate.
- Young teachers leaving the profession at a high rate.
- Alternative jobs plentiful due to booming economy
- 36% of teachers who left last year had five or fewer years of experience (13% had one year or less).



Why Don't We Just Hire More?

- The good news:
 - › SC students who graduated with a Bachelor's Degree and teacher certification during 2018-2019 rose by 79 graduates.
 - › First increase since 2013-2014.
- The bad news:
 - › The total number of SC students that graduated with a degree and teaching certification in 2018-2019 was only 1,752.

The Bottom Line

- **Districts need a way to strategically increase their hiring pools.**



360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

7

BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

7

International Hires

- **International hires now account for about 5% of all new hires in SC.**
- **International hires are not necessarily foreign educated.**
- **Districts have been using J-1 and H-1B visas for years to hire foreign nationals.**
- **Recent rule makes H-1B even more attractive**

360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

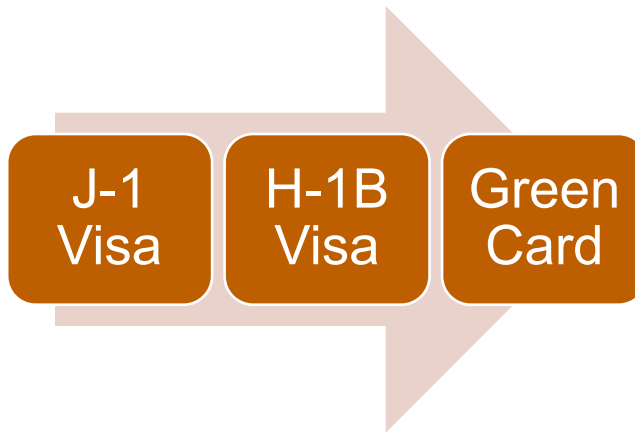
8

BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

8

Typical Foreign National Teacher Path



360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

9

BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

9

J-1 VISAS / WAIVERS



360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

10

BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

10

J-1 Visas

- Candidates must intend to remain in the US for a temporary, specific, and limited period on exchange program
 - › Provide evidence of funds to cover expenses in the US
 - › Provide evidence of compelling family, financial and economic ties abroad
- Some institutions are designated J-1 sponsors
- J-1 teacher category – 5 year maximum



360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

11

BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

11

Home Residency Requirement

- J-1 visa holders may be subject to two-year home residency requirement and must return to their home country or country of last residence for two years at end of the exchange visitor program.
- Not all countries have a home residency requirement.
- Exchange visitor skills list vs. government funding.
- Failure to fulfill requirement = cannot change or adjust status in US (i.e. J-1 to H-1B).

360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

12

BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

12

Home Residency Waivers for Teachers

- Teacher subject to home residency requirement may choose to pursue a waiver of the requirement.
- Most common waiver for J-1 teachers - “No-Objection”
- 3 Key Steps in No-Objection Process:
 1. Obtain No-Objection Letter from home government.
 2. File waiver application with the Department of State (DOS).
 3. DOS approves application and forwards to USCIS.
- Waiver process is typically handled by teacher or teacher’s legal counsel.

Timing of J-1 Waivers

- Usually, J-1 teacher status will expire on June 30 with a 30 day grace period until July 30
- Can take months to obtain No-Objection letter depending on the government.
 - › Note: Some governments will not issue a No-Objection (e.g. Venezuela).
- DOS Application takes approximately 12 weeks for adjudication.
- USCIS takes several months to issue final waiver approval
- Takeaway: **Identify potential waiver needs as early as possible!**



Negatives to J-1 Visas

- Typically require district to work through an intermediary sponsor.
- Five-year maximum in J-1 status and two-year residency requirement may apply.
- **Nonimmigrant intent requirement can limit permanent employment options.**

H-1B Visas for Teachers



H-1B – Specialty Occupation

- Specialty occupation – position must require at least a US Bachelor's degree or foreign equivalent in **specialty field**
- Employer-sponsor specific – H-1B petition/work authorization is associated only with sponsoring employer
- 6 year maximum; apply in 3 year increments; may extend in some circumstances



H-1B Wage Obligation

- H-1B employers are required to pay the higher of the “Prevailing Wage” or the “Actual Wage”
 - › Prevailing Wage – determined by looking at DOL wage database or private survey
 - › Actual Wage – Amount paid to individuals within the sponsoring organization in comparable positions with comparable skills
- Potential ‘bumps’ in prevailing wage
 - › Foreign language requirement
 - › Master’s Degree
 - › Extensive experience

Wage Levels

Foreign Labor Certification Data Center
Online Wage Library www.flcdatacenter.com

Wage Library
Quick Search
Search Wizard

Case Disclosure
Data Archive
H1B Data
H2A Data
H2B Data
Perm Data

Also available:
File Archive
Skill Level
Explanation
SVP Explanation
FLC Wage Data
updated
July 1, 2019
Job Zones updated
September 30,
2019
see change
history
Technical Support
Help FAQ page

FLC Wage Results [New Quick Search](#) [New Search Wizard](#)

You selected the All Industries database for 7/2019 - 6/2020.

Your search returned the following: [Print Format](#)

Area Code: 17900
Area Title: Columbia, SC
OES/SOC Code: 25-2021
OES/SOC Title: Elementary School Teachers, Except Special Education
GeoLevel: 1
Level 1 Wage: \$37,290 year
Level 2 Wage: \$44,140 year
Level 3 Wage: \$50,990 year
Level 4 Wage: \$57,840 year
Mean Wage (H-2B): \$50,990 year

This wage applies to the following O*Net occupations:
25-2021.00 Elementary School Teachers, Except Special Education
Teach students basic academic, social, and other formative skills in public or private schools at the elementary level.
O*Net™ JobZone: 4
Education & Training Code: 5-Bachelor's degree

For information on determining the proper occupation and wage level see the new Prevailing Wage Guidance on the [Skill Level](#) page.

The prevailing wage must be at, or above the federal or state or local minimum wage, whichever is higher. The federal minimum wage is \$7.25/hr effective July 24, 2009.

H-1B Cap

- Only 65,000 H-1B petitions approved per USCIS fiscal year (October 1 – September 30); additional 20,000 for those with US Master's degree
- Difference between cap-subject and cap-exempt
- For cap-subject, **registrations due in March for October start dates.**
- Some individuals and employers may be **exempt** from the H-1B cap

What Does It Mean To Be Cap Exempt?

- No limit on when cap-exempt employer can file H-1Bs.
- No limit on number of H-1Bs that can be approved.
- Applies to all occupations at the employer (i.e. not just teacher).
- No restriction on start dates for the employee after approval.

2017 Cap-Exemption Rule

- 2017 Final Rule extended cap-exemption to *“non-profits that have entered into an affiliation agreement with an institution of higher education for purposes of education/research that contributes to the educational mission of the institution of higher education.”*
- Two Major Indicators:
 - › 1) Non-profit – USCIS includes government units
 - › 2) Affiliation Agreement – “Dual Enrollment Agreements” may qualify
- Result: Public school districts typically qualify!

H-1B Teacher Licensure Issues

- Teachers typically required to obtain license through State Department of Education
- J-1 teachers can use “International Certificate”
 - › In SC, DOE takes position that International Certificate is not permitted for H-1B teacher
- H-1B teachers must obtain Initial Certificate
- Licensure typically handled by school representative
- Timing can be key because exams not always given regularly

360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

23



© 2019. Burr & Forman LLP

23

H-1B Fees / Expenses

- H-1B employers typically required to pay the higher of the actual or prevailing wage
- H-1B sponsor must pay legal and filing fees as “business expenses”
- Recoupment of business expenses may not be deducted if the H-1B employee’s wage dips below the prevailing wage.
- What is a “Business Expense”: Attorney fees and other costs connected to H-1B program required to be performed by the employer, including J-1 waiver costs.

360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

24



© 2019. Burr & Forman LLP

24

Benefits of H-1B Visa

- Gives options to districts to continue employment of J-1 teachers after their maximum J-1 stay
- Nice transition to long-term employment strategy – H-1B to green card – because of “dual intent” issues
- Immediate employment of transfer H-1Bs
- No home residency requirement
- Not typically renewable on annual basis – usually every 3 years if maintain current licensure

360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

25



© 2019 Burr & Forman LLP

25

H-4 Dependents

- H-1B visa also permits the beneficiary's dependents to live in the United States in H-4 status.
- J-1 waivers typically apply to dependents as well.
- H-4 dependents cannot work in most circumstances but can attend school.
- District is not required to pay fees (legal & filing) for H-4 dependents but they can be filed at the same time as H-1B petition.

360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

26



© 2019 Burr & Forman LLP

26

Immigrant Visas / Green Cards



360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

27

BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

27

Immigrant Visas

- Green Card Holder/Lawful Permanent Resident
- Employment and family-based sponsorships
- Numerically limited
 - › 140,000 employment-based green cards per fiscal year; 7% per country cap
- May apply for U.S. citizenship after 3 - 5 years



360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

28

BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

28

Employment-Based Categories

EB-1

Priority workers – alien of extraordinary ability, outstanding professor/researcher and multi-national manager or executive

EB-2

Advanced-degree professional (Master's, or Bachelor's + 5 years experience); alien of exceptional ability

EB-3

Professional, skilled and unskilled worker

360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

29

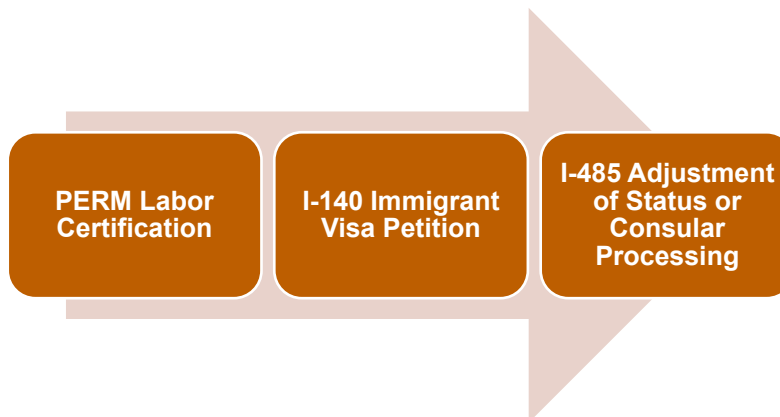
BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

29

Permanent Resident Process

EB-2/EB-3 - 3 Step Process



360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

30

BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

30

PERM – Step 1

- Most teacher positions require a PERM filing
- Goal is to have PERM filed prior to 5th year in H-1B status to avoid six-year max out
- Recommendation: Track 4th year of H-1B status and discuss Green Card option with legal counsel
- Employer must show there are **no minimally qualified** US workers for the position
- Requires external advertising, internal posting and filing of State job order
- Takes about 9-12 months to recruit and obtain PERM approval

PERM

- Employer also must pay the Prevailing Wage, similar to H-1B requirements.
- Electronic filing with DOL.
- Typically, 180 days to recruit and 90-120 days for DOL to approve.



I-140/I-485 Petitions – Steps 2 and 3

- I-140 and I-485 petitions can be filed together, unless the employee's green card classification is subject to backlog
- If no backlog exists, Green Card is typically issued within 12-24 months of filing

Is There a Green Card Backlog?

- For green card petitions, a priority date is assigned based on the **INITIAL FILING DATE** associated with the immigrant petition (i.e. PERM filing date)
- The priority date determines one's place in the queue for green card processing
- Check Visa Bulletin on monthly basis



Immigration Compliance



360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

35

BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

35

Form I-9 Basics

- Immigration Reform and Control Act of 1986 (“IRCA”)
- Cannot knowingly hire or continue to employ unauthorized worker
- Treat all employees the same and do not discriminate based on national origin, citizenship, or immigration status



360 Attorneys. 19 Offices. 1 Firm. Southeastern Strong.

36

BURR
FORMAN
MCNAIR

© 2019. Burr & Forman LLP

36

WHY IS I-9 COMPLIANCE IMPORTANT?

- › ICE worksite investigations increased from 1,691 in FY2017 to 6,848 in FY2018.
- › I-9 audits increased from 1,360 in FY2017 to 5,981 in FY2018.
- › Worksite investigations, I-9 audits, criminal arrests, and administrative worksite-related arrests each increased by between 300% to 750% in FY2018.



Completing Form I-9

- Section 1 must be fully completed on or before the first day of employment and only after an offer has been made and accepted.
- Section 2 must be fully completed within 72 hours of the date of hire.

Section 2: Employer Completes

- Employer reviews original document(s)
- Does document appear to relate to employee?
- Does document appear to be genuine?
 - Reasonableness standard
- Employer not required to be document expert
- Keeping supporting documents is not required
 - E-Verify employers must keep copies of certain documents
 - Important: Follow consistent approach if keeping copies of documents

Common I-9 Compliance Mistakes

- Missing I-9s
- Failure to sign and date where and when required
- Entering wrong dates in wrong boxes (date/DOB)
- Forgetting to complete translator certification and immigration status boxes
- Accepting photocopies (as opposed to originals)
- Not fully completing List A/B/C
- Failure to monitor expiration of temporary work authorization
- Reverifying wrong information
- Improperly handling rehires

I-9 Audit Reminders

- Training, Training and More Training - VERY IMPORTANT!
 - › A poorly trained employee can do more harm than good when completing I-9 forms and making I-9 audit corrections
- Consider who will complete I-9 forms and/or conduct the self audit
- **Remember:** Good faith efforts go far
 - › Examples: self audits, I-9 compliance training, immigration compliance policies

I-9 Self Audit Tips

- Conduct periodic I-9 internal audits and correct any problem areas ASAP
- Notify employees prior to conducting an audit
- Provide detailed and specific training for those engaged in I-9 internal audit process
- Work with legal counsel to properly document corrections through audit memos, if appropriate
- I-9 changes are always acceptable before ICE arrives; in some states, corrections are **not** accepted after notification of ICE audit

Defining Scope

- Determine the appropriate I-9 audit scope
 - › Full Internal Audit vs. Sample Size Audit
 - › Sample Selection Considerations:
- How are the individuals selected – disparate impact?
- Citizenship and national origin are inappropriate considerations
- Key: Consistency and Uniformity



Communication to Employees

- Communicate with employees
 - › Written communication about audit and reasons
 - › Define process for answering questions
 - › Create plan for dealing with I-9 mistakes/corrections
 - › Address language barrier issues



The Bottom Line: Civil Penalties

- › I-9 fines increased for penalties assessed after April 5, 2019.
- › Substantive/Uncorrected Technical Violation:
 - Minimum per individual increased from \$224 to \$230.
 - Maximum per individual increased from \$2,236 to \$2,292.
- › Knowingly Hire/Continuing to Employ:
 - First Offense increased from \$559-\$4,473 to \$573-\$4,586.
 - Second Offense increased from \$4,473 – \$11,181 to \$4,586 – \$11,463
 - Third Offense increased from \$6,709 – \$22,363 to \$6,878 – \$22,927



ICE Audits: What to Expect

- ICE Special Agent serves employer with Notice of Inspection (NOI) and subpoena/document list
 - Personal Service
 - Three (3) Business days to respond
 - Discuss and negotiate scope
 - Evaluate documents requested
- ICE forensic auditor provides detailed review after submission



Questions?

Melissa L. Azallion
(843)785-2171
Mazallion@burr.com

Jonathan C. Eggert
(843)785-2171
Jeggert@burr.com

© 2019. Burr & Forman LLP

47

With You Today



Melissa Azallion
Mazallion@burr.com

Melissa leads the firm's immigration practice, and has more than 20 years of experience advising clients on business immigration and labor and employment law issues. She represents clients in multiple industries including manufacturing, technology, health care, quick service/food service, hospitality, government and education. In addition to serving as legal counsel for clients over the past twenty years, Melissa worked as a Human Resources Administrator and Affirmative Action Director for the University of Dayton, where she was responsible for writing and directing the University's Affirmative Action Plan.



Jonathan Eggert
Jeggert@burr.com

Jonathan has experience assisting and advising clients on business immigration and labor and employment issues in a wide range of industries, including higher education, healthcare, hospitality, and manufacturing. His experience includes assisting domestic and foreign businesses in immigration matters before the United States Citizenship and Immigration Services, the U.S. Department of Labor, the U.S. Consulates and Embassies, and other Federal and State agencies. He has also assisted clients in litigation matters in areas including the FLSA, ADA, FMLA, and Title VII.

48

360 Attorneys.

19 Offices

1 Firm.

Southeastern Strong.

49

**BURR
FORMAN
MCNAIR**

© 2019. Burr & Forman LLP

49

**BURR
FORMAN
MCNAIR**

Get Connected

linkedin.com/company/burrforman

@burrforman

www.burr.com

Thank you
for your
participation

© 2019. Burr & Forman LLP

50