REQUIREMENTS FOR INTERNATIONAL STUDENTS TO CLERK IN STATE AND FEDERAL COURTS

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Clerks with state and federal courts are becoming an increasingly popular option for law school graduates. A recent survey published in the ABA Journal estimated that last year there was a 66% increase in online applications for clerkships with federal judges. However, many law school graduates who are not United States citizens assume that they are ineligible to apply for these positions, or begin the application process but are deterred by the maze of federal rules and regulations or the uncertainty regarding the policies of state courts. This article summarizes the relevant information for non-U.S. citizens considering a post-graduate clerkship.

CLERKS WITH FEDERAL JUDGES

Non-U.S. citizens who are seeking employment with the federal government must meet the requirements of (1) an Executive Order restriction on appointing non-citizens in the competitive service; (2) the Appropriations Act; and (3) immigration law as codified in title 8 of the U.S. Code of Federal Regulations.

First, Executive Order 11935 (September 2, 1976) restricts the employment of non-citizens for “competitive service” positions covered by title 5 of the U.S. Code. This applies to all federal employers with competitive service positions anywhere in the world. However, a limited number of positions are “excepted” from the competitive service; these positions are also exempt from the Executive Order ban. The primary differences between the competitive service positions and the excepted service positions are in the areas of appointment procedures and job protections. Fortunately for prospective clerks, excepted positions include law clerks, as described in 5 USC § 213.3102(e), so non-citizens applying for clerkships do not have to worry about these restrictions.

Second, under an Appropriations Act restriction that is codified annually in a note to 5 USC § 3101, Congress has prohibited the use of appropriated funds to pay federal employees whose post of duty is in the continental United States unless they are U.S. citizens or meet one of a very few limited exceptions. This ban does not apply to citizens of Ireland, Israel, the Republic of Philippines, and the nationals of those countries that are allied with the United States in a current defense effort. As such, the first step for a non-U.S. citizen seeking a clerkship position with a federal judge is to determine whether: (1) s/he falls under one of the few exceptions to the ban; or (2) s/he is excluded from the ban because his or her country of origin has a qualifying treaty with the United States. For further information on the Appropriations Act restrictions, see the U.S. Office of Personnel Management website at http://www.opm.gov/emp/emp/html/citizen.asp. For an authoritative list of allied countries, contact the Office of the Assistant Legal Adviser, U.S. Department of State, or see the list of U.S. Collective Defense Arrangements available on their website at http://www.state.gov/j/trl/treaty/collectivedefense/.

Third, all non-U.S. citizens must be eligible for employment under United States’ immigration law. Law clerk applicants for federal judges will be required to prove citizenship information and proof of eligibility to work in the United States prior to being hired. This is discussed in more detail below.

CLERKS WITH STATE COURT JUDGES

We contacted the human resources departments (or the equivalent thereof) for each state’s highest level court. We received responses from nearly every state, and each responsive state indicated that clerkship applicants do not have to be United States citizens; however, clerkship applicants must be graduates of an ABA-accredited law school and will be required to provide proof of eligibility for employment in the United States. In addition, some states indicated that clerks are required to sit for the state’s bar examination, so applicants are encouraged to check the requirements for the bar in the states that they are considering. The requirement regarding eligibility for employment in the U.S. is addressed in more detail below.

VISA ISSUES

Once eligibility to apply for federal clerkships is established or applicants decide to pursue state court clerkships, applicants must ascertain whether they will have a visa which will allow them to stay in the United States for the duration of a clerkship. This hurdle is a difficult one.

Most non-citizen law students are in the United States on a student (F-1) visa. Under that visa, a student, after graduating from law school, can usually stay in the United States for a year doing Optional Practical Training (OPT). There are strict rules regarding the timing of OPT. OPT must begin within 60 days of graduation and last for no more than one year. Therefore, if a student graduates on
May 15, the OPT timeline starts running on July 14. 60 days later, and ends the following July 14. However, judicial clerkships typically last for one year and start in August or September, making it impossible for students with F-1 visas to complete a clerkship. Extension of OPT beyond one year is now available but only for those foreign nationals for whom a petition for H-1B has been filed requesting a Change of Status, if the petition has been selected for processing. This is an unlikely scenario for clerkships.

Many students look to the H-1B to stay in the United States after graduation. However, in the clerkship context, this visa is little or no help for several reasons. First, the judge would have to file on behalf of the applicant and pay significant fees, currently $1,570 to $2,320. Few courts or judges have the budget to pay these fees. Moreover, H-1B visas have annual quotas, so there is no guarantee that a petition will be selected for processing. Lastly, most non-U.S. citizens cannot apply for an H-1B visa until the April after they graduate from law school, so they will not know if they will get one at the time a judge is hiring, often a year before a clerkship starts. For more details on this visa, see “Making the Transition from F-1 Visa Status to H-1B” in the January 2009 NALP Bulletin.

What other visa options are available? Two possible visas are the J-1 and H-3.

The J-1 has several categories. The one most relevant for clerkships is the Trainee Category. There are several criteria for qualifying for a J-1 Trainee visa. First, applicants must have a bachelor’s degree from their home country or five years of relevant experience overseas. They also need a sponsoring organization, one of many accredited by the State Department (the American Bar Association is one). They must also have a detailed training plan and be in the United States to develop skills to be used in their home country. Applicants will have to pay fees to their sponsoring organizations and purchase the mandatory insurance coverage. If applicants meet all the criteria, they may get a visa for up to 18 months (depending on the length of the training plan).

Some individuals (notably those whose training is sponsored by the home or U.S. government - such as Fulbright Scholars - and those from countries deemed by the U.S. to be in need of legal professionals) who obtain this visa must go back to their home countries for two years before qualifying for H and L visas or a green card unless they obtain a waiver.

Another avenue for non-U.S. citizens interested in clerking is the H-3. To obtain this visa, applicants must demonstrate that the training they will obtain in the United States is not available at home and that they will not be displacing a U.S. worker. They must also show that the training in the U.S. will be useful back in their home countries. Here too, a detailed training plan is required and it can last up to two years. However, after a two-year H-3 visa expires, applicants must return to their home countries for six months and will not be eligible for an H-1B visa during that time.

For more detailed information on visas, please visit the U.S. Department of State website, http://www.travel.state.gov/visa/visa_1750.html.

For those students who are interested in getting a clerkship experience but cannot successfully navigate the visa path, there is always the option of doing unpaid judicial internships after graduation using their OPT on their F-1 visa.

In summary, the main issue facing non-citizens who want to apply for post-graduate judicial clerkships is that they must have a visa that will allow them to stay in the United States for the duration of a clerkship. However, the unique and rewarding experience provided by a state or federal clerkship is worth the time and effort that it takes to explore the possibility.

ENDNOTES


2 The term “continental United States” excludes Hawaii, Alaska, Puerto Rico, the Virgin Islands, and the Isthmus of Panama.

3 Exceptions to the Appropriations Act ban include, but are not limited to, persons who: were born in American Samoa, Swains Island, or the Northern Mariana Islands; are South Vietnamese, Cambodian, or Laotian refugees paroled in the U.S.; or are nationals of the People’s Republic of China who qualify for adjustment of status pursuant to the Chinese Student Protection Act of 1992.