

33.99.09 Employment of Foreign Nationals

Approved July 31, 1996
Revised December 16, 1997
Revised December 6, 1999
Revised October 17, 2000
Revised August 20, 2001
Revised October 17, 2003
Revised August 17, 2007
Revised June 2, 2008
Next Scheduled Review: June 2, 2010



Regulation Statement

Members of The Texas A&M University System (system) shall employ foreign nationals as provided by this regulation.

Reason for Regulation

This regulation provides minimum procedures to be used by system members in employing foreign nationals. However, this regulation does not apply to the employment of international students.

Procedures and Responsibilities

1. ADMINISTRATION

- 1.1 This regulation applies to the employment of international faculty, researchers and staff, but does not apply to the employment of international students.
- 1.2 Each system member must designate human resources or another office to be responsible for the employment of full-time international faculty, researchers and staff.
- 1.3 The International Faculty & Scholar Services Office (IFSS) at Texas A&M University is authorized to provide assistance to system members regarding immigration employment matters. This assistance includes, but is not limited to, reviewing supporting immigration documentation and facilitating the processing of immigration employment petitions, after a contingent offer has been made by system members. IFSS is also authorized to act as an agent for system members in filing labor condition applications and applications for labor certification with the Department of Labor.

2. EMPLOYMENT OF FOREIGN NATIONALS IN THE UNITED STATES

- 2.1 Unless there is a legal requirement for a particular position, citizenship status shall not be used as a means for discriminating against a foreign national. Federal law governs the employment of a non-citizen. A system member may not request documentation that a person is eligible to work in the United States until a contingent offer of employment has been made. Each offer of employment should state that employment is contingent on the applicant's ability to provide employment eligibility documentation required by federal immigration laws.
- 2.2 The head of a hiring department or similar administrative unit, proposing to employ a foreign national, is responsible for ensuring that correspondence with the foreign national prior to obtaining the necessary approvals does not constitute a firm offer of employment.
- 2.3 The continued employment of a foreign national student immediately after graduation is not guaranteed and will be considered only on a case-by-case basis and may require a change in immigration status.

3. AUTHORITY TO APPROVE OFFERS OF EMPLOYMENT

The system member chief executive officer or designee must authorize the proposed employment of a foreign national. The head of a hiring department or similar administrative unit, proposing to employ a foreign national, is responsible for initiating the request, including the necessary immigration information, and securing the appropriate official's approval to make a firm offer of employment.

4. CERTIFICATION OF VISA CREDENTIALS

After a contingent offer of employment is made, the head of the hiring department or similar administrative unit must contact the designated office within the system member. The designated office will provide assistance regarding immigration matters, review supporting immigration documentation, and facilitate the processing of immigration employment petitions, if appropriate.

5. RESPONSIBILITY OF EMPLOYING DEPARTMENT OR UNIT

The head of a hiring department or similar administrative unit is responsible for contacting the designated office within the system member, under the following circumstances:

- 5.1 when a foreign national employee gives notice to the department of a change of address;
- 5.2 when a foreign national employee reports, or fails to report, for duty or terminates employment;
- 5.3 when the nonimmigrant status of a foreign national employee requires extension or change to a different nonimmigrant category;

- 5.4 when a member contemplates sponsoring a foreign national employee for permanent resident status;
- 5.5 when a member contemplates changing the foreign national employee's scope of employment, training, work site, dates of employment, title, job description, salary, or hours per week; and,
- 5.6 when a foreign national employee obtains permanent residency in the United States.

6. PETITIONS FOR NONIMMIGRANT EMPLOYMENT

- 6.1 Employment of nonimmigrant foreign nationals requires employer sponsorship and the filing of a written petition with the United States Citizenship and Immigration Services for nonimmigrant status.
- 6.2 The head of a hiring department or similar administrative unit, proposing to sponsor a foreign national for nonimmigrant status, is responsible for contacting the designated office within the system member to initiate the process.
- 6.3 Each system member will determine in its sole discretion whether or not to sponsor a foreign national and file an employer-sponsored nonimmigrant status petition.
- 6.4 Each system member is responsible, as the employer, to pay for reasonable and relevant costs and/or fees associated with filing a petition to sponsor a foreign national for nonimmigrant status, including the attorney's fees of Outside Counsel authorized to represent the system, if needed.

7. PETITIONS FOR PERMANENT RESIDENCY

- 7.1 Sponsorship for permanent residency is not an entitlement. A system member will only consider sponsoring positions for permanent residency if the positions are eligible for such sponsorship, and it is clearly demonstrated to be in the best interest of the system member to do so.
- 7.2 Petitions Requiring Sponsorship
 - 7.2.1 Sponsorship of a foreign national for immigrant status (permanent residency) requires an employer to offer either a permanent position or a tenure/tenure-track position.
 - 7.2.2 The head of a hiring department or similar administrative unit, proposing to sponsor a foreign national for immigrant status, is responsible for developing a written justification that clearly explains how the proposed sponsorship is in the system member's best interest because it will meet critical scientific, teaching, public service and/or other needs. In addition, the written justification must address the following:

- 7.2.2.1 The foreign national has been employed with the sponsoring department for at least one year and has a current overall performance rating of above average or higher;
 - 7.2.2.2 Employment of the foreign national will continue for the foreseeable future;
 - 7.2.2.3 Funding to support the position is in place for a minimum of three years from the date of the written justification, and there is a reasonable expectation that funding for the position will continue for the foreseeable future beyond the initial three-year period; and
 - 7.2.2.4 There is a reasonable expectation that the foreign national employee will remain with the system for a minimum of three years after acquiring permanent residency.
- 7.2.3 The sponsoring department may further justify waiving the one-year employment requirement for tenured and tenure-track faculty with actual classroom teaching responsibilities that qualify for special handling under the employment based second preference immigrant petition process or otherwise qualify under the employment based first preference immigrant petition process.
- 7.2.4 The written justification must be approved by the appropriate vice president and dean of a university and the health science center, or the appropriate director and deputy or associate director of an agency.
- 7.2.5 Each system member will determine in its sole discretion whether or not to sponsor a foreign national and file an employer-sponsored immigrant status petition.
- 7.2.6 Each system member is responsible, as the employer, to pay for reasonable and relevant costs and/or fees associated with filing a petition to sponsor a foreign national for immigrant status, including the attorney's fees of Outside Counsel authorized to represent the system, if needed.
- 7.2.7 The foreign national employee is solely responsible for filing a petition for adjustment of status to permanent resident, including all costs and/or fees.

7.3 Temporary Positions that System Members will not Sponsor

Positions that a system member will not sponsor for permanent residency because they are temporary include: postdoctoral researchers, postdoctoral scholars, lecturers, researchers with fixed-term appointments, appointments ending with funding, exchange visitors, temporary employees, and visiting appointments. Individual foreign national employees in these positions are not prevented from pursuing a self-sponsored immigrant petition, provided a system member is not named as a petitioning employer.

7.4 Sponsorship of Staff Positions

A staff position may be considered for sponsorship by a system member only in exceptional cases when determined to be in the system member's best interest. Such cases, however, are expected to be rare and will require additional justification beyond that required in Section 7.2.2 above.

7.5 Petitions Not Requiring Sponsorship

Individual foreign national employees are not prevented from pursuing a self-sponsored immigrant petition (*i.e.*, Extraordinary Ability or National Interest Waiver), provided a system member is not named as a petitioning employer. Assistance from a system member, if any, will be limited to an official letter of recommendation, if appropriate. A foreign national employee is responsible for notifying the head of his or her department regarding any change in immigration status resulting from a self-sponsored immigrant petition.

8. EMPLOYMENT OF FOREIGN NATIONALS OUTSIDE OF THE UNITED STATES

Prior to hiring a foreign national to work outside the United States, the hiring department must contact the designated office within the system member for assistance in determining the documentation and reporting requirements in the country of employment. The designated office within the system member will direct the member department to the appropriate member office for assistance with immigration and tax compliance. If the appropriate member office needs assistance in determining requirements and compliance issues, the System Office of Budgets and Accounting should be contacted.

9. CONTINUED EMPLOYMENT

A foreign national employee is responsible for maintaining valid immigration status and employment authorization to continue employment, and immediately notifying the head of his or her department regarding any change in immigration status. The head of each hiring department or similar administrative unit is responsible for ensuring that extensions or changes in immigration status are properly documented in a timely manner on a new or re-verified I-9 Form (Employment Eligibility Verification). An employing department must not continue to employ a foreign national employee knowing that the employee has become an unauthorized alien with respect to such employment and is unable to provide evidence of employment eligibility pursuant to federal law.

10. RETENTION OF COUNSEL

A private attorney must not be engaged to represent any system member in any nonimmigrant or immigrant petition or application unless approved by the Office of General Counsel in accordance with System Regulation *09.04.01, Legal Counsel and Attorney General Opinion Requests*. This regulation, however, does not prevent a foreign national employee from retaining individual counsel to obtain his or her own legal advice or representation.

Related Statutes, Policies, or Requirements

Regulation 09.04.01, *Legal Counsel and Attorney General Opinion Requests*

<http://tamus.edu/offices/policy/policies/pdf/09-04-01.pdf>

IFSS Homepage

<http://ifss.tamu.edu/>

Definitions

- Labor Certification. Under the Immigration and Nationality Act (INA) certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that: (1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.
 - Special Handling. The United States Department of Labor (DOL) establishes in 20 C.F.R. §656.18 an optional special recruitment and documentation procedure for college and university teachers commonly known as the Labor Certification Special Handling Process. This process allows the university to file within 18 months of the date of the offer letter an application with DOL using the evidence gathered during a competitive recruitment and selection process to prove that the labor market was tested and that the university found the final candidate to be more qualified than each of the U.S. citizens that applied for the job opportunity.
 - Employment Based First and Second Preference. Under the Immigration and Nationality Act (INA), aliens are subject to a worldwide level for employment-based immigrants in a fiscal year and are provided immigrant visas based on an employment preference allocation system. Under this system, Employment Based First Preference applies to priority workers that qualify as individuals of extraordinary ability, outstanding professors and researchers, and multinational executives and managers. Employment Based Second Preference applies to individuals who are members of the professions holding advanced degrees or aliens of exceptional ability.
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Contact Office

The System Office of General Counsel
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