

33.99.09 Employment of Foreign Nationals

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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 members when employing foreign nationals. However, this regulation does not apply to the employment of international students.

Procedures and Responsibilities

1. ADMINISTRATION

- 1.1 Each member must designate human resources or another office (designated office) to be responsible for the employment of foreign nationals on a full-time basis.
- 1.2 The International Faculty & Scholar Services Office (IFSS) at Texas A&M University is authorized to provide assistance to 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 members. IFSS is also authorized to act as an agent for 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 It is unlawful to hire a foreign national knowing that the foreign national is not authorized to work in the United States.
- 2.2 Unless there is a legal requirement for a particular position, citizenship status shall not be used as a basis for discriminating against a foreign national. Federal law governs the employment of a foreign national. A 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.
- 2.3 The head of the hiring department or similar administrative unit proposing to employ a foreign national shall ensure that correspondence with the foreign national prior to obtaining the necessary approvals does not constitute a firm offer of employment.
- 2.4 The head of the hiring department or similar administrative unit proposing to employ a foreign national shall ensure that the proposed employment complies with all U.S. export control laws and regulations as indicated in System Policy 15.02, *Export Controls*.
- 2.5 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

- 3.1 The member chief executive officer or designee must authorize the proposed employment of a foreign national. The head of the hiring department or similar administrative unit proposing to employ a foreign national shall initiate the request, including the necessary immigration information, and secure the appropriate official's approval to make an offer of employment.
- 3.2 The member who extends the offer of employment is the employer of the foreign national employee. By extending an offer of employment, the member creates an employer-employee relationship with the foreign national employee since the member supervises, controls the work, approves leaves, evaluates performance, administers the disciplinary process and can terminate the employment of the foreign national employee. In cases where the foreign national employee is assigned to more than one department, unit or member, the employer of such foreign national employee remains the member who extended the offer of employment.

4. IMMIGRATION SPONSORSHIP FOR EMPLOYMENT

After an offer of employment is made, the head of the hiring department or similar administrative unit must contact the designated office for handling the employment of foreign nationals within the 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 HIRING DEPARTMENT OR UNIT

- 5.1 The head of the hiring department or similar administrative unit is responsible for assuring that an Employment Eligibility Verification form (Form I-9) is properly completed in a timely manner by the foreign national employee and the employer as provided in System Regulation 33.99.12, *New Employee Processing*, and in accordance with the provisions contained in the Immigration Reform and Control Act of 1986, as amended.
- 5.2 The head of the hiring department or similar administrative unit is responsible for contacting the designated office within the member under the following circumstances:
- (a) when a foreign national employee gives notice to the department of a change of address;
 - (b) when a foreign national employee reports, or fails to report, for duty or terminates employment;
 - (c) when the nonimmigrant status of a foreign national employee requires extension or change to a different nonimmigrant category;
 - (d) when a member contemplates sponsoring a foreign national employee for permanent resident status;
 - (e) when a foreign national employee requests authorization to engage in independent consulting and/or external employment;
 - (f) when a foreign national employee will occupy two (or more) separate positions within Texas state government (dual employment);
 - (g) when a foreign national employee requests leave without pay or an alternative work location;
 - (h) 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; or
 - (i) when a foreign national employee obtains permanent residency in the United States.
- 5.3 When the employment of a foreign national is terminated, whether voluntarily or involuntarily, the head of the hiring department or similar administrative unit is required to immediately notify the designated office of the date of such termination.

6. PETITIONS FOR NONIMMIGRANT EMPLOYMENT

- 6.1 Employment of nonimmigrant foreign nationals is an employer-driven process requiring the employer's sponsorship and the filing of a written petition and

corresponding documentary evidence with the U.S. Citizenship and Immigration Services for the purposes of obtaining the appropriate nonimmigrant status.

- 6.2 The head of the hiring department or similar administrative unit proposing to sponsor a foreign national for nonimmigrant status shall contact the designated office within the member to initiate the process.
- 6.3 Each 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 In addition to the responsibility set forth in Section 2.4, the head of the hiring department or similar administrative unit shall ensure that a deemed export control attestation is properly completed, if required, and complied with prior to the start of the proposed employment of the nonimmigrant foreign national.
- 6.5 Each 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.
- 6.6 Each member is responsible for the payment of the premium processing filing fee only in cases in which there is a business need on the part of the member requiring the nonimmigrant petition to be filed under an expedited process.
- 6.7 The foreign national employee is solely responsible for filing petitions pertaining to dependents of the foreign national employee, including all costs and/or fees.
- 6.8 The foreign national employee is solely responsible for filing applications, including all costs and/or fees, relating to Department of State waivers or consular visa applications at U.S. consulates overseas in which the member is not the petitioning party.

7. PETITIONS FOR PERMANENT RESIDENCY

- 7.1 Sponsorship for permanent residency is not an entitlement, and it is an employer-driven process. A 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 member to do so.
- 7.2 Each member will determine in its sole discretion whether or not to sponsor a foreign national and file an employer-sponsored immigrant status petition.
- 7.3 Petitions Requiring Sponsorship
 - 7.3.1 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.

- 7.3.2 The head of the 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 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:
- 7.3.2.1 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;
 - 7.3.2.2 Employment of the foreign national will continue for the foreseeable future;
 - 7.3.2.3 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
 - 7.3.2.4 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.
- 7.3.3 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 outstanding professor or researcher immigrant petition process.
- 7.3.4 The written justification must be approved by the appropriate vice president and dean of a university or the appropriate director and deputy or associate director of an agency.
- 7.3.5 After the written justification has been approved, as indicated in Section 7.3.4, the designated office within the member will issue an administrative recommendation to the head of the hiring department or similar administrative unit regarding the immigrant process to be pursued.
- 7.3.5.1 The criteria adopted for sponsorship of a foreign national employee as an outstanding professor or researcher requires the foreign national employee to (a) possess at least three years of post-degree teaching or research experience and (b) establish, from a preponderance of the evidence, outstanding international accomplishments that overall make the foreign national employee stand apart in the academic community through eminence and distinction based on international recognition as an outstanding professor or researcher.

7.3.5.2 Legal opinions from immigration attorneys obtained by a foreign national employee or the personal opinions of a foreign national employee in regard to the foreign national employee's qualifications for sponsorship under a specific immigrant category are not binding on the member.

7.3.6 Each 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 employee for immigrant status, including the attorney's fees of outside counsel authorized to represent the system, if needed.

7.3.7 The foreign national employee is solely responsible for filing a petition for adjustment of status to permanent resident and/or applications relating thereto, including all costs and/or fees.

7.3.8 The foreign national employee is solely responsible for filing petitions for the adjustment of status to permanent resident pertaining to dependents of the foreign national employee, including all costs and/or fees.

7.4 Temporary Positions that Members Will Not Sponsor

Positions that a 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 member is not named as a petitioning employer.

7.5 Sponsorship of Staff Positions

A staff position may be considered for sponsorship by a member only in exceptional cases when determined to be in the member's best interest. Such cases, however, are expected to be rare and will require additional justification beyond that required in Section 7.3.2.

7.6 Petitions Not Requiring Sponsorship

7.6.1 Individual foreign national employees are not prevented from pursuing a self-sponsored immigrant petition at their own cost (*i.e.*, Extraordinary Ability or National Interest Waiver) provided a member is not named as a petitioning employer. Assistance from a 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.

7.6.2 Individual foreign national employees are solely responsible for filing self-sponsored petitions, including all costs and/or fees.

8. RECORDS RETENTION OF IMMIGRATION EMPLOYMENT

Each member is solely responsible for complying with federal and state records retention guidelines and policies on all immigration filings pertaining to the employment of foreign nationals. This includes, but is not limited to, H-1B public access and inspection files relating to Labor Condition Applications, Applications for Permanent Employment Certifications (labor certifications), and nonimmigrant and immigrant petitions.

9. EMPLOYMENT OF FOREIGN NATIONALS OUTSIDE OF THE UNITED STATES

9.1 Prior to hiring a foreign national as an employee of a member to work outside the United States, the hiring department or similar administrative unit must contact the designated office within the member for assistance in determining whether such a hiring could raise potential foreign tax, immigration, labor, export control or other legal issues.

9.2 The designated office within the member will direct the hiring department or similar administrative unit to the appropriate office for assistance with issues arising out of the proposed hiring of foreign nationals to work outside the United States as employees of a member. If the designated office needs assistance in determining requirements and compliance issues, the Office of General Counsel should be contacted.

10. 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 Form I-9 (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.

11. RETENTION OF COUNSEL

A private attorney must not be engaged to represent any 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](#)

Member Rule Requirements

A rule is not required to supplement this regulation.

Contact Office

Office of General Counsel
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