
RECRUITMENT, SELECTION AND APPOINTMENTS

A9.610 **IMMIGRATION CLASSIFICATIONS FOR EMPLOYMENT OF FOREIGN NATIONALS**

1. **Purpose.** To provide procedures for obtaining appropriate employment-based immigration classifications for foreign nationals ("aliens"); to fix responsibility for petitioning for employment-based immigration classifications on behalf of alien employees.

2. **References.**
304A-1001 H.R.S.
304A-1005 H.R.S.
78-1 H.R.S.
Immigration and Naturalization Act of 1952 as amended
Immigration Reform and Control Act of 1986 as amended
Immigration Act of 1990 as amended
Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as amended
American Competitiveness and Workforce Improvement Act of 1998
American Competitiveness in the Twenty-First Century Act of 2000
8 CFR Aliens and Nationality
20 CFR Employees' Benefits
22 CFR Foreign Relations
Exchange Visitor Program Designation P-1-1793

3. The University of Hawai'i ("University") shall comply with applicable federal laws and regulations governing the employment of aliens. The University shall follow regulations and procedures set forth by U.S. government agencies for immigration-related petitions and applications filed by the University on behalf of alien employees.

4. **Applicability/Responsibility.** These procedures are intended to outline the basic information necessary to initiate the petition/application processes for the most common and appropriate visa classifications for the alien employees of the University. These procedures shall apply to all campuses and activities of the University.

- a. **It is the responsibility of the alien employees as the beneficiaries of immigration petitions and applications filed by the University to:**
- 1) Ensure that the necessary and appropriate entry, visa, and employment authorization documents are completed for themselves and their families, if applicable.
 - 2) Provide information and supporting documents required for petitions and applications filed by the University on behalf of themselves to the employing department/unit, college administrative/personnel officer, or the Office of Faculty and Scholar Immigration Services ("FSIS") as requested.
 - 3) Pay applicable filing and visa fees, unless payment by the University as the employer is required by federal regulation.
 - 4) Maintain legal immigration status and ensure their family members are maintaining legal immigration status.
 - 5) Keep informed of federal regulations affecting their status.
- b. **The employing department/unit shall:**
- 1) Follow recruitment procedures as required by EEO/AA regulations and by the DOL for labor certification purposes.
 - 2) Follow normal hiring procedures.
 - 3) Consult with college/unit administrative/personnel officer regarding procedures and documentation required for employment-based immigration petitions and applications.
 - 4) Prepare UH/FSIS forms and obtain information and supporting documents for immigration petitions or applications from the alien.

- 5) Transmit UH/FSIS forms and supporting documents to college/unit administrative/personnel officer.
- 6) Obtain and attach any applicable filing fees to completed petitions and applications.
- 7) In the absence of the alien employee, arrange mailing or delivery of petition/application packet to the appropriate U.S. government agency (e.g. USCIS). Send immigration documents (e.g. Form DS-2019, Form I-797 approval notices), and/or other pertinent information to the alien employee.

c. The college/unit administrative/personnel officer shall:

- 1) Consult with the immigration staff in FSIS regarding appropriate employment visa classifications, guidance on forms and instructions for preparing petitions/applications and supporting documents, and other immigration questions.
- 2) Provide the necessary personnel documents and supporting documents.
- 3) Transmit forms and supporting documents to FSIS with a request from the Dean/Director/Chancellor or designee for processing by FSIS.
- 4) Transmit approvals to hiring department/unit.

d. The Office of Faculty and Scholar Immigration Services shall:

- 1) Assist college/unit administrative/personnel officers in determining appropriate employment-based visa classifications. Provide instructions and advice pertinent to the preparation of immigration petitions/applications.
- 2) Review and complete immigration petitions and related applications pertinent to the employment of aliens by the University, as requested by employing units. FSIS staff members who are authorized by the University President or designee to act as representatives of the University in

immigration matters shall sign all applicable immigration petitions/applications on behalf of the University.

- 3) Return signed copies of the applicable immigration petitions/applications to the hiring department/unit for transmittal to the alien employee or to the proper U.S. government agencies, as applicable.
- 4) Conduct related correspondence with U.S. government agencies on behalf of the University.
- 5) Receive immigration-related correspondence from U.S. government agencies and forward copies or originals, as necessary, to the college/unit.

e. **Use of Outside Attorneys.** HRS Section 304A-1005 provides that the Office of the General Counsel provides legal services to the University of Hawaii. If outside counsel is to be retained by the University of Hawaii to provide legal services for the University of Hawaii in the filing of an immigration petition or application, such counsel must be hired in compliance with the University procurement procedure. If an alien employee retains an attorney to represent the alien at the alien's personal cost,

- 1) All immigration petitions/applications that require the authorized signature of the employer shall be reviewed by the administrative/personnel officer for accuracy and compliance with University policies and procedures.
- 2) If the hiring unit supports the petition/application, the petition/application and supporting documents shall be forwarded with a supporting memo from the Dean/Director/Chancellor or designee for review by an authorized FSIS staff member for compliance with immigration regulations.
- 3) The authorized FSIS staff member shall review the petition/application, make necessary corrections, and if he/she concurs with the statements in the petition/application, he/she shall sign the petition/application on behalf of the University as the authorized representative of the employer and return the petition to the hiring department/unit for filing by the attorney representing the alien.

5. **Guidelines for Obtaining Nonimmigrant Classifications for Employment at the University:**

a. **General:** Nonimmigrant classifications for temporary appointments are limited to finite periods as authorized by USCIS. The following are guidelines for nonimmigrant classifications commonly used by the University for alien employees. Use of other nonimmigrant classifications (e.g. E-3, P-3, etc.) requires consultation with an authorized FSIS staff member.

b. **J-1 Exchange Visitor**

- 1) The University of Hawai'i is designated by the U.S. Department of State ("DOS") as an exchange visitor program sponsor and is authorized by DOS to utilize the J-1 classification for eligible foreign nationals selected to participate in its Exchange Visitor Program.
- 2) J-1 status is available to aliens who are bona-fide students, professors, research scholars, short-term scholars, and specialists as defined in the Exchange Visitor regulations (22 CFR) and who seek to enter the United States temporarily as participants in educational and cultural programs designed to "promote the interchange of persons, knowledge, and skills" in such a way as to "promote mutual understanding between the people of the United States and the people of other countries." The J-1 classification is generally used for visiting faculty and researchers, post-doctoral fellows, workshop, seminar and conference participants, and experts in a specialized field of knowledge.
- 3) An exchange visitor's appointment to a position shall be temporary. The J-1 classification shall not be used for alien employees who are candidates for tenure-track or permanent positions.
- 4) The J-1 classification, as a general rule, should be used in cases of faculty or staff exchange where the alien's stay is temporary in nature. The minimum period of stay is three weeks, except for short-term scholars who have no minimum period of stay. The maximum period of stay shall be in accordance with exchange visitor regulations

governing the exchange visitor category. Professors and research scholars may remain in J-1 status for up to 5 years; short-term scholars may remain in J-1 status up to 6 months; and specialists may remain in J-1 status for up to 1 year. These durations are subject to amendment by DOS.

- 5) Financial support of a J-1 exchange visitor may be derived from a variety of sources, including University general fund appropriations.
- 6) J-1 exchange visitors who are subject to the foreign residence requirement are required to return and reside in their home country for an aggregate of two years before they are eligible to reenter the United States as an immigrant or temporary worker.
- 7) Only University staff designated by DOS as the Responsible Officer ("RO") or as Alternate Responsible Officers ("ARO") are authorized to issue and sign DS-2019 forms on behalf of the University. The RO of the University's J-1 Exchange Visitor Program is authorized by DOS to administer the University's exchange visitor program.
- 8) Processing Procedures: Information about J-1 eligibility requirements and instructions regarding the preparation and processing of the Certificate of Eligibility for J-1 Exchange Visitor Status (Form DS-2019) may be obtained from FSIS through the college/unit's administrative or personnel officer. Requests for an exchange visitor to begin a new program, extend an ongoing program, transfer from/to another program, changes of status, and to bring J-2 dependents are submitted by the department/unit through the college/unit's administrative/personnel officer to FSIS.

c. H-1B Temporary Worker

- 1) The H-1B classification is designated for aliens coming temporarily to the United States to perform services in a "specialty occupation." A specialty occupation means an occupation that requires: a) theoretical and practical application of a body of highly specialized knowledge,

and b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

- 2) H-1B status is used by the University to employ foreign nationals who are temporary faculty members, researchers, and consultants or who are temporarily engaged in professional level activities at the University. H-1B status may also be used for tenure-track faculty until they obtain lawful permanent residence.
- 3) H-1B aliens must be employees of the University as defined at 8 CFR 274a.1(f).
- 4) The H-1B filing fee and associated fees are the sole responsibility of the University, the cost of which cannot be passed on to the non-immigrant worker.
- 5) Initial H-1B approval may be issued for a period of employment up to a maximum of three years. Extensions of H-1B status may be requested for up to three additional years, provided that the alien's total period of stay in H-1B status does not exceed six years. Extensions beyond the six-year limit are contingent upon certain conditions provided by U.S. federal law. These durations are subject to amendment by the U.S. Citizenship and Immigration Services (USCIS).
- 6) College/unit administrative officers shall inform FSIS of any material changes to the terms and conditions of an H-1B alien's employment before the changes take effect. Examples of material changes include but are not limited to: changes in worksite, FTE changes from full-time to part-time or part-time to full-time, new position with different duties.
- 7) If the alien employee is terminated prior to the expiration of the approved H-1B petition:
 - a) The college/unit administrative officer shall inform FSIS. FSIS will notify USCIS of the termination and withdraw the Labor Condition Application certified by the U.S. Department of Labor.

b) The department/unit is responsible for reasonable costs of returning the alien to his or her last place of foreign residence if the alien is dismissed from employment. If the alien voluntarily terminates his or her employment prior to the expiration of the H-1B approval notice, the alien has not been "dismissed."

- 8) Applications on behalf of H-4 dependents are the responsibility of the alien employee.
- 9) Approval notices, notices of action, copies of the certified Labor Condition Application, or other documents for H-1B petitions submitted by the University on behalf of alien employees shall be transmitted to the alien by the college/department/unit as instructed by FSIS.

d. **O-1 Alien of Extraordinary Ability**

- 1) The O-1 classification is designated for aliens having sustained national or international acclaim for extraordinary ability in the sciences, arts, education, business, or athletics.
- 2) O-1 status is used by the University to employ aliens who are temporary faculty members, researchers, and consultants or who are temporarily engaged in professional level activities at the University. This category is best utilized for the most highly qualified professors and researchers.
- 3) O-1 aliens must be employees of the University as defined at 8 CFR 274a.1(f).
- 4) Initial O-1 approval may be issued for a period of employment up to a maximum of three years. Extensions of O-1 status may be requested in one year increments, with no maximum limit of stay in O-1 status. These durations are subject to amendment by USCIS.
- 5) If the alien employee is terminated prior to the expiration of the approved O-1 petition:

a) The college/unit administrative officer shall inform FSIS. FSIS will notify USCIS of the termination.

b) The department/unit is responsible for reasonable costs of returning the alien to his or her last place of foreign residence if the alien is dismissed from employment. If the alien voluntarily terminates his or her employment prior to the expiration of the O-1 approval notice, the alien has not been "dismissed."

6) Applications on behalf of O-3 dependents are the responsibility of the alien employee.

7) Approval notices and other notices of action for O-1 petitions submitted by the University on behalf of alien employees shall be transmitted to the alien by the college/department/unit as instructed by FSIS.

e. **TN Canadian and Mexican Professionals**

1) The TN classification is used by Canadian and Mexican citizens who are temporarily working for a U.S. employer as professionals. The TN classification is part of the North American Free Trade Agreement (NAFTA). Schedule 2 of Annex 1603 of NAFTA, commonly referred to as the TN Schedule, provides a list of the professions that are eligible for TN classification and the evidence required to determine if an individual is qualified to work in that profession.

2) TN status is used by the University to employ Canadian or Mexican citizens who are temporarily engaged in professional level activities in the professional occupations listed in the TN Schedule, including temporary faculty and researchers.

3) TN aliens must be employees of the University as defined at 8 CFR 274a.1(f).

4) Initial TN approval may be issued for a period of employment up to a maximum of three years. Extensions of TN status may be requested in three year increments, with no maximum limit of stay in TN status, provided the

position continues to be temporary. Canadians may also renew the TN status by repeating the application process at a U.S.-Canadian preflight or port-of-entry inspection facility. These durations are subject to amendment by USCIS.

- 5) If an alien employee is terminated prior to the expiration of an approved TN petition, the college/unit administrative officer shall inform FSIS.
- 6) Processing Procedures for Canadian citizens:
 - a) Initial Admission: Canadians need not have prior petition approval or a visa to apply for admission to the United States in the TN category. He/she may present the following documents at a U.S. port-of-entry or Canadian preflight inspection facility:
 - i. Proof of Canadian citizenship: Canadian passport, Canadian birth certificate, or certificate of Canadian naturalization. (Canadian Landed Immigrants are not eligible for TN status.)
 - ii. A letter from the employer: This letter must be issued by the University department/unit, providing information about the position (must be on TN Schedule), description of professional activities the applicant will perform (duties and responsibilities), the applicant's educational qualifications or relevant credentials, anticipated length of stay (starting date of hire should be indicated, but the length of employment will not exceed the TN expiration date determined by CBP), and amount of compensation.
 - iii. Evidence that the alien has the required credentials for the profession as stated in the TN Schedule: Degree diplomas, transcripts, licenses, or other documentation must be provided in the original form or as certified copies.

- iv. U.S. Customs and Border Protection fee.
- b) After arrival in the U.S., the hiring unit shall transmit copies of the following documents to FSIS:
- i. TN employee's passport biodata/expiration page(s)
 - ii. Both sides of the I-94 card
 - iii. Evidence confirming UH employment (e.g. PNF, offer and acceptance letters)
 - iv. Curriculum vitae
- c) Extensions, changes in employment, and changes of status: Information about the TN classification and instructions regarding the preparation and processing of the Form I-129 Petition for Nonimmigrant Worker and related forms/documents to extend TN status may be obtained from FSIS through the college/unit's administrative or personnel officer. Requests for extensions, changes in employment, and changes of status are submitted by the department/unit through the college/unit's administrative/ personnel officer to FSIS.

7) Processing Procedures for Mexican citizens:

- a) Initial Admission: Mexican citizens require a TN visa to apply for admission to the United States in the TN category. He/she may present the following documents at a U.S. port of entry:
- i. Proof of Mexican citizenship: Mexican passport, Mexican birth certificate, or certificate of Mexican naturalization.
 - ii. TN visa from a U.S. Embassy/Consulate.
 - iii. A letter from the employer: This letter must be issued by the University department/unit, providing information about the position (must be on TN Schedule), description of

professional activities the applicant will perform (duties and responsibilities), the applicant's educational qualifications or relevant credentials, anticipated length of stay (starting date of hire should be indicated, but the length of employment will not exceed the TN expiration date determined by CBP), and amount of compensation.

- iv. Evidence that the alien has the required credentials for the profession as stated in the TN Schedule: Degree diplomas, transcripts, licenses, or other documentation must be provided in the original form or as certified copies.
- v. U.S Customs and Border Protection fee.

b) After arrival in the U.S., the hiring unit shall transmit copies of the following documents to FSIS:

- i. TN employee's passport biodata/expiration page(s)
- ii. TN visa
- iii. Both sides of the I-94 card
- iv. Evidence confirming UH employment (e.g. PNF, offer and acceptance letters)
- v. Curriculum vitae

c) Extensions, changes in employment, and changes of status: Information about the procedures for visa application and admission of Mexican citizens in TN status and instructions regarding the preparation and processing of Form I-129 Petition for Nonimmigrant Worker and related forms/documents may be obtained from FSIS through the college/unit's administrative or personnel officer. Requests for extensions, changes in employment and changes of status are submitted by the hiring department/unit

through the college/unit's administrative or personnel officer to FSIS.

- 8) Applications on behalf of TD dependents are the responsibility of the alien employee.
- 9) Approval notices and other notices of action for TN petitions submitted by the University on behalf of alien employees shall be transmitted to the alien by the college/department/unit as instructed by FSIS.

6. **Guidelines for Processing Immigrant Petitions for Alien Employees of the University:**

a. General:

- 1) Nonimmigrant alien employees may be appointed temporarily to tenure-track or permanent positions. The appointment of a nonimmigrant alien employee to a tenure-track position is subject to the University's tenure policy for nonimmigrant alien employees until he/she attains lawful permanent resident ("LPR") status.
- 2) LPR status should not be promised or offered as a term of employment when hiring an alien. For faculty appointed to tenure-track positions, offer and appointment letters should clearly state the University's tenure policy as it applies to nonimmigrant alien employees.
- 3) The University may initially apply for appropriate nonimmigrant statuses for foreign faculty and staff who are offered employment by the University. A nonimmigrant status will permit a qualified alien to be employed by the University and to maintain legal immigration status during the immigrant petition and permanent residence process.
- 4) UH may file employment-based immigrant petitions on behalf of alien employees in positions that are "permanent" as defined by USCIS. The decision to initiate the immigrant petition process (with the ultimate objective being an alien employee's attainment of LPR status) on behalf of an alien employee rests solely with

the University and shall be based on future need, staff resources, and funding.

b. Types of Immigrant Petitions Filed by the University:

- 1) If the alien qualifies for the employment-based immigrant classifications of an a) alien of extraordinary ability or b) outstanding professor/researcher, FSIS shall process the Immigrant Petition for Alien Worker (Form I-140). In such cases, labor certification is not required.
- 2) If an alien who is appointed to a tenure-track or "permanent" position and who performs classroom instruction qualifies for the employment-based immigrant classifications of a a) professional with an advanced degree or b) professional, FSIS shall process a labor certification application (ETA 9089) within the U.S. Department of Labor's ("DOL") 18-month deadline after the alien's selection for the position. If DOL approves the labor certification application, FSIS will process the Immigrant Petition for Alien Worker.
- 3) If an alien who is appointed to a "permanent" position and who does not perform classroom instruction qualifies for the employment-based immigrant classifications of a a) professional with an advanced degree or b) professional, FSIS shall process a labor certification application (ETA 9089) in accordance with DOL's labor certification requirements. If DOL approves the labor certification application, FSIS will process the Immigrant Petition for Alien Worker.

c. Processing Procedures:

Information about employment-based immigrant classifications, eligibility criteria, processing procedures, forms, instructions for preparing and processing the Application for Alien Labor Certification, the Immigrant Petition for Alien Worker, and related applications may be obtained from FSIS through the college/unit's administrative or personnel officer.

- d. After an immigrant petition has been approved, FSIS shall provide the alien with a copy of the approval notice and

general instructions regarding the following applications. The alien shall be responsible for obtaining LPR status by either:

- 1) Consular Processing - applying for an immigrant visa at an American Embassy or Consulate abroad, or
- 2) Adjustment of Status to Permanent Resident - applying to USCIS to adjust status in the United States from non-immigrant status to immigrant status.
- 3) The alien's dependent(s) will be responsible for preparing and filing his/her application(s) for adjustment of status or consular processing of an immigrant visa.

e. Upon entry on an immigrant visa or approval of adjustment of status, the alien shall provide the department/college/unit and FSIS with evidence of his/her LPR status.

7. Special Provisions Governing Foreign Medical Graduates:

The Hawai'i Residency Programs shall prepare and process immigration documents for foreign medical graduates who will participate in its programs.

8. Income Tax Liability of Aliens:

It is the individual responsibility of each alien employee to determine the applicability of federal and state tax laws to his/her taxable income. Under federal tax regulations, aliens are divided generally into two classes, namely, resident aliens and nonresident aliens. In certain instances, U.S. tax treaties may provide an exemption from U.S. income tax on certain amounts earned by the alien employee while temporarily in the U.S. Due to the complexity of federal and state income tax requirements which are subject to change, the alien employee is advised to consult the Internal Revenue Service (IRS), the State Department of Taxation, or his/her tax advisor.