[Minor revisions: September 18, 2014]

Angelo State University
Operating Policy and Procedure

OP 52.53 Employment of Foreign Nationals

DATE: September 18, 2014

PURPOSE: The purpose of this Operating Policy/Procedure (OP) is to set forth the procedures for the hiring of foreign nationals as temporary workers in H-1B immigration status in compliance with the Immigration Act of 1990 (IMMACT), the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA) and their implementing federal regulations.

REVIEW: This OP will be reviewed in August every three years, or as needed, by the provost and vice president for academic affairs and the director of human resources, with recommended revisions forwarded to the president by September 15 of the same year.

POLICY/PROCEDURE

1. Scope of the Policy

a. Identify those positions for which Angelo State University will consider sponsorship.

b. Provide information about the legal requirements of employment visas as set forth by the U.S. Department of Homeland Security, the U.S. Department of Labor, and the Texas Workforce Commission related to the processing of petitions.

c. Establish the procedures for requesting, obtaining approval for, and processing a petition and provide forms for departments and foreign nationals to use in relation to the process.

d. Establish immigration procedures in compliance with state and federal laws as well as related institutional policies and procedures.

e. In order to reduce the university's and employing departments' risk, all university units are required to use the services of the Office of the Provost for all immigration services related to international scholar faculty, professional staff, and international employees as stipulated below.

2. Definitions/Operational Policies Information - The following operational policies and definitions apply to the stated visa categories:

a. Foreign National

An individual who is a citizen of any country other than the U.S. Also used interchangeably with "alien."

b. Lawful Permanent Residency (LPR)

Certain employment-based permanent residency petitions *require* a job offer letter to be submitted from, or on behalf of, the university. Pursuant to university guidelines and policies, as well as federal government regulations and requirements, the Office of the Provost has the authority to determine whether to move forward with the filing of such petitions that require a job offer letter, according to the criteria stipulated below. There are other employment-based petitions that do not require a job offer letter or employer sponsorship. With regard to these cases, the foreign national may choose to submit a petition on his/her own and/or with the assistance of an attorney, without any employer sponsor. However, even in these cases that do not require an employer sponsor, it is extremely important that the Office of the Provost is aware of the filing because it may have implications for the international's status within the United States.

The Office of the Provost must approve, sign, and submit petitions to the United States Citizenship and Immigration Services (USCIS), and in some cases the Department of Labor (DOL), for the following LPR preference categories. These categories must be processed in-house by the Office of the Provost staff unless the Office of the Provost authorizes in writing that the Texas Tech University System (TTUS) appointed outside attorney shall assist in processing.

(1) EB-1(B) Outstanding researchers and professors who are internationally recognized, have a minimum of three years of experience, and have been offered a tenured, tenure-track, or long-term research position comparable to tenure-track.

No labor certification is required. A copy of the job offer letter used to hire the employee is required.

(2) EB-2 Members of the professions holding advanced degrees or aliens of exceptional ability in the sciences, arts, or business. "Advanced degree" is defined as any academic or professional degree or foreign equivalent above the U.S. baccalaureate as determined by the appropriate vice president.

Permanent Labor Certification and a copy of the job offer letter used to hire the employee are required.

(3) EB-3 Skilled workers, professionals, and other workers. Professionals who do not hold advanced degrees, but who hold licenses, certificates, or other professional qualifications as determined by the appropriate vice president.

Permanent Labor Certification and a copy of the job offer letter used to hire the employee are required.

3. H-1B Temporary Worker in a Specialty Occupation Visa

a. A non-immigrant visa that allows a U.S. company to employ a foreign individual for up to six years. It is a visa category that allows for temporary work visas for foreign nationals in the U.S. in an occupation that requires a theoretical and practical application of a body of specialized knowledge and at least a bachelor's degree or higher in a discipline that aligns with a "specialty occupation" as defined below:

(1) Individuals cannot apply for an H-1B visa to allow them to work in the U.S. The employer must petition for entry of the employee.

(2) H-1B visas generally fall into two categories: subject to cap and cap-exempt. The U.S. Government places a 65,000 limit, or "cap," on the number of H-1B visas that may be issued each fiscal year. Some employers are not subject to the H-1B visa cap and are known as cap-exempt. Angelo State University, as a non-profit institution of higher education, is cap-exempt.

b. Specialty Occupation: An occupation that requires attainment of a bachelor's or higher degree in the specific specialty (or its equivalent, which could be a three-year degree and three years' relevant post-graduate experience) as a minimum for entry into the occupation in the U.S.

c. Temporary Worker: A foreign national coming to the U.S. to work for a temporary period of time.

(1) At Angelo State University, H-1B status is typically used for tenure-track faculty and professional staff.

(2) H-1B status is not available for employees in secretarial, clerical, office, and administrative support positions, or for those individuals in graduate assistantships.

d. Criteria for H-1B sponsorship by Angelo State University

The following criteria must be met in order to be eligible for ASU sponsorship for a U.S. H-1B visa:

(1) Faculty: Full-time faculty members must hold faculty rank of instructor or higher in order to be considered eligible for H-1B sponsorship.

(2) Staff: Staff members must hold a permanent, full-time position at ASU in order to be considered eligible for H-1B sponsorship.

The university will not sponsor individuals for an H-1B visa if the position does not satisfy the requirements for a specialty occupation.

e. Length of Stay Accorded H-1B Visa Holders

(1) H-1B status may be requested for an initial period of three years with an extension available for up to another three years; the cumulative duration of an H-1B classification is six years.

(2) The university encourages departments to request the full three-year duration for the initial H-1B and, if funding is available, the full three-year duration for the H-1B extension. In no case will the university sponsor a temporary worker for a period of time longer than the salary can be guaranteed.

(3) The Office of the Provost will request the H-1B visa for the duration of the position as indicated by the employing department.

(4) The employment of the H-1B temporary worker must not adversely affect the working conditions of employees similarly employed in the area.

f. Part-time H-1Bs

Part-time H-1Bs are not permitted under Angelo State University policy. Please consult with the Office of the Provost to discuss exceptions to this policy. Cases that merit further discussion will be referred by the Office of the Provost to the appropriate vice president.

g. Changes of Status to H-1B

(1) For individuals already in the U.S. in another immigration status (e.g., F-1/OPT, J-1, O-1, TN, H4), the individual must still petition for H-1B status. In order to change status within the U.S., a nonimmigrant must first maintain his/her current status. The university will not sponsor an individual for H-1B status who has not properly maintained legal status in the U.S.

(2) If the non-immigrant is in J status and is subject to the 212(e) two-year home residence requirement (or ever was in the past), he/she cannot change to H-1B status until this requirement is either fulfilled or waived. If the Department of State waives the non-immigrant status, an official waiver letter must accompany the petition when the case is sent to the U.S. Citizenship and Immigration Services (USCIS).

h. Non-Transferability of H-1B Status

(1) Work authorization is employer specific. The H-1B status, which has been outlined on behalf of an employee, may not be used by any other employer. An additional H-1B would need to be approved for a second employer.

(2) While a person may hold more than one H-1B classification, he/she is permitted to work only for the approved employer(s).

(3) A portability provision allows a current H-1B temporary worker, who is changing employment to Angelo State University and thus filing a new H-1B petition, to begin working at the university as soon as confirmation is received that USCIS has received the petition, rather than waiting for the new petition to be approved.

i. Extensions of H-1B Status

(2) H-1B extension procedures are basically the same as the initial H-1B process.

(3) The entire procedure must again be completed by the department and the employee and submitted to the Office of the Provost with all supporting documentation.

(4) An extension must adhere to additional guidelines and deadlines.

(a) H-1B extensions fall under a special “240-day rule (he/she can continue employment for the same employer while the request for extension of stay is pending with USCIS for a period of up to 240 days beyond the expiration of the prior period of authorized stay.”

j. Change in H-1B Temporary Worker Job Duties, Work Location, or Resignation/Termination of Employee

(1) The employing department is responsible for notifying the Office of the Provost if the H-1B temporary worker's job duties change, if the location of employment changes, or if the H-1B temporary worker resigns or is terminated from his/her position.

(2) A change in job duties, job location, resignation or termination creates certain legal obligations on the part of the university to amend/revise/revoke documentation that was filed pertaining to the H-1B temporary worker's status.

(3) If the university does not notify the USCIS of changes in an H-1B employee's status, the university and/or department may incur monetary liabilities.

k. Public Access File and Department of Labor File

(1) Per Department of Labor (DOL) regulations, an employer must make certain document files as part of the H-1B petition available for public examination at the employer's principal place of business. Public access means that individuals have the right to view these documents, including the Labor Condition Application (LCA). The Office of the Provost will maintain the Public Access File for one year beyond the LCA period. The Office of Human Resources will maintain any related payroll records for three years from the date of creation.

(2) In addition to the Public Access file, the employer is required to maintain and must make available for the inspection of the DOL the documentation related to the H-1B petition. These documents are maintained as part of the foreign national's immigration file, which is kept at the Human Resources Office and the Office of the Provost. Employing departments should direct any representatives of the DOL interested in reviewing these documents to the Office of Human Resource and the Office of the Provost.

(3) Employing departments should direct any individuals interested in reviewing these documents to the Office of the Provost.

(4) The Office of the Provost will maintain required public documentation of labor condition applications and supporting wage surveys.

4. O-1 Workers of Extraordinary Ability

The O-1 non-immigrant category is for professionals who have achieved and sustained national or international acclaim for extraordinary ability in the sciences, arts, education, business, or athletics who are in the U.S. to work. The application process is handled entirely by the Office of the Provost and requires extensive documentation establishing "a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor" as determined by the appropriate vice president.

To sponsor an employee for O status, please contact the Office of the Provost.

5. TN Professionals under NAFTA (Canada & Mexico)

The TN status permits Canadian and Mexican citizens to work for ASU in a professional occupation on a temporary basis. Only occupations specified in the NAFTA treaty can serve as the basis for TN employment.

To sponsor an employee for TN status, please contact the Office of the Provost.

6. E-3 Visas for Australian Nationals in Specialty Occupations

The E-3 is a visa for Australian nationals to work in specialty occupations in the U.S. The definition of "specialty occupation" is one that requires:

a. A theoretical and practical application of a body of 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.

In determining whether an occupation qualifies as a "specialty occupation," follow the definition contained in the Immigration and Nationality Act (INA) 214 (i)(1) for H-1B non-immigrants and applicable standards and criteria determined by the Department of Homeland Security (DHS) and United States Citizenship and Immigration Service (USCIS).

To sponsor an employee for E-3 status, please contact the Office of the Provost.

7. J-1 Exchange Visitor Scholars

The university's Exchange Visitor Program sponsors foreign nationals as temporary members of the academic staff for short-term teaching/lecturing, observing, conducting research, or consulting. An Exchange Visitor at Angelo State University is a foreign national who is coming temporarily to the United States for the purpose of educational and cultural exchange, *not employment*.

ASU is authorized by the Texas International Education Consortium to host the following categories of J-1 scholars: research scholar, professor, short-term scholar, and specialist. Each category permits specific activities and has its own maintenance-of-stay requirements, limitations of stay, and employment options. The Exchange Visitor Program is part of the federal government's Student and Exchange Visitor Information System (SEVIS) and requires meeting all SEVIS standards, including but not limited to maintaining accident and sickness insurance for the duration of the international's J program.

a. J-1 Professor: Used for an individual primarily teaching, lecturing, observing, or consulting at a post-secondary, accredited educational institution, museum, library, or similar institution. A professor may also conduct research. The maximum stay is limited to one (1) year.

b. J-1 Research Scholar: Used for an individual primarily conducting research, observing, or consulting in connection with a research project at ASU. This category has a maximum stay of up to five (5) years.

c. Short-Term Scholar: Used for a professor, research scholar, specialist, or person with similar education or accomplishments coming to the U.S. on a short-term visit for purposes of lecturing, observing, consulting, training, or demonstrating special skills at ASU. The maximum stay is six (6) months.

d. Specialist: Used for an individual who is an expert in a field of specialized knowledge or skill coming to the U.S. for observing, consulting, or demonstrating special skills. The maximum stay is limited to one (1) year.

e. The J-1 Exchange Visitor category may not be used for the following:

(1) The employment of persons in non-academic staff positions

(2) Tenure-track or tenured faculty appointments

(3) Foreign medical graduates who will be engaged in clinical activities, including training.

8. Criteria for LPR Immigration Sponsorship by Angelo State University

The following criteria must be met in order to be eligible for ASU sponsorship for U.S. Lawful Permanent Residence:

a. Faculty: Full-time faculty members must hold faculty rank of Instructor, Assistant Research Professional, or Public Service Assistant or higher and must have been in ASU H-1B or O-1 visa classification for <u>one year of continuous full-time employment</u> in order to be eligible for LPR sponsorship.

b. Staff: Staff members must hold a permanent, full-time position at ASU and must have been employed at ASU in H-1B or O-1 visa classification for <u>three years of continuous full-time employment</u> in order to be eligible for LPR sponsorship (see criteria for H-1B and O-1 categories below). Staff members seeking ASU sponsorship for LPR shall be members of professions holding advanced degrees and/or aliens of exceptional ability, or professional or skilled workers holding relevant and specific licenses, certificates, or other professional qualification as determined by the appropriate vice president. Staff LPR filings are reserved for positions critical to ASU's mission as outlined in the most current University Strategic Plan; the employing department must demonstrate the necessity of retaining the alien, as opposed to a U.S. worker, to meet departmental and university goals, per federal regulations. Typically, LPR is not available for employees in secretarial, clerical, or other office and administrative-support positions.

c. Post-Doctoral Positions: Post-doctoral positions are generally not eligible for LPR, given their temporary status.

Exceptions to the above criteria are considered only in exceptional circumstances on a case-by-case basis by the Office of the Provost. A written request for an exception must be submitted to the Office of the Provost from the appropriate Vice President, Dean, Director, or other top-ranking official in the sponsoring department.

9. Fees

a. The employing department is responsible for all fees associated with visa and immigration petitions. Departments should verify with the Office of the Provost the applicable fees for each petition.

b. The employing department is also responsible for miscellaneous mailing fees (e.g., FedEx, UPS, certified mail).

c. Premium Processing Fee

(1) Depending on the timing of the petition, a premium processing option may be initiated.

(2) The employee is responsible for paying the premium processing fee.

(3) Departments are strongly urged to consider the premium processing option of an H-1B petition if the new foreign employee has not received his/her approval notice three weeks prior to the requested employment date

d. Source of Funds

(1) Funds generated through student fees may not be used to pay the fees as cited above.

(2) State appropriated funds may not be used to pay the fees as cited above.

(3) Private, unrestricted gift dollars may be used to pay the fees as cited above.

e. Costs Borne by the Temporary Worker

(1) The temporary worker will pay an additional filing fee if he/she is abroad and must engage the U.S. consulate to assist in processing the H-1B visa.

(2) The temporary worker will pay any costs associated with the filing of dependent petitions; the university has no obligation for these fees.

f. Return Transportation

If the temporary worker is dismissed before the end of the authorized period of employment, the sponsoring department will be responsible for paying the reasonable costs of return transportation to the temporary worker's home country, as required by USCIS regulations, in order to ensure that the temporary worker will not be stranded in the U.S. without being able to return to his/her home country.

10. Angelo State Liability

Submission of a petition by Angelo State University on behalf of a prospective foreign national employee does not guarantee that the petition will be approved.

The approval of such petition rests with U.S. government agencies, not Angelo State University.

a. Disclaimer

The information contained in this policy should not be construed as legal advice, but is intended for general information use by Angelo State University.

b. Faculty and staff are prohibited from signing any documents related to immigration and/or visa status on behalf of Angelo State University. This includes form G-28 (Notice of entry of Appearance as Attorney or Representative) and submission of employer-based petitions or documents including, but not limited to, the following forms:

(1) DS-2019 (Certificate of Eligibility for J-1 Exchange Visitor Status)

(2) I-20 (Certificate of Eligibility for F-l Nonimmigrant Student Status)

(3) ETA-9035 (Labor Condition Application)

(4) ETA-9089 (Application for Permanent Employment Certification)

(5) I-140 (Immigrant Petition for Alien Worker)

(6) I-539 (Application to Extend/Change Nonimmigrant Status)

(7) I-129 (Petition for a nonimmigrant Worker)

(8) I-907 (Request for Premium Processing Service)

c. Failure to follow procedures related to visa categories is a federal violation. The sponsoring department will be responsible for any and all violations and penalties under federal regulations.

It is vital that the sponsoring department present completely accurate information regarding all situations and/or developments. It is the ongoing responsibility of each department to notify the Office of the Provost of changes in any conditions that may affect an employee's status (e.g. employment, location, compensation, insurance, etc.) so that the Office of the Provost may notify the proper governmental agency. In the event that the U.S. Citizenship and Immigration Services (USCIS), Department of Labor (DOL), or other federal or state entity audits ASU, the Office of the Provost will not be responsible for any misinformation provided by departments or departmental sources, and those departments providing such incorrect or incomplete information or that have failed to provide timely updated information about changes shall be responsible for any costs or fines that result from their actions.