

# Hiring Noncitizens to Fill Permanent Positions

## Background

Permanent employment in the Federal Government is generally restricted to United States citizens and nationals. Only under rare and unusual circumstances may noncitizens may be hired and the approval process may take up to 12 months.

## Competitive versus Excepted Service

Agencies wishing to hire noncitizens to positions within the competitive service must follow normal selection procedures and ensure applicants meet requirements outlined in all three of the following:

- Annual appropriations laws prohibiting the use of funds to employ certain noncitizens;
- Immigration laws governing employment eligibility;
- Executive Order 11935 (September 2, 1976) restricting employment of noncitizens in competitive service positions.

Agencies wishing to hire noncitizens to positions within the excepted service or the Senior Executive Service must conform with the first two items in this list (i.e., appropriations and immigration restrictions). The Executive Order restrictions apply only to competitive service positions.

## Annual Appropriations Act

Every Appropriations Act since 1939 has included a ban on using appropriated funds to employ noncitizens within the continental United States (i.e., the restriction does not apply to positions located in Hawaii, Puerto Rico, the Virgin Islands, Alaska, and the Isthmus of Panama). OPM has no authority to regulate, enforce, or grant further exceptions to this ban. The following groups of people are exempt from this ban:

- Persons who owe permanent allegiance to the United States (e.g., natives of American Samoa and Swains Island);
- Aliens from Cuba, Poland, South Vietnam, and countries of the former Soviet Union lawfully admitted to the United States for permanent residence;
- South Vietnamese, Cambodian or Laotian refugees paroled into the United States after January 1, 1975;
- Nationals of the People's Republic of China who qualify for adjustment of status (indicated on their resident alien card as EC6) pursuant to the Chinese Student Protection Act of 1992;
- Citizens of Ireland, Israel, or the Republic of the Philippines.
- Nationals of countries currently allied with the United States in a defense effort (e.g., NATO allies).

Although an alien may be authorized to work and be paid from agency appropriated funds, that individual is still subject to the provisions of immigration law and may be subject to requirements of Executive Order 11935 (discussed below).

## **Immigration Law**

For work to be performed in the United States, private and public employers may only hire an individual who is:

- A citizen or national of the United States;
- An alien admitted for permanent residence;
- An alien lawfully admitted for temporary residence and granted an employment authorization document by the U.S. Citizenship and Immigration Services, Department of Homeland Security;
- An alien admitted or paroled into the United States as a refugee and granted an employment authorization document;
- An alien granted asylum and granted an employment authorization document;
- A fiancé, fiancée, child, or parent of an alien who was admitted under certain conditions; or;
- An alien who is authorized employment with a specific employer incident to status. (H-1B Specialty Worker or TN).

Although an alien may be authorized to work under immigration laws, that individual is still subject to appropriations act restrictions and may be subject to requirements of Executive Order 11935 for Federal employment.

## **Executive Order 11935**

Executive Order 11935 states that only United States citizens and nationals may compete for positions within the competitive service. This restriction applies to all agencies with competitive service positions any place in the world.

### **Exceptions to this Rule**

OPM may grant exceptions to this rule and this authority has been re delegated to the Director, Office of Human Capital Management, USDA. If an agency can show that no citizens are **basically** qualified and available to fill a specific competitive service position, it is possible that approval may be obtained to hire a noncitizen.

**Submitting a request for exception:** Very few of these exceptions have been approved in the past and it is unlikely that hiring of noncitizens will become a commonplace event. Pursuing this option might work in a rare and unusual instance, but it should not be viewed as a solution to broader employment problems.

**Content of the request:** The request must include:

- Proof that the vacant position was announced extensively and intensively, including use of paid advertising in trade and professional journals, and that the announcement remained open for a considerable length of time (one month or longer). The advertisement must include that a recruitment incentive may be offered. It is not usually necessary to have made repeated unsuccessful attempts to fill the position; one vigorous, but fruitless recruiting campaign should be sufficient;
- Proof that no citizens who are basically qualified for the position could be located, or, if they were located, they were not interested in the position;
- Proof that the position is unique and that few, if any, United States citizens possess the necessary skills and qualifications;
- Identity of the noncitizen proposed for the position; the individual must meet all requirements outlined in appropriations and immigration laws.

**Approving authority:** The Director, Office of Human Capital Management, USDA, can approve requests to hire noncitizens if all requirements are met.

**Type of appointment authorized:** A noncitizen hired in the absence of qualified citizens may only be given an excepted appointment under Schedule A, authorized by 5CFR 213.3102(bb).

**Impact of this action on the position:** A position filled in this manner is withdrawn from the competitive service. The position will remain in the excepted service as long it is filled by a noncitizen.

**Impact on the employee:** The noncitizen thus hired will not acquire competitive civil service status by means of this appointment. The employee may not be promoted or reassigned to a position in the competitive service, except in situations where a qualified citizen is once again unavailable and another Schedule A appointment is made.

### **For Further Information:**

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### **Related References:**

*Hiring Noncitizens to Fill Nonpermanent Positions in the Excepted Service*