

Obtaining U.S. Permanent Resident Status through Employment Sponsorship

-Basic Process for Professional Positions-

With limited exceptions, an employer sponsoring an employee for permanent residence must, as a first step, obtain a labor certification from the U.S. Department of Labor (the “DOL”) that the employment in question will neither displace qualified U.S. workers nor adversely affect wages and working conditions of U.S. workers. This memorandum describes the procedures that Virginia Tech (the “Employer”), and the hiring unit (the “Department”) will be required to follow to apply for a labor certification for the job being offered to the foreign national (the “Employee”).

The labor certification is a recruitment process in which the Employer must satisfy the DOL that it made a good faith but unsuccessful effort to locate a qualified U.S. worker for the job offered to the Employee. The DOL has very detailed rules and procedures that the Employer must follow to conduct its recruitment for the job, and many of these rules and procedures differ significantly from the procedures normally followed by the university when we recruit for positions. Because the Employer may ultimately be required to provide documentation of its recruitment efforts to the DOL and because the DOL has broad discretion in adjudicating labor certification applications, the Employer’s failure to follow any of the procedures described in this memorandum could result in the denial of the application.

Initial Considerations Regarding a Labor Certification Application

In preparing the labor certification application and supporting documents, the Department must first specifically define the job to be covered by the application and the minimum requirements necessary for an individual to perform that job. The Department can only include requirements that are necessary to perform the job's duties.

The DOL will scrutinize any requirements for the job that it deems overly restrictive. The Department must be prepared to show that each job requirement bears a reasonable relationship to the job in the context of the Employer’s business and is essential to perform the job’s duties in a reasonable manner. For example, the DOL strictly scrutinizes requirements such as foreign language requirements, experience levels that exceed the guidelines established by the DOL for the job, and other requirements that are outside the parameters of what most companies would set for similar jobs.

It is also critical for the Department to understand, at the outset, that if the DOL approves a labor certification application for the job offered, that approval is valid **only** for the position described on the application and **only** in the geographic area of intended employment covered

by the application. In other words, from the time of filing the labor certification application through the approval of the Employee's application for U.S. permanent resident status (assuming that the labor certification application is approved), the Department must not materially change the offered job (**including promotions, demotions or lateral changes**) or transfer the Employee to a different city.

If the Department or the Employee is now aware of any changes in the coming years that may affect the application, please advise us of those changes immediately. Furthermore, from the time of filing the labor certification application through the approval of the Employee's application for U.S. permanent resident status, please advise us of any such potential changes **before they occur** so we can evaluate their possible impact on the labor certification application.

The Employer must obtain from the DOL a prevailing wage determination ("PWD") in order to be certain that the employer will pay the prevailing salary to the Employee, once the Employee's green card application is approved. It is important to note that the Employer's obligation to pay the salary reflected on the PWD does not commence until the green card application is finally approved (unless the Employee is working on an H-1B visa and the Department does not have other evidence to document that the salary being paid for H-1B purposes is the prevailing salary for the position in question).

Documenting the Employee's Satisfaction of the Job Requirements

The Employer is required to state on the labor certification application the minimum requirements for the offered position, in terms of experience, education, training and any other special requirements. An important aspect of this requirement is documenting that the Employee possesses the minimum education and experience requirements for the offered position. The Employee must be able to objectively document that he or she meets the position requirements. This means that the Employee must provide copies of his or her educational credentials and letters from previous employers or other documents confirming that they possess the required minimum education and experience. We strongly recommend that the Employee provide these documents to us before the Department commits significant funds to recruitment advertising. In order to be able to rely on any of the experience that the Employee has acquired with the Employer and its affiliates, the Employer must demonstrate that the position covered by the labor certification application is not "substantially comparable" to the positions previously held.

Obtaining the PWD

The Employer must first request a PWD from the DOL for the job offered. International Support Services ("ISS") will prepare and file the request for the PWD based on the minimum requirements for the position as prepared by the Department. In case the Employer disagrees

with the DOL's assessment of the appropriate PWD for the job offered, the law offers limited opportunities to the Employer to ask the DOL to reconsider and change its PWD. The PWD will specify its period of validity (which will be no less than 90 days or more than one year from the date of the PWD). The Employer must file any labor certification application or commence the required pre-filing recruitment within the validity periods of the PWD.

Recruitment for the Offered Job

Prior to filing the labor certification application, the Employer is required to conduct specific recruitment efforts for the offered job. The specific recruitment efforts required of the Employer include two advertisements in the Sunday edition of the newspaper with general circulation in the area where the job is located. (The Employer must choose the Sunday newspaper most appropriate to the occupation and the workers likely to apply for the job opportunity and most likely to bring responses from able, willing, qualified, and available U.S. workers. For jobs in Blacksburg, this is the Roanoke Times. For jobs outside Blacksburg, ISS will assist the Department in selecting the appropriate newspaper.) The Department is responsible for placing the advertisements with the newspaper and requesting "tear sheets" to confirm the dates the advertisements ran and the contents of the advertisements. International Support Services ("ISS") will provide the Department with instructions for placing these advertisements. **The Department should not place any advertisements prior to receiving approval from ISS.**

The Employer must also post a notice of the job's availability at the worksite for ten consecutive business days and post a job order in the "Job Bank" for the state where the job is located. ISS will post an appropriate job order in the Virginia Employment Commission's Job Bank and prepare the required documentation of that posting.

In addition to the above-mentioned recruitment steps, the DOL has set established additional recruitment steps for what it defines as professional positions. For professional positions, the DOL requires the Employer to satisfy three additional recruitment steps. Virginia Tech has elected to use the following three recruitment steps to meet this requirement.

1. Employer's Web Site. The use of the Employer's web site as a recruitment medium can be documented by providing dated copies of pages from the site that advertise the job offered to the Employee. Since all employment opportunities at Virginia Tech are required to be posted at www.jobs.vt.edu, this is a convenient and free way to satisfy one the three additional recruitment steps. **Please note, that it is the Department's responsibility to login into the website as a job applicant would and print out the job posting on the first day the job is opened and immediately before the position is closed.**

2. Job Search Web Site other than the Employer's. The use of a job search web site other than the Employer's can be documented by providing dated copies of pages from one or more web site(s) that advertise the offered job. Copies of web pages generated in conjunction with the two required advertisements in the Roanoke Times (or the newspaper of general circulation chosen by ISS and the Department for positions outside of Blacksburg) serve as documentation of the use of a web site other than the Employer's. **Please note, that it is the Department's responsibility to login into the newspaper's website as a job applicant would and print out the online advertisement on the first and last day the advertisement runs.**
3. Campus Placement Offices. The use of a campus placement office can be documented by providing a copy of the Employer's notice of the job opportunity provided to the campus placement office. International Support Services will place an appropriate advertisement with Hokies 4 Hire (Virginia Tech's Campus Placement Office) and be responsible for documenting the advertisement.

Posting of Job Notice at the Worksite

As part of its recruitment for the job in question, the Employer must post a notice of the job's availability at the worksite. This notice must be posted for at least ten consecutive business days. The notice must be posted in a clearly visible and unobstructed location, where the Employer's U.S. workers can easily read it on the way to or from their places of employment. Appropriate locations normally include bulletin boards where other federally mandated postings, such as Wage and Hour and OSHA postings, are placed.

The notice of the job's availability posted by the Employer must contain the employer's name, job title, duties, minimum requirements, worksite location (city and state) and the salary or salary range offered for the job. The notice must direct any applicants for the job to an appropriate individual in the Employer's organization. **ISS will prepare the notice to be posted at the worksite and provide it to the Department along with specific instructions for posting the notice.**

Recruiting Procedures and Evaluation of Applicants

The Employer must recruit for the job prior to filing the labor certification application with the DOL. None of the required recruitment steps may have taken place more than one hundred eighty days prior to the filing of the labor certification application, and with one limited exception, all recruitment steps must have been completed at least thirty days before the filing

of the application. (The limited exception is that one of the additional recruitment steps required for professional-level positions may occur within thirty days of the filing of the application.)

The Department must carefully consider any applicants who express an interest in the job, either from outside the company or from within, and determine whether or not any applicant has all of the requirements for the job described on the labor certification application. The Employee may not be involved in the recruitment process. The Employer should interview, at least over the telephone, most, if not all, applicants who apply for the job and thoroughly document each interview (date, applicant's qualifications, etc.).

After the conclusion of the recruitment period and before the filing of the labor certification application, the Department must prepare a recruitment report describing its recruitment efforts for the job. A representative of the Department must sign this recruitment report, must describe the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job-related reasons for such rejections. The Department must keep a copy of this recruitment report on file, along with copies of the resumes received from all U.S. workers who applied for the position for five years. ISS will assist the Department with preparing this report.

Processing the Application

The labor certification application may be filed electronically with the DOL. If the DOL approves the application, the Employer and the Employee may then proceed with the remaining steps to obtain U.S. permanent resident status for the Employee, which are described in more detail below. If the DOL has questions about the application, it can deny the application outright. As an alternative, the DOL can request an audit of the application and its supporting documentation.

As you can see, obtaining a labor certification requires the Department's full support and involvement. The Department must be involved throughout the application process, as described in this memorandum. For example, the Department must be willing to comply with the recruitment and posting requirements and to interview any applicants who reasonably appear to be qualified. Moreover, the Department must be prepared to document the business necessity of any requirements for the job and to respond to any audit of the labor certification application by the DOL.

Completing the Process of Obtaining U.S. Permanent Resident Status

If the Employer obtains a labor certification for the offered job, the next step that the Employer must take is to qualify the Employee for one of the employment-based quota categories

available to employer-sponsored applicants. In this regard, the Employer must file an I-140 petition to obtain such classification from the United States Citizenship & Immigration Services ("USCIS"). The Employee has the option of completing the final step in obtaining U.S. permanent resident status either by filing an adjustment of status application at the appropriate service center of the USCIS or by applying for an immigrant visa at a U.S. Consulate in the country of last residence or nationality.

If the Employee is in the United States, the Employee may be eligible to complete the final step in obtaining U.S. permanent resident status through the adjustment of status process. An Employee eligible for adjustment of status may be able to file (depending upon the availability of the immigration quota) the adjustment of status application at the same time as the Employer files its I-140 petition. The Employee's spouse and any accompanying unmarried children under age 21 are eligible to apply with the Employee at the same time, provided that they are also in the United States at the time of filing.

Instead of applying for adjustment of status, the Employee may complete the final step of U.S. permanent resident status by applying for an immigrant visa at a U.S. Consulate in the country of last residence or nationality. Individuals who are currently working in the United States generally opt to apply for adjustment of status with the USCIS instead of applying for an immigrant visa at a U.S. Consulate outside the United States. Individuals who have violated their immigration status while in the U.S. may not be eligible to file for adjustment of status and may have to return to their home country or country of last residence abroad to complete the process at a U.S. Consulate. Please note that the I-140 petition described above must be approved by the USCIS before an individual can pursue an immigrant visa application through a U.S. Consulate overseas.

* * * * *

As you can see, the procedures for obtaining a labor certification are complex. Our role in this matter will be to assist the Department and the Employee in reducing the difficulties as much as feasible. Obtaining the labor certification is the most significant obstacle that the Employee faces in qualifying for U.S. permanent resident status. Once the labor certification is obtained, the remaining procedures, although involving a considerable amount of paperwork and additional processing time, are, as a general rule, less difficult.

To obtain the information that we need to assist with this labor certification application, we have attached a questionnaire for your completion. Please answer all questions on the questionnaire thoroughly and provide the requested documents. We will be happy to discuss any questions you might have after reading this memorandum.