



United States Department of Agriculture
Research, Education, and Economics
Agricultural Research Service

--AMENDED--

June 8, 2012

SUBJECT: Annual Appropriations Law and the Employment of Foreign Nationals

TO: REE Administrators

FROM: Joon Park
Director
Human Resources Division

Each year Congress releases the Appropriations Law which covers the compensation of officers and employees of the Federal Government. This particular appropriations law allows federal agencies to use appropriated funds to pay the compensation of its officers and employees who meet the requirements stated within the Law.

For many years, Research, Education, and Economics (REE) had the authority to employ foreign nationals with appropriated funds because they met the requirements of both "Appropriations Law" and "Immigration Law." Typically, foreign nationals employed by REE met Appropriations Law requirements by being a citizen from those countries allied with the United States in a current defense effort and met Immigration Law requirements by obtaining a temporary U.S. worker visa.

Through the FY-2010 Appropriations Law, Congress eliminated some of the long standing criteria used by federal agencies to pay the compensation of their officers and employees. In particular, they eliminated the "Allied Country List" which greatly impacts federal agencies ability to employ foreign nationals using appropriated funds.

The current Appropriations Law states that agencies are prohibited from using appropriated funds to pay the compensation of any officer or employee of the Government of the United States, unless they meet one of a few exceptions stated in the Consolidated Appropriations Act, 2010, P.L. No. 111-117, Division C, Title VII, Section 704 (December 16, 2009).

The Human Resources Division (HRD) consulted with the Office of General Counsel (OGC) to seek a written opinion of their interpretation of the current Appropriations Law. We have received OGC's legal interpretation of the aforementioned law. Effective immediately the following is REE's policy on the compensation of employees and officers of the Federal Government.



Human Resources Division
5601 Sunnyside Ave • Beltsville, MD 20705
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1. REE agencies may not use appropriated funds to employ an individual unless the person:
 - a. is a citizen of the United States;
 - b. is lawfully admitted for permanent residence and is seeking citizenship as outlined in 8 U.S.C. 1324b(a)(3)(B);
 - c. is admitted as a refugee under 8 U.S.C. 1157 or is granted asylum under 8 U.S.C. 1158 and has filed a declaration of intention to become a lawful permanent resident and then a citizen when eligible;
 - d. owes allegiance to the United States (for example, natives of American Samoa and Swains Island);
 - e. is employed as an international broadcaster by the Broadcasting Board of Governors;
 - f. is temporarily employed as a translator;
 - g. is temporarily employed in the field of service (not to exceed 60 days) as a result of emergencies;
 - h. is a nonresident alien employed as a wild-land firefighter for not more than 120 days by the Department of the Interior or the U.S. Department of Agriculture, Forest Service, pursuant to an agreement with another country; or
 - i. was an officer or employee of the U.S. Government on December 16, 2009.

Most likely, foreign nationals being considered for employment in excepted service positions (i.e., postdocs, students or L/As) will not meet most of the exceptions listed above. However, you may find a foreign national who has been lawfully admitted as a permanent resident and is seeking citizenship. In this situation, if the foreign national is willing to sign an affidavit stating that he/she is seeking citizenship, the foreign national can be employed. A signed affidavit must be submitted to the servicing human resources specialist along with a copy of the foreign national's permanent residence card before an official offer of employment can be made. According to Immigration Law, if the foreign national falsifies the affidavit, he/she will be guilty of a felony and upon conviction, shall be fined no more than \$4,000 or imprisoned for not more than 1 year, or both. Any payment made to the employee contrary to the provisions of the Appropriation Law shall be recoverable by the Federal Government. [See Enclosures 1 and 2]

Note: If the foreign national's permanent residence card indicates "CR6" under category, the foreign national has conditions to their residency. In these cases, we cannot employ the foreign national until the conditions have been removed.

2. When foreign nationals do not meet any of the appropriations requirements listed above, REE agencies may use non-appropriated funds, also referred to as "soft funds" to employ these individuals. Soft funds may not come from or originate from another federal agency's appropriations. For example, if a federal agency such as the National Institutes of Health (NIH), the National Science Foundation (NSF), or the National Institute of Food and Agriculture (NIFA), were to give the University of Maryland appropriated funds to do research and the University turned around and gave those funds to ARS, those funds are still appropriated

funds. In addition, if REE accepts grant monies from another federal agency's appropriations, that grant cannot be used to employ foreign nationals unless they meet the requirements of the Appropriations Law.

Soft funds must be sufficient enough to cover the employee's salary, Federal Employee Retirement System (FERS) retirement, matching Thrift Savings Plan (TSP) contributions, government share of health insurance premiums, and any other compensation the employee will received during their appointment period.

If you use soft funds to employ a foreign national, you must attach a copy of the fully signed and executed Extramural Agreement, Form REE-451 to the Request for Personnel Action, Form SF-52 before submitting the action to the servicing human resources specialist. Form REE-451 is necessary for funding source and project documentation purposes only. In addition, selecting officials must sign a certificate acknowledging that there are sufficient soft funds to cover the total compensation of the foreign national's employment period. This certificate should be attached to the SF-52 as well. [See Enclosure 3]

3. REE agencies may use appropriated funds to extend the appointment of foreign nationals as long as their initial appointment was effective prior to December 16, 2009. These appointments may be extended to the maximum period covered under the appointing authority; therefore, postdoctoral research associates can be extended up to four years, six under certain circumstances. Students and L/As do not have a maximum appointing authority; therefore, students and L/As must be terminated upon the expiration date of their appointment unless the extension will be funded by a non-appropriated source. Foreign nationals hired after December 16, 2009, may not be extended unless soft-funds are used for the extension.
4. REE agencies may use appropriated or non-appropriated funds to support visiting scientists through the J-1 Exchange Visitor Visa Program. The Appropriations Law does not apply to exchange visitors since they are not employees or officers of the Federal Government.
5. Appropriated and non-appropriated funds may be given to universities and industry through an extramural agreement. These entities can then use these funds for any purpose specified within the agreement which may include the employing of foreign nationals. Keep in mind that these individuals are cooperators and **not** federal employees; therefore, they do not need to adhere to the Appropriations Law.
6. REE agencies may not employ foreign nationals or allow foreign nationals to visit our facilities in any capacity if they are a citizen of a country on the State Sponsors of Terrorism list. Exceptions to this particular policy will be considered on a case-by-case basis by the Director of Human Resources Division. If a foreign national from one of these countries is a permanent residence and is seeking U.S. citizenship, we can employ that individual or allow that individual to visit our facilities. For a current list of these countries, click on the following link: <http://www.state.gov/j/ct/c14151.htm>.

7. The Appropriations Law only applies to officers or employees of the Federal Government whose post of duty is in the continental United States; therefore, Hawaii and Puerto Rico are exempt from Appropriations Law requirements.

HRD fully understands the impact the current Appropriations Law has on the Federal Government's ability to hire foreign nationals. We recommend that managers use the J-1 Exchange Visitor Visa Program instead of the Postdoctoral Research Associate Program when their desired candidate is a foreign national. Since exchange visitors are not federal employees, appropriated funds can be used to fund the visit. The Exchange Visitor – Research Scholar category has a five year maximum program period which would be an alternative to the four year postdoctoral appointing authority. HRD will distribute a guide on the J-1 Exchange Visitor Visa Program in the very near future.

HRD will set-up a webinar within the next few weeks to answer any questions regarding the new policy and provide some basic information on the J-1 Exchange Visitor Visa Program.

Please disseminate this information throughout your agencies and if you need immediate assistance, please contact Catherine Walker, Foreign Nationals Program Manager, at 301-504-4418 or Cathy.Walker@ars.usda.gov .

Enclosures

CONSOLIDATED APPROPRIATION ACT, 2010
Pub. L. No. 111-117, div C, tit VII, 704
(December 16, 2009)

SEC. 704. Unless otherwise specified during the current fiscal year, no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States) whose post of duty is in the continental United States unless such person: (1) is a citizen of the United States; (2) is a person who is lawfully admitted for permanent residence and is seeking citizenship as outlined in 8 U.S.C. 1324b(a)(3)(B); (3) is a person who is admitted as a refugee under 8 U.S.C. 1157 or is granted asylum under 8 U.S.C. 1158 and has filed a declaration of intention to become a lawful permanent resident and then a citizen when eligible; or (4) is a person who owes allegiance to the United States: *Provided*, That for purposes of this section, affidavits signed by any such person shall be considered prima facie evidence that the requirements of this section with respect to his or her status are being complied with: *Provided further*, That any person making a false affidavit shall be guilty of a felony, and upon conviction, shall be fined no more than \$4,000 or imprisoned for not more than 1 year, or both: *Provided further*, That the above penal clause shall be in addition to, and not in substitution for, any other provisions of existing law: *Provided further*, That any payment made to any officer or employee contrary to the provisions of this section shall be recoverable in action by the Federal Government: *Provided further*, That this section shall not apply to any person who is an officer or employee of the Government of the United States on the date of enactment of this Act, or to international broadcasters employed by the Broadcasting Board of Governors, or to temporary employment of translators, or to temporary employment in the field service (not to exceed 60 days) as a result of emergencies: *Provided further*, That this section does not apply to the employment as Wildland firefighters for not more than 120 days of nonresident aliens employed by the Department of the Interior or the USDA Forest Service pursuant to an agreement with another country.

AFFIDAVIT

I, _____ am a
(Last Name, First Name, and Middle Initial)

citizen of _____. I am in the United States as a permanent resident
(Country)

seeking U.S. citizenship.

- I have been in the United States for () years and I'm currently in the naturalization process.
- I have been in the United States for () years and I will be applying for naturalization upon eligibility.

I am attaching a copy of my permanent residence card.

I understand that being a permanent resident seeking U.S. citizenship is a condition of employment. I also understand that if I make a false statement, I will be guilty of a felony and upon conviction, shall be fined no more than \$4,000 or imprisoned for not more than 1 year, or both. In addition, I understand that any payments made to me as an officer or employee of the Federal Government shall be recoverable in action by the Federal Government.

I hereby swear that the information contained in this affidavit is true and accurate.

Affiant's Signature

Date

Certification of Soft Funds Usage

Selecting officials may use non-appropriated funds, also referred to as "soft funds" to employ foreign nationals in excepted service appointments (i.e., postdocs, students or L/As) when the foreign national does not meet any of the requirements under the Appropriations Law. Appointments supported by soft funds should not be made beyond the period of available funding annotated on the extramural agreement.

Name of Selectee: _____

Country of Citizenship: _____

Appointment Beginning and Ending Dates: _____ to _____

Project Beginning and Ending Dates: _____ to _____

Soft Funds Availability Period: _____ to _____

Position: _____

Pay Plan, Series, and Grade: _____

Location (city, state): _____

I certify that the position mentioned above will be sufficiently supported by non-appropriated funds and no part of the employee's compensation will come from an appropriated source. I understand that the total compensation of this employee's appointment must cover the employee's salary, retirement, matching Thrift Savings Plan (TSP) contributions, government share of health insurance premiums, and any other compensation the employee will receive during their appointment period.

Signature of Selecting Official

Date