



NASA DESK GUIDE

ON THE

EMPLOYMENT OF NONCITIZENS

**Agency Workforce Management and Development Division
Office of Human Capital Management
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Section I. Purpose

To provide guidance concerning policies and procedures related to appointment of noncitizens in NASA. It replaces the NASA Desk Guide on Alien Scientist Appointments, August 1997.

Section II. References

- A. 42 USC 2473(c)(10): Authorizes NASA to employ and pay noncitizens
- B. Executive Order 11935: Restrictions on employment of noncitizens in the competitive service
- C. 5 CFR 213.3102(bb): Governmentwide Schedule A authority permitting the appointment of noncitizens
- D. 5 CFR 213.3148(a): Schedule A authority for NASA to appoint up to 150 alien scientists having special qualifications in the fields of aeronautical and space research
- E. 5 USC 3109 and 42 USC 2473(c)(9): Authority for NASA to employ experts and consultants
- F. 5 CFR 319: Employment in senior level (SL) and scientific and professional (ST) positions
- G. NPG 3300.1, Chapter 4: NASA Procedures and Guidelines, Appointment of Experts and Consultants available at <http://www.hq.nasa.gov/office/codef/codefp/policies.html>
- H. NPG 3300.1, Chapter 5: Appointment of Foreign Nationals available at <http://www.hq.nasa.gov/office/codef/codefp/policies.html>
- I. NASA Desk Guide on the Intergovernmental Personnel Act
- J. 8 USC 1101: Immigration and Nationality Act, describes the various visa classifications

- K. 22 CFR 41: Documentation of nonimmigrant status under the Immigration and Nationality Act
- L. 22 CFR 514.20 to 27: Exchange visitor program
- M. 8 CFR 214.2: Special requirements for admission, extension, and maintenance of status
- N. 8 CFR 274A: Control of Employment of Aliens
- O. 26 USC 3121: Exclusion of certain nonresident aliens from participation under the Social Security Program
- P. 5 USC 5703: Payment of travel expenses for experts and consultants serving on an intermittent basis
- Q. 5 USC 5723: Payment of travel and transportation expenses to first post of duty

Section III. Administrator's Prior Approval Required

A. Basic Requirement

The employment of noncitizens in NASA, whether by appointment or detail, must be approved in advance by the Administrator. This requirement applies regardless of the level of the position or the type of appointment, including permanent appointments, time limited appointments, appointments of students under the temporary or career work experience programs, appointments of experts or consultants with or without compensation, and selections to serve on advisory committees. Even if an action is not included in this list of examples, all noncitizen appointments and details must be approved by the Administrator.

B. Extensions

All extensions of appointments or details must be approved in advance by the Administrator unless the Administrator's approval of the initial action contains a statement authorizing an extension. Any extension beyond the time specified in the statement must be approved in advance by the Administrator.

C. Submission of Requests

Requests must be submitted through the Office of Human Capital Management, attention Workforce Management and Development Division, to the Administrator. Requests should not be submitted until all other approvals (Center Director, Associate Administrator, General Counsel, External Relations, Security and Program Protection, including security clearance) have been obtained. Appendix A describes the information which should be included with requests.

D. Requests for Visas, Visa Reclassification, and Waivers of Foreign Residence Requirements

Appendix B of this guide contains information concerning visas, which some noncitizens must have in order to be employed. It also explains the process for visa reclassification, and describes the foreign residence requirement and procedures for requesting waivers.

NASA may be involved in sponsoring a noncitizen for a visa, requesting a visa reclassification, or requesting a waiver of the foreign residence requirements. Before any of these requests are submitted to the approving agency, they must have the Administrator's approval.

Section IV. Appointment Authorities and Restrictions

A. Competitive Service

Executive Order 11935 prohibits Federal agencies from employing noncitizens in the competitive service. This includes time limited (temporary and term) and permanent appointments (career and career-conditional).

There is one exception to the prohibition on the appointment of noncitizens to the competitive service. 5 CFR 319.402 permits the appointment of noncitizens to Scientific and Professional (ST) positions filled under 5 USC 3104. These positions are high-level positions for individuals with exceptional qualifications and must be approved in advance by OPM.

B. Excepted Service

Restrictions on the employment of noncitizens do not apply on a blanket basis to the excepted service. Thus, Federal agencies, including NASA, are permitted to appoint noncitizens to most excepted positions. However, some excepted appointment authorities specifically prohibit the appointment of noncitizens, so each authority

must be reviewed before it is used to appoint a noncitizen. Additionally, Agency appropriations language may bar the employment of noncitizens in certain instances.

The following information concerns the appointment of noncitizens under several excepted appointing authorities.

1. NASA Schedule A Authority

5 CFR 213.3148(a) is a Schedule A authority which has been approved for NASA. It is probably the authority which will be most often used for the appointment of noncitizens.

Under this authority, NASA may appoint up to 150 alien scientists having special qualifications in the fields of aeronautical and space research. Note, this guide uses the term “noncitizen,” but some laws and regulations use the term “alien.” There is no difference in the meaning of the terms.

2. Governmentwide Schedule A Authority

5 CFR 213.3102(bb) is a Governmentwide Schedule A authority which OPM has approved to permit agencies to appoint noncitizens to what would normally be a competitive service position when no citizens are available. In other words, the competitive service position is placed in the excepted service while the noncitizen occupies it. Because of the existence of NASA’s own authority, in most cases, Centers would not have to use this authority. However, there may be instances where NASA’s authority would not be applicable, and the use of the Governmentwide authority could be considered.

3. Experts and Consultants

Experts and consultants appointed under 5 USC 3109 and 42 USC 2473 are in the excepted service. Like other persons appointed to these positions, noncitizens must possess qualifications which exceed those prescribed for comparable work in the competitive service or be otherwise eminently qualified for the specific position.

4. Intergovernmental Personnel Act Assignments

Because IPA assignments to NASA are made either by an excepted appointment or by detail, restrictions on the appointment of noncitizens in the competitive service do not apply to these assignments. For information on these assignments, see the Desk

Guide on the Assignment of Personnel to and from NASA under the Intergovernmental Personnel Act.

5. Student Employment

Noncitizens may be appointed to either the temporary or career work experience programs which make up the student employment program. However, noncitizens appointed under the career work experience (cooperative education) programs may not be converted to the competitive service unless they have become citizens before conversion. Students who cannot be converted must be terminated after graduation.

6. Disabled Individuals

Noncitizens may be appointed to Schedule A authorities which have been established to facilitate the employment of disabled individuals (213.3102(t) and (u)). They may not be converted to the competitive service unless they have become citizens prior to conversion. However, they may remain employed under the excepted appointing authority.

7. Veterans Readjustment Appointments

Noncitizens may not be given Veterans Readjustment Appointments.

8. Presidential Management Fellows

Noncitizens may not be given Presidential Management Fellow appointments.

C. Senior Executive Service

There are no prohibitions against the appointment of noncitizens to the senior executive service. Like all other appointments of noncitizens, these must be approved by the Administrator.

D. Appropriations Act Restrictions

Each year, Congress places language in appropriations acts which restrict most agencies from paying salaries to noncitizens from some countries even in the excepted service. Because of 42 USC 2473, which gives NASA authority to hire and pay noncitizens, none of these restrictions apply to NASA.

E. Standards of Conduct

Appointees are covered by standards of conduct regulations which apply to Federal employees. Prior to forwarding appointment package to the Office of Human Capital Management, Center Chief Counsels must ensure that appointees receive information and training on standards of conduct.

Section V. Documentation of Employment Eligibility

As is the case for the employment of citizens, Centers must obtain form I-9, Employment Eligibility Verification, for all noncitizens who are being employed. The following documents can establish both identity and employment eligibility:

- (1) United States passport (unexpired or expired);
- (2) Alien Registration Receipt Card or Permanent Resident Card, Form I-551;
- (3) An unexpired foreign passport that contains a temporary I-551 stamp;
- (4) An unexpired Employment Authorization document issued by the Immigration and Naturalization Service which contains a photograph, Form I-766; Form I-688, Form I-688A, or form I-688B;
- (5) In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, an unexpired foreign passport with an Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, so long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the Form I-94.

The following documents may establish identity only, but not employment eligibility:

- (1) A driver's license or identification card containing a photograph, issued by a State (as defined in Section 101(a)(36) of the Act) or an outlying possession of the United States (as defined by Section 101(a)(29) of the Act). If the driver's license or identification card does not contain a photograph, identifying information shall be included such as name, date of birth, sex, height, color of eyes, and address;
- (2) School identification card with a photograph;
- (3) Voter's registration card;
- (4) U.S. military card or draft record;

- (5) Identification card issued by Federal, State, or local government agencies or entities. If the identification card does not contain a photograph, identifying information shall be included such as name, date of birth, sex, height, color of eyes, and address;
- (6) Military dependent's identification card;
- (7) Native American tribal documents;
- (8) United States Coast Guard Merchant Mariner Card;
- (9) Driver's license issued by a Canadian government authority.

The following documents may be used to establish employment authorization only, but not identity:

- (1) A social security number card other than one which has printed on its face "not valid for employment purposes;"
- (2) A Certification of Birth Abroad issued by the Department of State, Form FS-545;
- (3) A Certification of Birth Abroad issued by the Department of State, Form DS-1350;
- (4) An original or certified copy of a birth certificate issued by a State, county, municipal authority, or outlying possession of the United States bearing an official seal;
- (5) Native American tribal document;
- (6) United States Citizen Identification Card, INS Form I-197;
- (7) Identification card for use of resident citizen in the United States, INS Form I-179;
- (8) An unexpired employment authorization document issued by the Immigration and Naturalization Service.

Section VI. Security Procedures

A complete official security file will be retained at the requesting Center or Headquarters office for requests for approval to appoint aliens and requests for aliens to serve on NASA advisory committees without appointment whenever advisory committee activities involve access to sensitive or classified national security information. At a minimum, these files should contain:

For non-sensitive positions, Standard Form 85, Questionnaire for Non-Sensitive Positions (or where appropriate, Form 85P, Questionnaire for Public Trust Positions);

For sensitive positions, Standard Form 86, Questionnaire for Sensitive Positions;

Note: The Director, Security Management Division, must approve the use of all Center-specific forms which Centers substitute for Standard Forms 85 and 86.

For any position, Standard Form 87, Fingerprint Chart.

Section VII. Travel

Centers may pay travel and transportation expenses to first post of duty for noncitizens under the same conditions as these expenses may be paid for citizens. These expenses are authorized by 5 USC 5723. Before an individual travels, he/she must sign a service agreement, NASA Form 420.

5 USC 3375 authorizes the payment of travel and transportation expenses for assignments under the Intergovernmental Personnel Act. The Desk Guide on the Intergovernmental Personnel Act contains information on what travel expenses may be paid to IPA assignees.

Travel expenses may be paid under 5 USC 5703 for experts and consultants who are employed on an intermittent basis.

Section VIII. Benefits

In most cases, noncitizens are entitled to benefits under the same conditions as citizens. There is one exception. Noncitizens who are employed based on F-1 or J-1 visas are not covered by Social Security, so OASDI or Medicare deductions may not be taken out of their salaries. Since no Social Security deductions are being made, they cannot be covered by FERS or the Thrift Savings Plan. Because most of these individuals would not have been employed by the Federal Government before January 1, 1984, they would not be covered by CSRS either. In the unlikely event Centers have someone on a J-1 visa who had Federal employment before January 1, 1984, consult Section 12A5.1-3 of OPM's Operating Manual on Retirement, formerly CSRS and FERS Handbook.

Section IX. Acquisition of Citizenship

Centers should provide a letter to noncitizens who are employed by NASA advising them that they must keep NASA informed about any changes in visa status or their citizenship status. If a noncitizen becomes a citizen, Centers should notify the Workforce Management and Development Office, Office of Human Capital Management, NASA Headquarters, within 10 days of the acquisition of citizenship. The notification should include the naturalization certificate number, the effective date, and the name and location of the court. This information should also be provided to the Center's Chief of Security.

If a noncitizen becomes a citizen, Centers should review the appointment to determine if it is still appropriate. In most cases, steps should be taken to competitively convert the employee to an appointment in the competitive service.

APPENDIX A

REQUESTING ADMINISTRATOR'S APPROVAL

As explained in Section III of this Guide, the employment of noncitizens must be approved by the Administrator. All requests should be submitted for concurrence(s) and approval(s) to the appropriate Associate Administrator, General Counsel, Office of External Relations, Office of Security and Program Protection, and last, the Office of Human Capital Management, attention Workforce Management and Development Division, NASA Headquarters, for concurrence and forwarding to the Administrator for approval.

Requests for approval to employ a noncitizen should include a justification and the following information:

- (a) The functional and organizational titles of the position as well as grade level or rate of compensation;
- (b) Organizational and geographical locations of the position;
- (c) A description of the prospective employee's special skills and qualifications;
- (d) The resident status and type of visa for the noncitizen (and spouse and children, if applicable) as established by the appropriate Immigration and Naturalization Office;
- (e) The IPA agreement for IPA assignments;
- (f) A description of duties which the employee will be performing. For classified positions, a position description, NASA Form 692);
- (g) For experts and consultants, Request for Services of Consultant or Expert, NASA Form 452, which includes a description of duties;
- (h) A statement signed and dated by the applicant indicating whether the alien or spouse has any relatives residing in designated countries and, if so, the name, relationship, age, address, nature, and extent of contact with each such relative. (NOTE: The Security Office will provide updated lists of designated countries);

- (i) Memorandum for the Record from the appropriate security official concerning the level of classified information that the employee will access and, if the noncitizen will be assigned to duties which do not require access to classified information, a statement that the access can be precluded;
- (j) A statement that the required security documentation has been completed, reviewed, and that employee is cleared to report to duty;
- (k) A statement that Standards of Conduct have been reviewed and any required financial disclosure forms have been completed and reviewed by Center Chief Counsel; and
- (l) For individuals being appointed to a Federal position, whether the noncitizen has formally declared intent to become a United States citizen and, if not, his/her intention of becoming a United States citizen if employed by NASA (this is not required of noncitizens considered for non-permanent employment except in positions requiring access to classified information).

Noncitizens Who May Be Employed

1. Permanent Residence

In order to be employed, noncitizens must be lawfully admitted to the United States. A noncitizen may be admitted either for permanent residence or for temporary residence.

The indication that a noncitizen has been admitted for permanent residence is possession of a valid Noncitizen Registration Receipt Card (green card), Immigration and Naturalization Form I-551. A noncitizen who has been admitted for permanent residence is permitted to be employed in the United States, so if the noncitizen has a valid green card, he/she may be employed by NASA without obtaining another type of visa.

Note, the green card may contain an expiration date. This is simply the date by which the individual must obtain a new card, but it does not mean that his/her eligibility to be employed expires on that date.

2. Temporary Residence

If a noncitizen has not been admitted for permanent residence, he/she will have been admitted on one of a number of temporary visas. Each visa is for a specific purpose and permits the noncitizen to engage in certain activities. The following sections describe the visas which would be most appropriate for employment with NASA. Any other visa should raise a red flag.

a. J-1 Visa

The J-1 visa is for exchange visitors, and it can cover professors, research scholars, and other specialists who may be learning, observing, consulting or sharing their knowledges and skills. There must be a sponsoring organization, such as a university, or in some cases an employer like NASA.

The J-1 visa is often the appropriate visa for persons assigned to NASA from universities under the Intergovernmental Personnel Act (IPA). In these cases, the university would be the sponsoring

organization and would be responsible for working with the individual to help him/her to obtain the J-1 visa.

Centers may find that potential IPA assignees from universities have F-1 visas. Because this is a visa for students, it is not appropriate for an IPA assignment to NASA. A Center may not enter into an IPA agreement for the assignment of a noncitizen with a F-1 visa, unless that visa is reclassified to another type of visa such as J-1. Item d. below discusses situations when a student with a F-1 visa may be employed with NASA.

In the case of IPA assignees from a university or other organization, that organization continues to be the sponsoring organization for the noncitizen even if he/she is working on an IPA assignment with NASA. Therefore, it will usually be the sponsoring organization requesting any visa reclassification. NASA may be asked to provide supporting documentation. Remember, if the requested documentation requires NASA to make a firm commitment to use the assignee on an IPA assignment, that commitment may not be made without the approval of the Administrator.

There may be situations where the noncitizen is being hired directly by NASA, not under an IPA assignment. In these situations, NASA is the sponsoring organization and the noncitizen must apply for a J-1 visa. NASA must complete INS form IAP-66 and send it to the individual who is applying for the J-1 visa. He/she must include the completed IAP-66 in the visa application. The IAP-66 may not be sent to the applicant without the approval of the Administrator.

b. Service in a Specialty Occupation

Noncitizens may be employed by NASA to perform services in a specialty occupation, which is defined as an occupation requiring theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree or its equivalent as a minimum requirement for entry into the occupation in the United States. The individuals are given an H-1 visa, and within that broad category, they are classified as H-1B. This classification also applies to Government to Government research and development projects administered by the Secretary of Defense.

A noncitizen can be given a H-1B classification if the Immigration and Naturalization Service (INS) determines that he/she: (1) will perform services in a specialty occupation as defined above and is

qualified to perform services in the specialty occupation because he or she has attained a baccalaureate or higher degree or its equivalent in the appropriate field of study, or (2) based on reciprocity, will perform services of an exceptional nature requiring exceptional merit and ability relating to a DOD cooperative research and development project or a coproduction project provided for under a Government-to-Government agreement administered by the Secretary of Defense. If NASA feels that a noncitizen meets the requirements for being classified into the H-1B category, it could petition INS by filing a Form I-129. The fee for filing the form is \$610.00, payable to INS.

If INS determines that the criteria for the classification are met, it would issue an approval letter on Form I-797 to NASA. NASA would then forward this letter to the proposed employee who must include it with his/her application for a visa. Note, NASA must file its own petition, and the noncitizen must apply for a renewal of the visa even if the noncitizen already has a H-1 visa for employment with another organization.

Detailed instructions concerning the procedures for requesting the H-1B classification are contained in 8 CFR 214.2(H). This section of regulations also explains the requirement to obtain a certification from the Department of Labor that citizens are not available to fill the position for which the noncitizen will be hired.

Centers wishing to petition INS to obtain a H-1B classification for a proposed employee must first obtain the Administrator's approval.

(c) Noncitizens of Extraordinary Ability or Achievement

A noncitizen who has extraordinary ability in the sciences or arts and who is coming to the United States temporarily to continue work in the area of his/her extraordinary ability may be given an O-1 visa by filing Form I-129. As explained in 2 above, the fee is \$610.00.

If INS approves NASA's petition, it issues an approval letter on INS Form 797. NASA would then forward a copy of this letter to the potential employee, who must include it with his/her application for a visa. Note, NASA must file its own petition, and the noncitizen must apply for a renewal of the visa even if the noncitizen already has an O-1 visa for employment with another organization.

Detailed instructions on how to obtain an O-1 classification are contained in 8 CFR 214.2(O). There is no requirement for a

Department of Labor certification in connection with an O-1 visa. Centers wishing to petition INS to obtain an O-1 classification for a potential employee must first obtain the Administrator's approval.

(d) Students

NASA may employ noncitizen students who have F-1 visas. For employment which is not part of the student's academic program, he/she must obtain approval from the school. Employment is limited to 20 hours a week while school is in session and may be full time during holidays and vacations. Except in cases of severe economic hardship of the student which will be approved by INS, NASA must submit a statement to the Department of Labor that it has been recruiting domestic labor to fill the position for 60 days and that it will pay the student comparable wages to those which are paid to domestic labor. Where the INS approves the student's claim of severe economic hardship, NASA is not required to submit the statement to the Department of Labor.

For employment which is part of the student's curriculum (career work experience), the student must obtain approval from the school. NASA is not required to submit a statement to the Department of Labor. A student may not begin this type of employment until he/she has been enrolled for nine months. There is an exception to this requirement for graduate students if immediate employment is required as part of the educational program.

To be employed, students must present Centers with Form I-20 endorsed by the school.

Detailed instructions concerning employment of noncitizen students with F-1 visas are contained in 8 CFR 214.2(f).

Employment of students must be approved in advance by the Administrator.

3. Expiration of Employment Authorization

The visas described in this section and the corresponding status usually have an expiration date. If a noncitizen applies to the INS for an extension, he/she can continue to be employed for up to 240 days from the expiration date or the date on which the request is denied, whichever comes first. Of course, if the request for the extension is approved, he/she can continue to be employed in accordance with the terms of the extension.

4. Waiver of Foreign Residence Requirement

Many individuals who have a J-1 visa are required to return to their countries for 2 years before they can be employed again in the United States. This is referred to as the 2 year foreign residence requirement. There may be situations where NASA needs the individual to continue working. In these situations, NASA can request a waiver of this requirement.

Requests should contain the following information:

- (1) United States Information Agency Data sheet
- (2) Signed resume from the employee
- (3) Listing of publications
- (4) Form IAP66
- (5) Copy of the employee's J-1 visa
- (6) Letter explaining why it is necessary to NASA's mission to have the employee continue working

Requests should be forwarded to the Office of General Counsel for forwarding to the Administrator. If the Administrator agrees, the request for waiver will be sent to U.S. Department of State, Visa Services, Waiver Review Division, 2401 E Street, NW, Washington, DC 20522-0106.

If Visa Services, U.S. Department of State, supports the request, it will be forwarded to INS for final action. If Visa Services does not support the request, it cannot be approved.

5. Application for Permanent Resident Status

A noncitizen who has applied to have his/her status changed to permanent resident will be granted employment authorization in increments of one year while the application is pending. If Centers have questions about an individual's status, they should contact the local INS Office.

APPENDIX C

SOURCES OF INFORMATION

1. The Visa Services Office of the Department of State has a web site at http://travel.state.gov/visa_services.html which contains fact sheets and other materials concerning the various types of visas. The site also has links to other agencies including the Immigration and Naturalization Service.
2. The Visa Services Office of the Department of State may be reached at (202) 663-1225. By using this phone number, callers hear recorded messages on a variety of topics and may speak to a visa officer.
3. The web site for INS is <http://www.ins.usdoj.gov>. This site has information about immigration laws and regulations, and INS forms can be downloaded from the site.
4. For information about J-1 visas, call (202) 401-9810.
5. The Department of Labor's office dealing with employment of noncitizens may be reached at (202) 219-5263.

SUMMARY OF VISA CLASSIFICATIONS

| VISA | COVERAGE | REQUIREMENTS |
|-------------|--|---|
| J-1 | Exchange visitors Research scholars Professors | Sponsoring organization. Usually university, but can be NASA. Noncitizen applies for visa. Sponsoring organization gives IAP66. |
| H-1 | Specialty occupation | NASA sends Form I-129 to INS. If NASA request is approved, noncitizen applies for visa. Department of Labor certification is required. |
| O-1 | Extraordinary ability in sciences. | NASA sends Form I-129 to INS. If NASA request is approved, noncitizen applies for the visa. |
| F-1 | Student | School approval required. Students must have Form I-20. For work not Related to course of study, NASA must send certification to Department of Labor. |

NOTE: For detailed information on these visas, see Appendix B.