

Policy Title: University-Sponsored, Employment-Based Immigration Policy

Policy Section:

- **Department/Division-** University Counsel
- **Topic-based Section-** International Employment & Immigration

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Latest Update: N/A

Statement of Policy

The University seeks to recruit and retain the highest quality employees to support the mission of the University. To achieve this objective, in its sole discretion, the University may elect to provide immigration sponsorship to foreign nationals.

To ensure compliance with federal immigration and employment regulations, Montclair State University (hereinafter, “the University” or “University”) has established this policy and related procedures for University-sponsored, employment-based immigration petitions.

All University departments/divisions seeking to hire, extend the work authorization of, or amend the salary/title/job location/job duties of a foreign national for any position must coordinate exclusively with the Office of University Counsel within the Office of the President. Under no circumstances will University-sponsored, employment-based applications be processed, advised, or signed by individuals outside University Counsel and the University’s contractually designated immigration attorneys without written permission from the Office of University Counsel.

This policy outlines the procedures necessary for the University to petition the federal government for various types of immigration applications, all of which are managed by the Office of University Counsel in collaboration with the University’s designated immigration attorneys, as needed. The Office of University Counsel works closely with the University’s designated immigration attorneys, Human Resources, Academic Affairs, hiring departments, and international employees to identify the best course of action for maintaining an employee’s work authorization throughout their employment with the University, while carefully considering the individual needs of each employee.

Definitions

U.S. Department of Homeland Security (DHS)

The U.S. Department of Homeland Security (DHS) is a cabinet department of the U.S. federal government whose [stated vision](#) is “to ensure a homeland that is safe, secure, and resilient against terrorism and other hazards.”

U.S. Citizenship and Immigration Services (USCIS)

U.S. Citizenship and Immigration Services is an agency within the DHS that administers immigration and naturalization services for the United States, including employment-based immigration petitions and applications.

Department of Labor (DOL)

“The Department of Labor (DOL) fosters and promotes the welfare of the job seekers, wage earners, and retirees of the United States by improving their working conditions, advancing their opportunities for profitable employment, protecting their retirement and health care benefits, helping employers find workers, strengthening free collective bargaining, and tracking changes in employment, prices, and other national economic measurements.” ([DOL’s FAQ page](#))

H-1B

Immigration status/visa for a “specialty occupation” requiring a bachelor’s degree or its equivalent in a particular field or requiring “specialized and complex” duties “usually associated with the attainment of a bachelor’s or higher degree.” For more information, [visit USCIS’s H-1B page](#).

O-1

Immigration status/visa for an “individual who possesses *extraordinary ability* in the sciences, arts, education, business, or athletics, or who has a demonstrated record of *extraordinary achievement* in the motion picture or television industry and has been recognized nationally or internationally for those achievements.” U.S. Citizenship and Immigration Services states: “To qualify for an O-1 visa, the beneficiary must demonstrate extraordinary ability by sustained national or international acclaim and must be coming temporarily to the United States to continue work in the area of extraordinary ability.” For more information, [visit USCIS’s O-1 page](#).

E-3

Immigration status/visa available “only to nationals of Australia. You must be coming to the United States solely to perform services in a specialty occupation. The specialty occupation requires theoretical and practical application of a body of knowledge in professional fields and at least the attainment of a bachelor's degree, or its equivalent, as a minimum for entry into the occupation in the United States.” For more information, visit [USCIS’s E-3 page](#).

TN

Immigration status/visa that “permits qualified Canadian and Mexican citizens to seek temporary entry into the United States to engage in business activities at a professional level.” Tenure-track or tenured faculty members are not eligible for this status/visa. For

more information, visit [USCIS's TN NAFTA Professionals page](#).

Lawful Permanent Resident (LPR) (“Green Card”)

The Lawful Permanent Residence (LPR) process allows individuals to adjust their immigration status from nonimmigrant to immigrant by becoming green card holders.

Prevailing Wage (Form ETA-9141)

“The ‘prevailing wage’ rate is generally defined as the average wage rate paid to similarly employed workers in a specific occupation in the area of intended employment. The Immigration and Nationality Act (INA) and Department of Labor (DOL) regulations require that an employer pay at least the ‘prevailing wage rate’ as a condition of sponsoring an alien worker in the H-1B, H-1B1, H-2, or E-3 nonimmigrant categories, and as a condition of filing a permanent labor certification application through PERM. The theory behind the prevailing wage requirement is to prevent employers from undercutting the wages of U.S. workers by paying alien workers less than the prevailing wage rate.” (*NAFSA Adviser’s Manual 360*)

Labor Condition Application (Form ETA-9035)

Having a Labor Condition Application certified by the Department of Labor is a precondition to an employee being “admitted or provided status as an H-1B [or E-3] nonimmigrant” [INA: Act 212(n)(1)].

Labor Certification (Form ETA-9089)

“An employer must obtain an individual labor certification on behalf of an alien applying for lawful permanent residence under the following employment-based preference classifications:

- EB-2 Holders of advanced degrees (unless also applying for a national interest waiver or filing under Schedule A blanket certification)
- EB-2 Aliens of exceptional ability (unless also applying for a national interest waiver or filing under Schedule A blanket certification)...

A labor certification is a finding by the Department of Labor (DOL) that there are not sufficient U.S. workers in the geographic area of employment who are able, willing, qualified (or equally qualified, in the case of college and university teachers) and available to do the job in question, and that the employment of an alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.” (*NAFSA Adviser’s Manual 360*)

Procedures

Petitions for Employment-Based Visas/Immigration Status

Petitions for temporary employment-based immigration status/visas (H-1B, TN, O-1, E-3) are prepared by the Director of International Employment and Immigration in the Office of University Counsel in consultation with the University’s designated immigration attorneys, as needed. Hiring units seeking to sponsor international employees in full-time, permanent or

tenure-track/tenured positions for an employment-based immigration status based on their employment/employment offer at the University must contact the Director of International Employment and Immigration in the Office of University Counsel to undergo an immigration review process. In the case of a prospective employee, this review process can begin after the University has made a written offer of employment. The Director of International Employment and Immigration will evaluate the case based on the available evidence and recommend a course of action to the hiring unit. Hiring units should be aware that recommendations may change based on the information and documentation the hiring unit and employee/prospective employee provide throughout the application process.

Petitions for Employment-Based Lawful Permanent Resident Status

Hiring units seeking to sponsor international employees in full-time, permanent or tenure-track/tenured positions for Lawful Permanent Resident (LPR) status based on their employment at the University must contact the Office of University Counsel to undergo an LPR review process. University Counsel will evaluate the case based on the available evidence and make a recommendation to the University provost if it appears to be within the best interest of the university to move forward with an LPR application. Employment-based petitions for LPR status are costly and complex, and in order for the University to pursue an application, the applicant's position and immigration background must meet certain minimum criteria. Whenever possible, the University will pursue "special handling" labor certification with the Department of Labor for teaching positions, which must meet the Code of Federal Regulations (CFR) criteria described in the Principles and Practice section below.

Self-Petitioned Applications for Lawful Permanent Resident Status

Beyond their relationship with a Montclair State University employing department, international employees may have one or more personal paths through which they wish to apply for LPR status, including [family-based LPR petitions](#), [National Interest Waiver self-petitions](#) through the second preference EB-2 category, and [Extraordinary Ability petitions](#) through the first preference EB-1 category. Since these petitions do not require the University to "sponsor" the employee, individuals are free to pursue them, but employees of Montclair State University are not permitted to sponsor or sign these petitions/applications. If individuals require legal counsel for such applications, they must personally arrange for the services of an immigration attorney. University employing units may not pay any fees associated with these personal petitions or contract with attorneys outside the University (including the University's designated immigration attorneys) to provide such services for their employees. The Office of University Counsel will consider exceptions to this section of the policy in consultation with the University Provost only when it is in the University's best interest to do so.

Principles and Practice

For All Employment-Based Immigration Inquiries and Applications

1. Hiring units must not promise to file any immigration application or pursue any benefit on behalf of a current or prospective international employee, since each employee's situation

must be reviewed on its own merits, as factors such as available resources and timing of the application are critical to any determination.

2. With rare exceptions, the University will only sponsor full-time, permanent or tenure-track/tenured positions for employment-based immigration applications.
3. The hiring department or division/college/school is required to pay all USCIS and Department of Labor fees other than premium processing, which is optional for certain applications but may be required in order to meet a projected employment start date. When the premium processing fee is not required for the employee to start or continue work, the fee may be paid by the hiring department or the employee.
4. All requests for employment-based immigration status/visas for international faculty and staff must be directed to the Office of University Counsel. If the Office of University Counsel determines that an Exchange Visitor (J-1) category (Research Scholar, Professor, Short-Term Scholar, or Specialist) is a better fit for a prospective employee, the case will be referred to the Office of International Engagement.
5. A representative from the Office of University Counsel must review and sign all USCIS forms related to a given application or petition (including the I-907, I-129, I-140, etc.) and all attorney representation G-28 forms that enable designated legal counsel to work in support of an institutional petition. No other university representatives are permitted to sign immigration forms on behalf of the University without written permission from the Office of University Counsel.
6. Individual employees and departments may not work independently with an external attorney in cases involving a University-sponsored petition unless directly referred by the Office of University Counsel.
7. The Office of University Counsel will coordinate workshops on the process for hiring and onboarding international employees. Departmental supervisors/chairs of prospective and current international employees and HR liaisons are strongly encouraged to attend one of these sessions.
8. If Montclair State University elects to apply for employment-based nonimmigrant or immigrant status or a visa on behalf of an individual who accepts an offer of employment, the individual must cooperate fully and on a timely basis in providing the information required by the initial application or any amendment or extension application. If the individual fails to cooperate (which includes but is not limited to failing to timely provide accurate information or documentation), or the nonimmigrant or immigrant status or visa cannot be obtained within a reasonable period of time (as determined by Montclair State University in its sole discretion), or if the immigration application is denied, Montclair State University may withdraw the offer of employment and, if employment has begun, Montclair State University may terminate the individual's employment upon 60-days written notice, subject to any applicable collective bargaining agreement, and/or require the individual to reimburse the costs (or portion thereof) associated with the immigration application.
9. An immigration application requires a determination as to whether government authorization or an export control license is required before releasing certain equipment, materials, technology, and software to foreign nationals in connection with their employment. The hiring unit and the individual offered employment are required to complete a Deemed Export Control Certification on a timely basis to permit University Counsel to undertake the evaluation required to make this determination. If such license or authorization is required, the offer of employment is contingent upon receipt of any such required government authorizations or export control licenses and satisfactory review by

University Counsel. In the event the government authorization or export control license is subject to a presumption of denial, or cannot be obtained within a reasonable period of time or reasonable expense (as determined by Montclair State University in its sole discretion), Montclair State University may withdraw the offer of employment, and if employment has begun, Montclair State University may terminate employment upon 60-days written notice, subject to any applicable collective bargaining agreement.

For Lawful Permanent Residence Only

1. International employees in positions defined by Human Resources as temporary are not eligible for a University-sponsored application for LPR.
2. The request to pursue employment-based permanent residence must be approved first by the supervising manager and dean/division head and then by the Office of University Counsel and the University Provost.
3. Department representatives may request a review of their candidate's qualifications for pursuing University-sponsored permanent residence, and the Office of University Counsel will coordinate with the employee and/or departmental supervisor/chair to obtain the information needed to assess the candidate's qualifications. Based on the information provided, University Counsel will determine if the individual and position meet the minimum University requirements for sponsorship, and if they do, whether the application for permanent residence will be administered internally by the Director of International Employment and Immigration, by the University's designated immigration attorneys, or by both.
4. All documentation in support of a petition for permanent residence, academic and professional appointments alike, must reside with the Office of University Counsel for a period of 5 years from the date of filing the petition. This includes all application materials submitted in response to a labor test.
5. *Special Handling Labor Certification.* Whenever possible, the University will pursue a "special handling" Labor Certification with the Department of Labor for teaching positions. To do so, the following Code of Federal Regulations (CFR) requirements must be met:

20 CFR 656.18(b)

(b) *Recruitment.* The employer... must be able to document the alien was selected for the job opportunity in a competitive recruitment and selection process through which the alien was found to be more qualified than any of the United States workers who applied for the job. For purposes of this paragraph (b), documentation of the "competitive recruitment and selection process" must include:

- (1) A statement, signed by an official who has actual hiring authority from the employer outlining in detail the complete recruitment procedures undertaken; and which must set forth:
 - (i) The total number of applicants for the job opportunity;
 - (ii) The specific lawful job-related reasons why the alien is more qualified than each U.S. worker who applied for the job; and
- (2) A final report of the faculty, student, and/or administrative body making the recommendation or selection of the alien, at the completion of the competitive recruitment and selection process;

- (3) A copy of at least one advertisement for the job opportunity placed in a national professional journal, giving the name and the date(s) of publication; and which states the job title, duties, and requirements;
- (4) Evidence of all other recruitment sources utilized; and
- (5) A written statement attesting to the degree of the alien's educational or professional qualifications and academic achievements

20 CFR 656.18(c)

(c) *Time limit for filing.* Applications for permanent alien labor certification for job opportunities as college and university teachers must be filed within 18 months after a selection is made pursuant to a competitive recruitment and selection process.

- a. To qualify for special handling Labor Certification, the following requirements must be met, as per federal regulations: (a) the position requires classroom teaching; (b) the original employment offer letter to the incumbent must carry a date not more than 15 months prior to the initial request for LPR; and (c) the recruitment process that resulted in the offer made to the incumbent must meet the CFR requirements above, including a print ad and/or 30-day electronic or web-based advertisement in a national professional journal documenting the position title, duties, and requirements. A national professional journal is a journal that circulates nationally, not merely in a local area or region—e.g. *The Chronicle of Higher Education*. Electronic or online media must also meet the “national professional journal” requirement and not be merely a collection of job postings. A job website (e.g. HigherEdJobs.com) would not constitute a national professional journal, which would have to include both articles and job listings. Labor Certifications for academic positions that do not meet requirements (a) through (c) will not be processed via special handling.
 - b. The hiring unit should be aware that depending on the specific type of employment-based LPR petition filed, all applicant CVs, along with the other documentation listed in the CFR above, for the position in question may be required for submission to Office of University Counsel to comply with Department of Labor requirements. If a department is considering the possibility of permanent residence sponsorship, it should consult with the Office of University Counsel before discarding any applications or supporting documentation for the search for the position in question.
6. *Outstanding Professor or Researcher (First Preference EB-1).* The Office of University Counsel, in collaboration with its designated immigration attorneys, as needed, will determine if an applicant meets [the criteria for Outstanding Professor or Researcher](#) as defined by the Department of Homeland Security and has a strong case for the EB-1 application. To qualify, scholars must document that they are recognized internationally as outstanding in a specific academic area. Federal guidelines for documentation of the EB-1 category are rigorous and include (but are not limited to) the ability to demonstrate three years of experience in the academic field, proof of international recognition of one’s research, receipt of major awards in the field, invited memberships in professional organizations, significant original research demonstrated by published books, multiple journal articles as primary author and patents, and professional experiences judging the work of others in the field.
7. The hiring department is required to pay all advertising costs associated with the Labor Certification petition. The [USCIS I-140 filing fee](#) can be paid by either the international employee or the hiring department.

8. LPR self-petitions that do not require University support may be pursued with outside legal counsel at the employee's expense.
9. It is strongly recommended that the international employee have their I-485 petition reviewed by The Office of University Counsel to request an adjustment of status to Lawful Permanent Resident after the I-140 is approved or if eligible, in a concurrent filing with the I-140 petition. Either the department or the employee may pay the USCIS filing fees for the I-485.

To Whom Policy Is Applicable

Hiring units across the university, international employees and prospective employees, Human Resources, and Academic Affairs.

Exclusions & Special Situations

Each case of employment-based immigration sponsorship must be reviewed on its own merits, as factors such as available resources and timing of the application are critical to any determination. Exceptions to the policy as written can only be made at the recommendation of the Office of University Counsel with the approval of the Provost.

Responsible Office(s):

University Counsel

Responsible Officer(s):

Althea Broomfield-Michel, University Counsel
 Elizabeth A. Gill, Director of International Employment and Immigration

Contact(s):

Elizabeth A. Gill
 Director of International Employment and Immigration
gille@montclair.edu
 973-655-5225

Log of all policy revisions as deemed by Responsible Officer(s):

Date of Revision	Brief Description of Change(s)