

KENT STATE UNIVERSITY GUIDELINES FOR RECRUITING AND HIRING INTERNATIONAL PROFESSIONALS & FACULTY MEMBERS

Suggested practices to preserve the applicant's ability
to apply for permanent residency ("green card")
based upon employment at Kent State for:

Employment-Based Immigration: Second Preference (EB-2) and
Employment-Based Immigration: Third Preference (EB-3)

Provided by the Office of the General Counsel

This is not intended to be legal advice, but a practical explanation of the permanent residency process at Kent State University. Due to the changing legal landscape of immigration reform and decisions from several Federal boards and courts, any legal concerns or issues regarding any case should be directed to the Office of General Counsel for consideration. Contact Associate Counsel Michael Pfahl at mpfahl@kent.edu or 330-672-2982.

International Professional and Faculty Member Issues

As Kent State University continues to hire more international faculty and professionals, it is important for every department to recognize that there are several immigration, state, and federal concerns when engaging in the employment of an alien - or the advertisement of a position for which an alien may be hired. As our university community becomes more diverse, there is an increasing need to ensure that every hiring situation is prepared should an international candidate be selected.

The following hiring process provides an overview of the ideal process that should be in place to meet the needs of our international faculty and professionals when advertising for positions at the University. **Often when an international professional or faculty member is hired, he/she will usually (but not always) seek out permanent residency¹. If certain steps are missed, the international hire may no longer be eligible.** The process listed below ensures that the recruitment process will meet the needs for an international hire that may later seek permanent residency. Please consult this process when initiating the hiring process for both temporary and permanent positions.²

This document refers ONLY to Employment-Based immigration processes that require the application of a Permanent Labor Certification as a prerequisite to filing. Think of Employment-Based Immigration for Second and Third Preference purposes as a three-step process³: 1) the University must apply for a Permanent Labor Certification (PERM) representing the position as advertised and such application must be “Certified,” 2) then the University can use such certified Permanent Labor Certification to file the form I-140 (depending upon the job requirements and the degree held by the person); 3) once the I-140 is approved, the person can then file a personal petition using form I-485 (commonly referred to as the “Green Card Petition”).

If the college, school, department has already completed the hiring process, contact the Office of General Counsel as soon as possible to determine if the process used meets the requirements for permanent labor certification. Below are the deadlines for filing the first step toward permanent residency based upon employment:

- For Faculty: The Permanent Labor Certification must be filed no more than 18 months from the date on the person’s offer letter.
- For Staff: The PERM must be filed no later than 6 months after the date from which the first advertisement began.

¹ “Permanent resident” is the process by which an international professional or faculty member petitions the United States Citizenship and Immigration Services (USCIS) to which from a non-immigrant intent to a permanent status (“green card”).

² “Permanent position” does not mean that the employment of the international professional/faculty member is permanent, but that the position itself is a permanent fixture at the university (and is not temporary employment).

³ This document does not address those employment-based immigration preferences or petitions that do not require labor certification support.

ADVERTISING THROUGH THE PERMANENT LABOR CERTIFICATION LENS

1. Once the department/unit identifies there is a need to hire a professional or faculty member, it should determine the specific job responsibilities of the position, determine candidate selection criteria, and **create the job description**.

All advertised positions must state the “Minimum Requirements.” These requirements must specify a specific degree and require a specific field or fields of study (“a related field” may not be sufficient). If any certifications or previous experience is required, be as specific as possible. Descriptions should avoid “preferences” or “ideal candidate” language.

- a. For professional positions: Once the job description is created, contact the Office of General Counsel to determine the prevailing wage for the position. If an international candidate is ultimately chosen for this position, the compensation must meet the prevailing wage requirement (as mentioned below) or the candidate may not be approved for the proper visa or work authorization. The job description provided by the department will be used to locate a comparable position in the Department of Labor’s database. The job code derived from this position will be used for visa and work authorization purposes as well should an international professional be hired.
 - b. For faculty positions: Once the job description is created, determine whether the position will be part-time or full-time, a tenure-track position or non-tenure track position and whether the position will be covered by the Collective Bargaining Agreement. If the position is covered under one of the Collective Bargaining Agreements at the University, it is not necessary to get a prevailing wage determination as the CBA rate is accepted to obtain the proper visa and work authorization. However, it is important for the department to still provide a job description so the proper job code can be located.
 - c. Permanent residency. If the candidate is offered a permanent position, the University can initiate the permanent residency process using the PERM/Labor certification process once the person arrives to begin work. If the position is temporary, the University cannot. Please contact the Office of the General Counsel immediately upon hiring an international employee who would like to initiate the permanent residency process.
2. **Readvertisement.** On rare occasion, a department may already employ an international professional or faculty member and because of certain “Green Card” requirements, may need to “readvertise” the position. In this event, the proper

administrative official should contact the Office of the General Counsel for further guidance to ensure adherence to immigration laws and standards for this unique process. In the case of individuals currently on an H-1B visa, any readvertisement must be completed prior to the commencement of the 6th year when at all possible.

3. **Prevailing Wage determination.** Every job position should be advertised in such a manner with the presumption that an international applicant may apply or be chosen for the position, thus the wage offered must meet the “prevailing wage” (unless the position is a faculty position covered by collective bargaining as mentioned previously). This determination applies most commonly to professional positions (since faculty are supported by a Collective Bargaining Agreement, the Department of Labor will usually cite the CBA for purposes of the prevailing wage for the position). This determination may also be applied for after the job process has concluded, but in that event the timing may not permit enough time for the labor certification process to move forward.
 - a. The first step is the determination of the prevailing wage⁴ that requires the use of the Department of Labor’s (“DOL”) online iCert system. This process can take as long as 2-3 months. The DOL will determine, based on the requirements of the position per KSU’s job description, one of two things:
 - i. For the purposes of a visa and work authorization, the prevailing wage that the alien will need to make at or above on the day he/she begins work;
 - ii. For the purpose of permanent residency, the prevailing wage the alien will need to make once the permanent residency process is complete and he/she receives the permanent residency card.
 - b. If, in either case, the prevailing wage determined by DOL is higher than the offered wage (or above what the alien could possibly make in their present position within a few years):
 - i. For the purposes of a visa and work authorization, the University must pay the prevailing wage for this position or the alien may not receive the proper visa and work authorization;
 - ii. For the purposes of permanent residency, it will be up to the department if it will be willing and able to raise the salary to meet the prevailing wage for the alien at the time that the permanent

⁴ Note that the prevailing wage listed in the PERM process, leading to permanent residence, does not affect any previously obtained prevailing wage for a Labor Condition Application obtained during an H-1B nonimmigrant petition process.

residence (“green card”) is approved. If the University agrees to the higher wage, then the DOL’s wage determination becomes the offered wage and must be used on the ETA9089 (“PERM”, or Labor Certification). After the prevailing wage is completed the department should move forward to advertise the position. If the position has already been advertised and the wage was included in the advertisement, if such wage does not meet the prevailing wage then the advertising may be invalid (which means that the University may not be able to continue with the permanent residency process).

4. **Advertise the position.** It is important to enter the initiation of every recruitment process with the presumption that an international applicant may be hired for the position. To help the alien in any future visa or permanent residency endeavors, there are a few requirements that must be met along the way. There are two types of recruitment that can be done under the labor certification process. Please contact the Office of the General Counsel if unsure of which method is applicable to the position at issue.
 - a. The first type, the one Kent State University will use most of the time, is available for college and university professors and it is called “special” recruitment. This method of recruitment involves those positions that include “some actual classroom teaching” and can be pursued for positions such as: professor, associate professor, assistant professor, instructor, lecturer and teacher, as well as for instructional coordinators depending upon the job requirements. This position must be full-time and must be presumed to be a continuing appointment in accordance with university policy or the CBA.
 - i. This type only requires that at least **one national print ad** be placed - for example, in the *Chronicle of Higher Education*, or that at least one ad be placed online in a recognized academic journal for a minimum of 30-days (29 will not be acceptable!). The ETA 9089 (PERM) – the first step for permanent residency - must be filed **within 18 months of the date of selection by the Search Committee** (or hiring by the appointing authority) of an international faculty member. Under this process, the search committee must be able to show that the foreign national was more qualified than the other candidates.
 - ii. The department must keep detailed and accurate records of the recruiting process and must provide to the Office of General Counsel to following prior to filing:

1. A completed “Recruitment Report for Faculty” which can be obtained from the Office of General Counsel’s Immigration Services website.
 2. A final report of the Search Committee describing in detail the selection process and recommendation made to the hiring authority.
 3. A written statement from the hiring authority attesting to the degree of the alien’s educational or professional qualifications.
 4. Copies of all the advertising completed for the position (printouts of newspapers, printouts of websites, etc.), with the date/time stamp on the page.
 5. Copies of all the CVs and Resumes submitted by candidates for the position.
- iii. Selective Recruitment also requires that the university notify the bargaining representative (AAUP) of the job opportunity by providing them with an internal job notice or “**Notice of Filing**” with information about the position. (The Office of General Counsel will provide this form to the AAUP).
- b. The other type of recruitment is called Basic Recruitment. Within the basic recruitment there are two types of recruitments depending on whether the position is considered professional or non-professional according to the U.S. Department of Labor. Please contact the Office of the General Counsel for this determination.
- i. Professional positions (*Job Zone 4 or higher on ONET or those specifically listed on the DOL Appendix A – consult General Counsel for this information*) require 2 Sunday ads (or one Sunday advertisement and another ad in a professional journal, a 30 day job order with the State Workforce Agency (for the State of Ohio, the agency is the Ohio Department of Job and Family Services “ODJFS”), and 3 additional recruitment methods (out of 10 possibilities), including:
1. University’s Employment Web Site;
 2. Private Employment Agencies;
 3. Trade or Professional Organizations (newsletters, trade journals, web postings on their site, etc.);
 4. Employee Referral Program with Incentives (evidenced by a memo announcing the position and program);
 5. On-Campus Recruiting (Notice issued or posted by the university’s placement office, or perhaps e-Inside or FlashLine);
 6. Radio and Television Advertisements

- ii. During the advertisement phase, OR immediately after, the department must post an Internal Job Posting referred to as a **“Notice of Filing”** in a public place (usually near where other wage and safety notices are posted) for 10 consecutive business days. For the purposes of this filing, the salary of the offered position must be included on the notice, and if a range is provided the lower end of the range must be equal or greater to the prevailing wage determination for the position. The Office of General Counsel will prepare this notice and deliver it to the department. This Notice should be posted during the advertisement for the position.
 - iii. Both these methods within the basic recruitment **allow the PERM application to be filed within no less than 30 and no more than 180 days of the first ad.** The PERM can be filed as long as the hiring authority can attest that “no other U.S. workers applicant is able and qualified for the job opportunity, nor could any applicant acquire the skills necessary to perform the duties during a reasonable period of on-the-job training.” Other special timing requirements must be strictly adhered to in order to file the basic labor certification.
 - c. The advertisement must:
 - i. Contain the name of the employer (and campus where the position will be employed);
 - ii. Direct applicants to report to or send resumes to the employer;
 - iii. Provide a job description specific enough to apprise U.S. workers of the job opportunity; and
 - iv. Indicate the geographic location of the job opportunity (which campus?).
 - v. If a wage is included, it must be at least prevailing wage.
 - vi. If a wage range is included, the bottom of the range must meet the prevailing wage.
 - vii. For the degree requirement, include the language “or foreign degree equivalent” if expecting to receive candidates with international degrees and such requirement is relative to the actual requirements of the position.
5. **Review the applications** according to university policy and procedures.
6. **Select candidates to interview** according to university policy and procedures (i.e. “the short list”).
7. **Schedule interviews** as per university policy.

- a. **Reminder:** if the department/unit is considering an international candidate not currently residing in the United States, the candidate may have to get a visitor visa to appear for the interview or other phone interview/video interview may be sufficient as long as it does not deprive the person of the same or similar opportunity to be considered for the position along with all other candidates currently residing in the country.
8. Interview candidates and **select the final candidate** according to university policy. Once the candidate is selected, the University must prepare a recruitment report that:
- a. Is signed by the Employer;
 - b. Describes the recruitment steps undertaken;
 - c. Describes the results of the recruitment (must list the number of applicants hired and the number of U.S. workers who did respond to the position or state if there were no U.S. worker applicants who responded, state the number of U.S. applicants rejected – categorized by the reason for rejection);
 - d. Professional position (“Basic Recruitment”): In order for the position to be eligible to continue with the filing of the permanent labor certification, the appointing authority must be able to state that “no other U.S. worker applicant is able and qualified for the job opportunity, nor could any applicant acquire the skills necessary to perform the duties during a reasonable period of on-the-job training,” and that applicants who were not interviewed did not meet the minimum requirements of the position.⁵
 - e. Faculty position (“Special Recruitment”). If an international faculty member (or another position with some classroom teaching) is hired, the selected applicant must be “more qualified” than the other applicants.⁶ This must be

⁵ The Recruitment Report is designed to comply with 20 CFR 656.17(g) which states:

(1) The employer must prepare a recruitment report signed by the employer or the employer's representative noted in § 656.10(b)(2)(ii) describing 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 Certifying Officer, after reviewing the employer's recruitment report, may request the U.S. workers' resumes or applications, sorted by the reasons the workers were rejected.

(2) A U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training. Rejecting U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training is not a lawful job-related reason for rejection of the U.S. workers.

⁶ Secretary of Labor will grant labor certification for alien to enter United States to work if no qualified American worker applies for alien's position despite employer's good faith test of United States worker availability. Immigration and Nationality Act, § 212(a), as amended, 8 U.S.C.A. § 1182(a); § 212(a)(14), as amended, 8 U.S.C.(1988 Ed.) § 1182(a)(14). *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Dist. CA 1992).

stated on the recruitment report, as well as that applicants who were not interviewed did not meet the minimum requirements of the position.

- i. Please consult with the Office of the General Counsel for a broader explanation of a “reasonable amount of on-the-job training”.
9. Ensure that the wage determination and “terms and conditions” of employment are completed and approved by both parties and the appointing authority, **complete the final offer letter and obtain a signed response from the candidate**. These terms contained in the letter should be stated clearly and concisely and should outline the position and compensation.
10. If the final candidate is an international professional or faculty member, **contact the Office of the General Counsel at 330-672-2982 immediately** to begin the process of employment-based immigration.

Additional Considerations

1. There are **several fees** associated with the employment of international faculty and professionals. The department is responsible for these fees. Checks for petitioning fees for the I-129 (the H-1B petition), and I-140 (petition for immigrant worker) must be made out to “Department of Homeland Security.”
 - a. All costs associated with the advertising of the position for the PERM labor certification process is the responsibility of the department;
 - b. The employment-based immigrant petition fee (\$580);
 - c. If a nonimmigrant application is requested prior to immigrant visa process, then the nonimmigrant petition fee (\$460, ie, H-1B or O-1);
 - d. The one-time anti-fraud fee if an H-1B petition (\$500);
2. If the position involves **potential export control issues**, the department may be able to identify any regulations or issues during the interview that would prevent the international candidate from obtaining approval for an employment-based visa, special licenses, or security clearances necessary to perform the essential functions of the job. If the department is unsure about export control issues, it can contact the Office of the General Counsel and discuss the issue with appropriate counsel.
3. A department should contact the Office of the General Counsel for guidance concerning any immigration issues.
4. **Should a department be presented with an unrecognized status provided by an candidate during the hiring process or thereafter, be told or asked**

questions in person, in writing or otherwise receive information so as to alert a department that someone has used a different name, fake name, fake documents, or is seeking the University's assistance for an employment sponsored support for immigration purposes, this information should be brought to the attention of the Office of the General Counsel immediately. If such information is not reported and reviewed, the information may be seen as constructive knowledge for hiring unauthorized personnel and may place the University and individuals in a department in peril of possible civil fines and criminal penalties.