NON-US CITIZEN WITHOUT COMPENSATION (WOC) ELIGIBILITY QUICK REFERENCE GUIDE

Without Compensation (WOC) Non-US Citizen Statute Reference: 38 U.S.C. § 7407 – Administrative provisions for section 7405 and 7406 appointments: **https://www.law.cornell.edu/uscode/text/38/7407**

> (a) When the Under Secretary for Health **determines that it is not possible to recruit qualified citizens** for the necessary services, appointments under sections 7405 and 7406 of this title may be made without regard to the citizenship requirements of section 7402(c) of this title or of any other law prohibiting the employment of, or payment of compensation to, a person who is not a citizen of the United States.

WOC Non-US Citizen VA Policy Reference: VA HANDBOOK 5005, PART II CHAPTER 3, Section G:

> **7. ACCEPTANCE OF SERVICES ON A WOC BASIS UNDER 38 U.S.C. § 7405(a)(1)**
>
> d. Non-US citizens may be utilized on a WOC basis when no qualified US citizens are available, and it is deemed to be in the interest of the facility.

The above VA policy pertains to WOC **eligible** non-US citizens. **It should not be viewed as an overarching authorization that any non-US citizen may be appointed on a WOC basis.** The WOC eligibility for different categories of non-US citizens is described below.

WOC appointments are Federal employment appointments, holding all the requirements and restrictions that come along with other types of Federal employment appointments, whether paid or unpaid.

Note: Non-US citizen Physician (Medical, Surgical or Dental) Residents rotating through a VA facility on a **Disbursement Agreement** are exempted from the WOC eligibility requirements listed in this document. Physician Residents on a Disbursement Agreement cannot be employed or detailed into Research Services.

The following outlines WOC eligibility for different categories of non-US citizens:

Permanent Alien Resident (Green Card Holder):

Non-US citizens in this category may be appointed WOC when it is not possible to fill the WOC position with a US citizen. The VA Office of General Council (OGC) has opined that the green card must be current on the appointment date. However, while the card may show an expired validity date, permanent residence status does not expire.

Recent guidance from the U.S. Citizenship and Immigrations Services (USCIS) states that the validity of green cards is automatically extended 24 months so long as the individual has filed an extension. So, in the course of employment, while an employee's green card may expire, they can still work, unless that status is revoked for criminal or other egregious activity.

If the permanent alien resident is a student in a research program at a university or college, an attestation from a school official that the permanent alien resident was the only individual interested in the position will suffice for documentation that no US citizens were available for the appointment. The facility could then proceed with the WOC appointment of a permanent alien resident student. If the permanent alien resident is not a student, a job opportunity announcement (JOA) must be posted to USA Jobs for two calendar weeks to document that no US citizens were available for the appointment before the permanent alien can be appointed WOC.

H-1B Visa Holder:

Non-US citizens on H-1B visas are prohibited from being appointed on a WOC basis. This is the case even if the affiliate lists the VA as a work site, because WOC appointments are employment appointments. Any WOC appointment letter to an individual would require a concurrent I-129, Petition for a Nonimmigrant Worker, and visa approval.

Individuals on WOC appointments do not receive a salary as they are "without compensation" by definition. VA cannot attest they are paying the individual the prevailing wage identified on the labor condition application (LCA). Even if VA is identified as an alternate worksite, we would still be viewed as an employer of the individual.

Placing an H-1B on an employment appointment at VA also distorts the employer-employee relationship between the sponsor and H-1B holder. The individual would be working onsite at VA, would likely be supervised by VA employees, and performing VA work. For all intents and purposes, VA would appear to be the individual's employer as opposed to the actual sponsor. That could open the sponsor to scrutiny and possible fines from the USCIS for falsifying information on the H-1B petition. It could also subject VA to scrutiny as well.

J-1 Visa Holder:

Non-citizens on a J-1 visa may be appointed on a WOC basis only for purposes of a bona fide academic curriculum where all those in that same academic program/curriculum rotate through VA (e.g., on a disbursement agreement as Physician Residents). VA does not otherwise sponsor J-1 visas.

Note: Research Fellows are not included in this; disbursement agreements are not for Research Service.

Note: A non-US citizen physician resident on a disbursement agreement cannot also be on a research WOC appointment because that would not be covered under their disbursement agreement.

J-1 visa holders could be appointed WOC if the following requirements are met prior to the WOC appointment:

- A Research Fellow (not an Academic Fellow) has the program listed on the Student and Exchange Visitor Information System (SEVIS) site: https://www.ice.gov/sevis by the academic institution as a 'program; and
- The school amends the J-1 visa to add VA as a site of education; and
- When a J-1 visa holder is sponsored by the academic affiliate, an affiliation agreement needs to be in place to ensure that the program has included VA. This agreement allows students from the affiliate to participate in VA activities. Absent the agreement, the fellows/students would not be considered eligible for a WOC appointment at VA.

In general, Research Fellows are not part of a recurring program in that the Nonprofit Corporations (NPC) hires them based upon individual qualifications, not because they were accepted into a program. If all the above requirements are met, attestations or recruitments as noted in the Permanent Alien Resident (Green Card Holder) section above are required to document that no US citizens were available for the appointment before the J-1 visa holder can be appointed WOC.

J-2 Visa Holder:

Non-citizens on a J-2 visa are spouses and dependents of a J-1 visa holder. If they possess an Employment Authorization Document (EAD), they are eligible to be appointed WOC (but only incident to a current J-1 visa). Once the J-1 visa expires, the J-2 visa holder no longer holds a valid EAD incident to that visa. Attestations or recruitments as noted in the Permanent Alien Resident (Green Card Holder) section above are required to document that no US citizens were available for the appointment before the J-2 visa holder can be appointed WOC.

H-4 Visa Holder:

Non-citizens on a H-4 visa are spouses of H-1B visa holders and have the same requirements as a J-2 visa holder. If there is an EAD incident to an H-1B visa holder spouse, they are employable. Attestations or recruitments as noted in the Permanent Alien Resident (Green Card Holder) section above are required to document that no US

citizens were available for the appointment before the H-4 visa holder can be appointed WOC.

F-1 Visa Holder:

Non-citizens on F-1 visas are students in an academic program. All foreign national students, such as Diagnostic Radiologic Technologists or other program areas, will possess this visa if they are in the US as a full-time student. In some cases, the F-1 visa holders are employable, but only after completion of their first-year full-time course curriculum is completed and subject to regulations pertaining to Optional Practical Training (OPT) and Curricular Practical Training (CPT). This is very specific. Although employable, attestations or recruitments as noted in the Permanent Alien Resident (Green Card Holder) section above are required to document that no US citizens were available for the appointment before the F-1 visa holder can be appointed WOC.

O-1 Visa Holder:

Non-citizens on a O-1 visa may be employed by VA. However, the visa is a job specific non-immigrant status and there is not a prevailing wage requirement. O-1 visa holders may be eligible for WOC appointments but there is likely a need for concurrent sponsorship. If an O-1 visa holder wishes to change employers, the new employer must file Form I-129, Petition for a Nonimmigrant Worker, with USCIS.

If an agent filed the original petition, the new employer must file an amended petition with evidence showing they are the new employer and a request for an extension of stay. If there has been any material change in the terms and conditions of employment or eligibility, other than additional performances or engagements that require someone of extraordinary ability, the current employer or agent must file an amended Form I-129 with the service center where the original petition was filed. Attestations or recruitments as noted in the Permanent Alien Resident (Green Card Holder) section above are required to document that no US citizens were available for the appointment before the O-1 visa holder can be appointed WOC.

Employment Authorization Document (EAD) holders:

Other than the visas noted above as ‘incident to’ another visa type, some candidates have self-sponsored for a green card and are approved. However, due to per country limits on the number of green cards issued per year, the individual is unable to file an I-485, Application to Register Permanent Resident Status or Adjust Status. If otherwise approved by the USCIS, EAD holders of this type are employable as a WOC. Attestations or recruitments as noted in the Permanent Alien Resident (Green Card Holder) section above are required to document that no US citizens were available for the appointment before the EAD holder can be appointed WOC.

TN North American Free Trade Agreement (NAFTA) Professionals:

The NAFTA created special economic and trade relationships for the United States, Canada, and Mexico. The TN nonimmigrant classification permits qualified Canadian and Mexican citizens to seek temporary entry into the United States to engage in business activities at a professional level. Among the types of professionals who are eligible to seek admission as TN nonimmigrants are accountants, engineers, lawyers, pharmacists, scientists, and teachers.

To be eligible for this visa/status, individuals must: be a citizen of Canada or Mexico; work in a profession that qualifies under the regulations; have a prearranged full-time or part-time job with a US employer (but not self-employment) which requires a NAFTA professional; and possess the qualifications to practice in the profession in question. Refer to the following link for detailed eligibility requirements and other required processes to determine if the TN nonimmigrant can be appointed WOC: https://www.uscis.gov/working-in-the-united-states/temporary-workers/tn-nafta-professionals. Attestations or recruitments as noted in the Permanent Alien Resident (Green Card Holder) section above are required to document that no US citizens were available for the appointment before the TN nonimmigrant can be appointed WOC.

The following information pertains to hiring non-US citizens into WOC Allied Health Trainee positions:

Refer to the Office of Academic Affiliation (OAA) website and frequently asked questions at the following link:
https://vaww.va.gov/oaa/faqs/default.asp?TID=18&Cat=3

The Medical Center Director can approve the appointment of a non-US citizen into a WOC Allied Health Trainee position, but the individual must be a Permanent Alien Resident or on another type of visa (listed above) that would allow them to work for the VA. J-1 visa and a H-1B visa holders are not authorized to be appointed into Allied Health Trainee positions that are paid <u>or</u> on a WOC basis (**not** referring to Physician Resident Disbursement Agreement).

All funded trainees who are paid directly by VA must be US citizens. Funded training positions are considered national assets. If not filled at the original site of allocation, funded trainees are reallocated to facilities that can fill them with US citizens. Exceptions to appoint non-US citizens to VA funded positions require specific approval of the Under Secretary for Health and are generally not granted. Reference: VA Handbook 5005/57, Part II, Chapter 3, Section A, Paragraph 3.g. (5) (a), dated June 14, 2012.

Other rules on US citizenship requirements by type of appointment:

Graduate Medical Education (GME): US citizenship is required to be a resident who is in a program sponsored by and paid directly by the VA (this is not a Physician Resident Disbursement Agreement). Exceptions will be made only when demonstrated efforts have been made to recruit qualified US citizens. Physician residents who are in non-VA sponsored programs paid through disbursement agreements are exempt from these requirements. All international medical graduates (IMGs) must be certified by the Educational Commission for Foreign Medical Graduates (ECFMG).

Appointment of Associated Health/Nursing Education Trainees: All paid (funded) associated health trainees must be US citizens (see VHA Handbook 1400.08, Section 8a (1)). WOC trainees who are non-US citizens may be appointed with the approval of the medical center director (provided they obtain a Social Security number in advance of the onboarding process - see VA Handbook 5005/57, Part II, Chapter 3, Paragraph 3.g. (5) (b) (c), dated June 14, 2012).

Dental: Irrespective of citizenship status, dental residents must have graduated from an approved or accepted school of dentistry in the US, Canada, Puerto Rico, or Guam. There is no equivalency of the ECFMG for dental graduates. If a program is VA-sponsored, non-US citizens may only be accepted if there are no qualified US citizens. Non-US citizens may be accommodated if the program is not sponsored by VA and reimbursement of trainee stipends and benefits is through a disbursement agreement.