



This article presents general guidelines for nonprofit organizations and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Is Your Employee or Volunteer a Foreign National?

**By Chelsea M. Freeman Dease, Esq. and Kristin Aquino-Pham, Esq.,
Greenberg Traurig, LLP**

Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits discrimination in hiring, promotion, discharge, pay, and other aspects of employment, on the basis of race, color, or **national origin**. Employers are also prohibited from discriminating because of citizenship status against U.S. citizens, U.S. nationals, and the following classes of aliens with work authorization: permanent residents, temporary residents (that is, individuals who have gone through the legalization program), refugees, and asylees. However, foreign nationals and their potential employers should be aware that there are U.S. immigration regulations associated with both employment and volunteer opportunities. The unlawful employment of foreign nationals by U.S. employers is a violation of federal law and can subject employers to both civil and criminal penalties.

To assist employers in understanding the implications of citizenship status on both employment and volunteer opportunities, the following provides an overview of relevant U.S. immigration regulations.

I. Foreign Nationals as Employees

The definition of an employee within the context of immigration regulations is as follows: “An individual who provides services or labor for an employer for wages or other remuneration.” Please note that the term “remuneration” is very broad and includes a variety of non-monetary benefits, such as free housing, food, gifts, etc.

While employers are prohibited from discriminating on the basis of national origin, one’s ability to legally work in the United States is inextricably tied to immigration status. Put simply, employers must make sure that all employees are legally authorized to work in the United States. A foreign national must obtain and present to the employer proof of employment authorization. This generally will take the form of a permanent resident card, an employment authorization document, or an employment-based visa to evidence his or her ability to lawfully work in the United States, but other documents may be acceptable depending on the individual’s specific circumstances. Unless the individual has a permanent resident card, as discussed below, upon the expiration date of the employment authorization of the verification document provided by the employee, the employer must re-verify the work authorization of the employee using Section 3 of the form I-9 to ensure that the employee is still authorized to work.

a. What is a Permanent Resident Card (“Green Card”)?

A Permanent Resident Card (I-551) allows a foreign national to live and work permanently in the United States. All permanent residents age 18 or older are required to have a valid Green

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Card in their possession at all times. While there is an expiration date on a Permanent Resident Card, that is only an expiration of the card itself, not an expiration of the person’s status or employment authorization. Thus, an employer is prohibited from re-verifying the employment authorization of a Permanent Resident.

A sample of a Permanent Resident Card is provided below.



b. What is an Employment Authorization Document (“EAD”)?

An EAD, also known as a work permit, is issued by the United States Citizenship and Immigration Services (USCIS) allowing the holder to legally work in the United States. Foreign nationals who are temporarily in the United States may file form I-765, Application for Employment Authorization, to request an EAD. Other foreign nationals who are authorized to work in the United States without restrictions must also apply for an EAD to demonstrate such work authorization.

c. What is an Employment-Based Visa?

Some foreign nationals must be sponsored by a U.S. employer in order to live and work in the United States. For these individuals, the prospective employer must generally file a nonimmigrant visa petition with USCIS. Common examples of visa categories that are subject to this requirement include:

- E-1/E-2 Treaty Trader or Investor
- E-3 Specialty Occupation Professional from Australia
- L-1 Intracompany Transferee
- H-1B Nonimmigrant

d. Employment verification

All employers must properly complete a Form I-9 for every person they hire in the United States. Check with legal counsel on any questions involving the work authorization of nonprofit employees.

An employer MUST:

- Provide employees, including foreign nationals, with the entire Form I-9, including instructions for completing the form;
- Accept documentation if it reasonably appears to be genuine and applicable to that foreign national; and
- Allow the foreign national candidate to choose which documentation to provide.

An employer may NOT:

- Require that a foreign national show a document issued by the Department of Homeland Security because they are not a U.S. citizen;
- Require a U.S. passport because an employee “sounds foreign;”
- Refuse to accept a document or refuse to hire a candidate because of an unfounded suspicion that a document is fraudulent;
- Ask to see employment authorization documents before hiring a candidate or before an I-9 is completed;
- Refuse to accept a document or refuse to hire a candidate because the document expires in the future; or
- Demand a specific document when re-verifying the work authorization of a foreign national.

II. Foreign Nationals as Volunteers

According to the Department of Labor, a volunteer is: an “individual who performs hours of service... for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.” To be considered a volunteer, the work performed by the individual must meet the following criteria¹:

- No expectation of compensation.
- The volunteer cannot displace a genuine employee.
- The services provided by the volunteer should not be the same services for which he or she was previously paid and/or expects to be hired and paid for in the future.
- Services are performed for a nonprofit organization for public service, religious or humanitarian objectives.
- The entity that will benefit/receive services from the volunteer is a nonprofit organization.

¹ Please note that no single factor is determinative in this analysis. It is appropriate to consult legal counsel to ensure that both your retention of employees and volunteers is consistent with U.S. immigration and labor laws.

- The activity is less than a full-time occupation.
- The services are offered freely and without pressure or coercion.
- The services are of the kind typically associated with volunteer work.
- Regular employees have not been displaced to accommodate the volunteer.
- The worker does not receive (or expect) any benefit from the entity to which it is providing services.

Foreign nationals are free to engage in volunteering without first obtaining employment authorization from the U.S. government as long as the activities meet the above criteria. For example, it would be permissible to volunteer at a local homeless shelter, charitable food pantry, or American Red Cross.

While there is no law prohibiting foreign nationals from volunteering, irrespective of immigration status, there are several considerations that may deter or otherwise prevent foreign nationals from successfully engaging in volunteer opportunities. For example, nonprofit organizations requiring the use of background checks² or U.S. issued identification may deter foreign nationals from volunteering at their organization.

A nonprofit should consult with legal counsel with any questions regarding its volunteer screening process specifically or its use of foreign national volunteers more generally.³

III. Deferred Action for Childhood Arrivals (“DACA”)

a. Deferred Action for Childhood Arrivals (DACA)

DACA is an exercise of prosecutorial discretion, providing temporary relief from deportation (deferred action) and work authorization to certain young undocumented immigrants brought to the United States as children. However, unlike federal legislation, DACA does not provide a permanent legal status to individuals and must be renewed every two years. Foreign nationals who receive deferred action will not be placed into removal proceedings or removed from the United States for a specified period of time unless terminated. Receipt of deferred action may render a foreign national eligible for employment authorization.

On September 5, 2017, Acting Secretary of Homeland Security Elaine Duke rescinded the 2012 DACA memorandum and announced a “wind down” of DACA. Current DACA beneficiaries whose status expired before March 5, 2018 were permitted to renew their status for an additional two years if they applied by October 5, 2017, and are thereby, upon renewal, eligible to work until their renewed status has expired.

b. What are DACA EAD Documents?

² Absent a strict legal requirement, many volunteer organizations find background screening prudent. Like businesses, nonprofit organizations must respond to the needs and fears of their “clients.” Client trust is integral to the success of any nonprofit organization.

³ See Pro Bono Atlanta Partnership, *Addressing the Risks of Working with Volunteers*, <https://www.pbpatl.org/wp-content/uploads/2011/12/RisksofVolunteers1.pdf>

The Employment Authorization Document “EAD” that USCIS issues to an eligible deferred action recipient is one of the documents listed as acceptable for the Form I-9. This document establishes both identity and employment authorization under “List A” of the Form I-9. If a deferred action recipient presents an unexpired EAD to complete the Form I-9, an employer should accept it. The card must reasonably appear to be genuine and relate to the deferred action recipient presenting it. The information will appear on the card as indicated on the image below:



1. The document number, which is listed as the CARD# and begins with three letters.
2. The notation “C-33” under “Category.”
3. The expiration date.

Additionally, the employer must comply with Form I-9 instructions and enter the document title, issuing authority, number, and expiration date in Section 2 under List A. **The employer may NOT request that the employee provide additional proof that his or her case has been deferred or that he or she is authorized to work.**

Any person for whom DACA expires as of March 6, 2018, will no longer have deferred action or employment authorization and as such are ineligible to work as of that date.

If you have questions about working with foreign nationals as employees or volunteers, please contact your PBPA attorney or seek legal counsel.