

HUMAN RESOURCES MANUAL

Instruction 42-1: APPOINTMENT OF 42 U.S.C. § 209(f) SPECIAL CONSULTANTS

Issuance Date: February 15, 2012

Effective April 2, 2012, section 42-50 (C), Tenure, of this Instruction has been sunsetted and is no longer applicable.

Significant changes to HHS Instruction 42-1 dated February 15, 2012 from HHS Instruction 42-1 dated August 5, 2004 include the following:

- Provides a definition of “scientific position,” to include positions in which the incumbent is directly involved in or manages scientific research and/or activities, to include administrative positions that require the incumbent to have scientific credentials. Prior HHS Policy did not provide a definition of "scientific position."
- Under Qualifications, requires that appointees have a doctoral level degree in a scientific discipline related to the position and professional stature that is commensurate with the duties of the position being filled. Provides a mechanism for exceptions that require special justification and approval. Prior HHS Policy only required a Bachelor’s Degree.
- Also under Qualifications, establishes a minimum qualification level, equivalent to that required at the GS-13. The prior HHS Policy did not establish a minimum qualification level.
- Requires that the same recruitment plan be used for both Title 5 and Title 42 in order to meet the requirement to demonstrate that other available personnel systems (i.e., Title 5), failed to yield qualified candidates.
- Includes a detailed explanation of the process and documentation requirements necessary to demonstrate that other available personnel systems, including Title 5, failed to yield candidates that possess critical scientific expertise.
- Eliminates the current restrictions placed on commissioned corps officers converting to Title 42 209(f) appointments upon retirement.
- Identifies specific positions and/or categories of positions at NIH that may be filled through Title 42 209(f) without "exhausting" other recruitment mechanisms/authorities.
- Prescribes the approval process, including necessary documentation for other OPDIVs to "designate" positions as Title 42 209(f), allowing them to fill such positions without first "exhausting" other recruitment mechanisms/authorities.

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- Pay caps:
 - Base salary cannot exceed \$250,000 in a calendar year unless a higher rate is approved by the Secretary. The previous policy delegated authority to the FDA, CDC, and NIH OPDIV Heads to set base salary up to \$350,000.
 - Total compensation (including recruitment bonuses, retention allowances, and cash awards) cannot exceed \$275,000 in a calendar year without the prior approval of the Secretary. The previous policy capped total compensation at \$375,000.
 - Base salary for employees on time limited appointments may not exceed the rate set in accordance with Pub. L. No. 102-394. This cap was not in the previous policy.

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Material Transmitted:

Department of Health and Human Services (HHS) Instruction 42-1, Appointment of 42 U.S.C. § 209(f) Special Consultants, dated February 15, 2012.

Material Superseded:

HHS Instruction 42-1, Appointment of 42 U.S.C. § 209(f) Special Consultants, dated August 5, 2004.

Background:

This instruction provides guidance to Operating Divisions and Staff Divisions on the minimum eligibility and qualification requirements for appointments made under 42 U.S.C. § 209(f). Additionally, the Instruction provides guidance on compensation, awards, performance management and benefits for those serving on appointments made under 42 U.S.C. § 209(f).

This issuance is effective immediately. Implementation under this issuance must be carried out in accordance with applicable laws, regulations, bargaining agreements, and Department policy.

/E. J. Holland, Jr./

E. J. Holland, Jr.

Assistant Secretary for Administration

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**HHS PERSONNEL INSTRUCTION 42-1
APPOINTMENT OF 42 U.S.C. § 209(f) SPECIAL CONSULTANTS**

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42-00 Background

The authority to hire “special consultants” is granted by 42 U.S.C. §209(f) Special Consultants, which provides:

In accordance with regulations, special consultants may be employed to assist and advise in the operations of the Service. Such consultants may be appointed without regard to the civil-service laws.

The implementing regulation, 42 C.F.R. § 22.3(a) Appointments of special consultants, provides:

When the Public Health Service requires the services of consultants who cannot be obtained when needed through regular Civil Service appointment or under the compensation provisions of the Classification Act of 1949, special consultants to assist and advise in the operations of the Service may be appointed, subject to the provisions of the following paragraphs and in accordance with such

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instructions as may be issued from time to time by the Secretary of Health and Human Services.

42-10 Purpose

The policy establishes the minimum qualification and eligibility standards for compliance with the regulation implementing 42 U.S.C. § 209(f). An operating division (OPDIV) may apply more stringent requirements where that OPDIV deems necessary for its purpose. These baseline standards, however, must be adhered to in all instances.

42-20 Authorities

- 42 U.S.C. § 209(f) Special consultants
- 42 C.F.R. § 22.3(a) Appointment of special consultants
- Pub. L. No. 102-394

42-30 Definitions

Peer Review means the scientific and technical evaluation by a panel of experts who are qualified by training and experience in particular scientific or technical fields, or as authorities knowledgeable in the various disciplines and fields related to the scientific areas under review, to give expert advice concerning the scientific and technical merit and relevance of the subject matter investigated.

Scientific Position means (1) a professional occupation directly involved in the conduct of high-level research studies, regulatory or product reviews, investigations, or experimentations in a branch of natural science, applied science, biomedical science, or related scientific field; or (2) management or supervision of such research studies, regulatory or product reviews, investigations, or experimentations, in which scientific expertise and credentials are required to provide appropriate program direction.

42-40 Coverage

- A. Appointments under 42 U.S.C. § 209(f) may only be used to fill scientific positions. The authority will be used only when recruitment or retention efforts under other available and applicable personnel systems, including Title 5 of the United States Code, the Senior Biomedical Research Service (SBRS), and the PHS Commissioned Corps, have failed to yield candidates that possess critical scientific expertise. This instruction does not apply to any other excepted service appointments, including Special Government Employees (SGEs), Expert and Consultants (EE/EI), the SBRS, or those covered by 42 U.S.C. § 209(g).
- B. While employees appointed under 42 U.S.C. § 209(f) are not covered by the laws or regulations outlined in 5 U.S.C or 5 C.F.R, there are instances in which Title 5 principles are used to effectuate actions for employees appointed under 42 U.S.C. § 209(f).

42-50 Tenure

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- A. All appointments, including conversions from other pay systems, to positions under 42 U.S.C. § 209(f) are in the excepted service. Work schedules may be full-time, part-time, or intermittent.
- B. Appointments may be indefinite. That is, they do not have a stated time limit so one may serve an entire Federal career under an indefinite appointment.
- C. Appointments may be temporary for any period up to five years with unlimited extensions. Non-citizens on time-limited employment visas may only be given temporary appointments and appointments cannot exceed the visa expiration date.

42-60 Qualifications

A. Education

- 1. Candidates must meet education requirements in a scientific discipline directly related to the position being filled, in accordance with the Office of Personnel Management (OPM) qualification standards.
- 2. At a minimum, the candidate must possess a doctoral-level degree from an accredited institution of higher learning, including: Ph.D., M.D., D.V.M., D.D.S., D.M.D., Sc.D., or other research doctoral-degree widely recognized in U.S. academe as equivalent to a Ph.D. Exceptions to this requirement must be approved by the OPDIV head or designee and the justification must be documented.
- 3. Candidates that have completed part or all of their education outside of the United States must have their foreign education, necessary to meet qualification requirements, evaluated by an accredited organization to ensure that the foreign education is comparable to education received in the United States. It is the responsibility of the candidate to provide written proof of his/her foreign education accreditation prior to appointment. In addition, the servicing human resources office is responsible for verification.
- 4. Candidates must furnish proof, prior to appointment (*e.g.*, official transcript; ECFMG certification; foreign education accreditation), that they meet all required education requirements.

B. Experience

- 1. Candidates must have professional experience and stature in their area of expertise commensurate with the duties of the position being filled. At minimum, a candidate's experience must be equivalent to the minimum qualification standards prescribed for a position at the GS 13 level or higher.
- 2. In order to determine eligibility, supervisors must prepare a narrative statement fully describing the scientific duties and responsibilities of the position, the requisite educational background, and experience required to perform those duties. A classified position description is not required. However, the statement of duties must be reviewed to determine equivalent grade level.

C. Eligible Series

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All Title 42 positions must be identifiable within a General Schedule occupational group. The title and series assigned to the position will be based on the duties of the position.

42-70 Compensation

- A. Salaries for individuals appointed on a full-time schedule will be set on a per annum basis commensurate with the applicants' qualifications, experience, and other factors as described below. Appointments that are on other than a full-time basis will be paid on a pro-rata basis of an annualized salary.
- B. For purposes of this program, the appointee's compensation is the base salary for pay, leave, and benefits, as well as retention allowances, recruitment/relocation bonuses, and awards, which are not included in base salary. Base salary will be set at the lowest rate necessary to recruit the candidate. In determining the base salary, management must consider such factors as:
- Current salary;
 - Competing offer of employment, either written or verbal;
 - Stature of individual in his/her professional field;
 - Average salary from a published salary survey;
 - Urgency of the program relative to mission accomplishment;
 - Role and impact of the individual in the program;
 - Recruitment efforts, e.g., turnover rates, labor market factors, recruitment/retention statistics;
 - Specialized skills/training, and experience that the applicant may possess that will benefit the agency/program;
 - Compensation for cost of living disparity as reflected in a salary comparison;
 - Complexity of duties;
 - Consistency of pay with others in the organization; and
 - Responsibilities within the organization
- C. Base salary may be set up to \$250,000 per annum at the discretion of the OPDIV except for those employed on time limited appointments. Recommendations for base salary above \$250,000 must be submitted by the OPDIV head to the Assistant Secretary for Administration (ASA), for approval by the Secretary.
- D. Base salary for employees on time limited appointments may not exceed the rate set in accordance with Pub. L. No. 102-394.
- E. Pay Increases
1. Automatic cost of living adjustments do not apply to 42 U.S.C. §209(f) appointments. All pay increases will be performance based, will be consistent with the employee's annual performance appraisal and will be limited to one increase per year. Any pay increase outside of the normal performance cycle requires an exception authorized by the OPDIV head. Such exceptions must be fully documented and justified.

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2. Performance based pay increases will normally be limited to a maximum of six percent. OPDIV heads may authorize higher increases where performance clearly warrants. All pay increases must be fully documented and justified.
3. Recommended pay increases that will increase base salary above \$250,000 per annum, must be submitted by the OPDIV head to ASA for approval by the Secretary. Such requests must be fully documented and justified.

F. Pay Caps

1. Base salary cannot exceed \$250,000 in a calendar year unless a higher rate is approved by the Secretary.
2. Total compensation (including recruitment bonuses, retention allowances, and cash awards) cannot exceed \$275,000 in a calendar year without the prior approval of the Secretary.
3. Base salary for employees on time limited appointments may not exceed the rate set in accordance with Pub. L. No. 102-394

G. Pay Incentives

1. Employees appointed under 42 U.S.C. § 209(f) are eligible to receive recruitment, retention, and relocation bonuses. While not covered by the compensation laws and regulations outlined in 5 U.S.C. and 5 C.F.R., the same criteria and coding used for Title 5 employees will be used for employees appointed under Title 42 when making decisions regarding eligibility and implementation of these incentives.
2. Employees appointed under Section 209(f) cannot receive special salary rates, Physician's Comparability Allowances (PCAs), or Physician Special Pay (Title 38). No exceptions are authorized.

42-80 Initial Appointments

Appointments under 42 U.S.C. § 209(f) may only be used to fill scientific positions when recruitment or retention efforts under other available personnel systems, including Title 5 of the U.S. Code, the SBRS, and PHS Commissioned Corps, have failed to yield candidates that possess critical scientific expertise. The recruitment efforts used under other available personnel systems (i.e., Title 5) must be as extensive and exhaustive as those used to recruit under Title 42. These efforts, as well as the scientific credentials of the potential appointee, must be fully documented. Before 42 U.S.C. §209(f) may be used, the OPDIV must demonstrate that the following criteria have been met:

1. Efforts to recruit and/or retain under other available personnel systems were attempted, but unsuccessful, and these recruitment efforts must be completed prior to commencing recruitment under Title 42;

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2. The recruitment efforts utilized for other available personnel systems were as extensive as those used to recruit under Title 42 (e.g., nationwide search, ads in professional journals, vacancy information shared with professional organizations, etc.); and
3. The applicant's credentials, experience, and stature in the scientific community are commensurate with, and directly related to the position being filled.

42-90 Conversions from Other Pay Systems

Conversions are only to be used in exceptional circumstances as outlined in this policy. A scientist may only be converted to a 42 U.S.C. § 209(f) appointment from another pay system if he/she is appropriately peer-reviewed according to the requirements outlined in this instruction and OPDIV procedures and is determined to meet all the following criteria:

1. Evidence of recognition as a national or international expert in the field, such as: specific experience, invited manuscripts, presentations, and consultations; receipt of honors and/or awards; or other recognition for noteworthy performance or contributions to the field;
2. Evidence of original scientific or scholarly contributions of major significance in the field;
3. Evidence of leadership in the field; and
4. Special knowledge and skills of benefit to the agency.

42-100 Positions Designated as 42 U.S.C. § 209(f)

- A. There are some positions within HHS that require a level of scientific expertise that has historically not been successfully recruited or retained under regular civil service appointment. To expedite the recruitment process and limit the amount of time these positions remain vacant, a subset of high level, mission critical positions within each OPDIV may be designated as 42 U.S.C. § 209(f). This designation will allow such positions to be filled through 42 U.S.C. § 209(f) without the requirement to document efforts to fill the position through other available personnel systems each time the position is vacated and/or filled. In order to obtain this designation, OPDIVs must submit a request, in accordance with section 42-110 of this instruction, and obtain approval from the Assistant Secretary for Administration (ASA).
- B. The list of NIH-specific individual and categorical positions, identified in Appendix 3, are covered by this designation.

42-110 Case Documentation and Approval Procedures

A template to document the required justification for initial 42 U.S.C. §209(f) appointments is provided as Appendix 1. The OPDIV must use this template, or develop an equivalent that documents how the criteria outlined in 42-80 of this policy have been met.

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A. Conversions

Conversions are only to be used in exceptional circumstances as outlined in this policy. In addition, the OPDIV must document the results of the peer review, demonstrating that the employee meets the required criteria outlined in 42-90 of this policy.

B. Positions Designated as 42 U.S.C. § 209(f)

For positions not identified in Appendix 3, OPDIVs may request this designation for specific positions. This designation must be approved for each specific position, or group of positions, by the ASA. In order to be considered for 42 U.S.C. §209(f) designation, the OPDIV must submit the following documentation to the HHS OHR Title 42 Program Manager:

1. Historical data, including, but not limited to, current (not to exceed 5 years), local and national labor market analysis and workforce analysis, demonstrating that prior efforts to recruit and/or retain under other available personnel systems were attempted, but unsuccessful; and
2. Description of the position, including the credentials and experience necessary for an incumbent to possess to be successful in the position.

42-120 Benefits

- A. While the laws and regulations outlined in 5 U.S.C. and 5 C.F.R. do not apply to employees appointed under 42 U.S.C. § 209(f), the benefits available (e.g., life insurance, health insurance, retirement, etc.), as well as the criteria for eligibility are the same for both groups of employees. Specifically, employees appointed under 42 U.S.C. § 209(f) for more than 12 months (with the exception of non-citizens in overseas locations) will receive benefits equivalent to those of employees appointed under Title 5.
- B. As noted above, although the laws and regulations outlined in 5 U.S.C and 5 C.F.R do not apply to employees appointed under 42 U.S.C. § 209(f), these employees are covered by the same leave provisions as employees appointed under Title 5.

42-130 Awards

Employees appointed under 42 U.S.C. § 209(f) are eligible for the following categories of awards: performance-based cash awards, onetime special act awards (including on the spot and time off awards), and honorary awards.

42-140 Performance Management and Conduct

- A. All Title 42 employees must be on a performance plan that meets all requirements of the appropriate Departmental performance system. Ratings under the performance plan will be used as the basis for pay decisions.
- B. Title 42 employees must maintain acceptable performance and conduct in order to be retained in their positions.

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42-150 Other Actions

- A. If an employee voluntarily or involuntarily separates from a Title 42 position and seeks to return to a non-Title 42 position, the employee may be considered in accordance with all civil service or Commissioned Corps requirements. Pay of Title 42 employees, upon converting to a non-Title 42 position, will be set no higher than the maximum General Schedule pay limitations under Title 5 for civil servants and regular pay tables (including any applicable special or professional pay) for Commissioned Corps officers.
- B. Prior to appointment or conversion to a Title 42 position, employees must be informed in writing that they are not entitled to Merit System Protection Board (MSPB) appeal rights under the Civil Service Reform Act (CSRA).

42-160 Conduct Laws and Regulations

Title 42 employees must comply with all ethical and conduct-related laws and regulations applicable to other Executive Branch employees. These include laws concerning financial interests, financial disclosure, and conduct regulations promulgated by the Department, by the Office of Government Ethics, and other agencies.

42-170 Processing Appointments and Conversions to 42 U.S.C. § 209(f)

- A. Initial and Subsequent Appointments. Requests to appoint and/or convert individuals using 42 U.S.C. § 209(f) will be processed in accordance with the OPM Guide to Processing Personnel Actions.
- B. Employees appointed or converted to a 42 U.S.C. § 209(f) position must sign a statement documenting their understanding that they are accepting an excepted service appointment and to acknowledge that they are not entitled to MSPB appeal rights under the CSRA.
- C. Appointment of Non-citizens

Non-citizens may be appointed as permitted by law. The non-citizen must have an appropriate work visa.

42-180 Program Review and Evaluation

The ASA, Office of Human Resources, will periodically review appointments made under the 42 U.S.C. § 209(f) authority and associated supporting documentation to ensure proper use.

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**APPENDIX 1: REQUIRED DOCUMENTATION FOR
INITIAL APPOINTMENTS UNDER 42 U.S.C. § 209(f)**

The following information must be documented and maintained for each individual initial appointment made under 42 U.S.C. § 209(f). The information must be maintained by the OPDIV and made available upon request from the HHS OHR.

POSITION SUMMARY: Provide a summary of the position, including major duties/responsibilities and required qualifications/experience.

RECRUITMENT EFFORTS:

A. Provide a summary of recruitment efforts to fill this position through other available personnel systems. Provide detailed information regarding recruitment strategies (e.g., USAJOBS, professional journals, professional organizations, etc.); number of applicants; and probable reasons recruitment efforts were unsuccessful.

B. Provide a summary of recruitment efforts used to fill the position through Title 42, if different from those used for other personnel systems, please explain.

CANDIDATES QUALIFICATIONS AND EXPERIENCE: Provide a summary of the candidate's credentials, experience, and stature in the scientific community and explain how they are commensurate with, and directly related to the position being filled.

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APPENDIX 2: DOCUMENTATION CHECKLIST FOR 42 U.S.C. § 209(f) APPOINTMENTS

For All Appointments be sure to include:

- Statement of Duties
- CV
- Documentation to support positive education requirements (e.g., official transcript)
- Statement signed by employee acknowledging he/she understands that he/she is accepting an excepted service appointment and is not entitled to MSPB appeal rights under the CSRA
- Appropriate employment visa (if applicable)
- Salary justification
- Any other documentation deemed necessary by the OPDIV

For Initial Appointments be sure to include:

- Summary of Recruitment Efforts and Supporting Documentation for Title 5 or Other Available Personnel System
- Summary of Recruitment Efforts and Supporting Documentation for 42 U.S.C. § 209(f)
- Qualification and Experience Summary

For Conversion Actions be sure to include:

- Peer Review Summary

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**APPENDIX 3: NIH 42 U.S.C. § 209(f) OFFICIAL SCIENTIFIC
INDIVIDUAL/CATEGORICAL DESIGNATIONS**

42 U.S.C. § 209(f) appointments may appropriately be made at the NIH if in the designated official scientific individual/categorical position titles listed below.

Senior Investigator (excluding Clinical Senior Investigators)

NIH Distinguished Investigator

NIH Clinical Track (HS)

Investigator

Staff Clinician

Senior Clinician

Scientific Executive

NIH Deputy Director

IC Director

IC Deputy Director

Scientific Director