

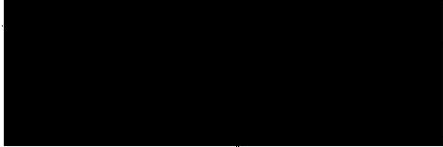


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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

06 NOV 2001

File: [Redacted] Office: Nebraska Service Center Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as an Outstanding Professor or Researcher pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(B)

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a university. It seeks to classify the beneficiary as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(B). The petitioner seeks to employ the beneficiary permanently in the United States as a research associate (instructor). The director determined that the petitioner had not established that the position offered to the beneficiary is permanent, as required by the statute.

On appeal, the petitioner submits a letter from a professor who asserts that the beneficiary can expect continued employment, and a brief in which counsel argues that a series of short-term contracts are the functional equivalent of permanent employment.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C): . . .

(B) Outstanding Professors and Researchers. -- An alien is described in this subparagraph if . . .

(iii) the alien seeks to enter the United States --

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

Service regulations at 8 C.F.R. 204.5(i)(3)(iii) state that a petition for an outstanding professor or researcher must be accompanied by:

An offer of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:

(A) A United States university or institution of higher learning offering the alien a tenured or tenure-track teaching position in the alien's academic field;

(B) A United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field; or

(C) A department, division, or institute of a private employer offering the alien a permanent research position in the alien's academic field.

8 C.F.R. 204.5(i)(2) defines "permanent" as "either tenured, tenure-track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination."

The petition was submitted with a copy of a letter to the beneficiary, dated April 19, 1999, that informs the beneficiary of his "reappointment as a Research Associate (Instructor) in the Department of Neurobiology, Pharmacology and Physiology for a 1-year term" ending March 31, 2000. The letter was signed by a university official on behalf of the "President or Provost." Counsel asserts that "this contract is renewable. There is every expectation of continued employment with the University," although the initial petition included no evidence to that effect from any university official with hiring authority. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaiqbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

The director denied the petition, stating "no representations are made that the position is either tenure or tenure-track. The employment letter issued by the petitioner clearly indicates that the beneficiary's re-appointment is for a term of definite and limited duration." The director asserted that "the petitioner's mere willingness to issue a series of yearly re-appointments cannot be found to equate to a permanent job offer of indefinite or unlimited duration," and concluded "[t]he facts do not support a conclusion that the position is permanent as commonly understood and as required by regulation."

On appeal, the petitioner submits arguments from counsel and a letter from Professor Harry A. Fozzard of the petitioning institution. Prof. Fozzard states:

[W]e strongly state our intention to have [the beneficiary] work for us on a permanent/indefinite basis. . . .

[O]ur department has recently received funding for a research grant . . . that extends through September of 2005. . . . [The petitioner] intends to employ [the beneficiary] as a research associate to work on this grant for as long as we are able to do so. . . .

In sum, we expect to continue to employ [the beneficiary] and therefore, he has every expectation of continued employment with the University.

On appeal, counsel argues:

The Service provides no justification as to why a series of renewable contracts cannot be considered permanent. Most employment contracts are written for a finite period of time. . . . It is by virtue of an employment contract that an employee has continuing job security. Therefore, by issuing a series of yearly renewable contracts on a continuous basis, we contend that an employee has an expectation of continued employment, which is tantamount to permanent employment under 8 C.F.R. Part 204.5(i)(3)(iii). The word "series" itself implies that the contracts will be issued continuously and indefinitely.

Counsel's argument fails for a variety of reasons. Counsel contends that employment on a contract basis is actually more secure than "at will" employment lacking such a contract. Counsel has not, however, established that annually renewed contracts are the norm at the petitioning university. The petitioning university presumably employs a number of tenured full professors, for instance; the record does not show that these tenured full professors are employed on annually renewed contracts. Prof. Fozzard, for instance, never states that he himself must sign annual contracts to continue his own employment at the petitioning university. The expressly stated one-year length of the beneficiary's employment term is not strong presumptive evidence that the position is actually permanent and of indefinite duration.

The petition was not accompanied by any documentation from any official with hiring authority to indicate that the beneficiary's position is permanent, tenured, or tenure-track. Instead, accompanying the petition was a binding letter which states the beneficiary's employment ends in March 2000. At no point does the job offer letter assert that the employment is in fact indefinite or permanent, or that the one-year duration of the contract is a mere technicality.

Also, the letter which expressly limits the beneficiary's employment to one year was issued on behalf of the "President or Provost," and specifically states that the university's "President . . . has approved [the beneficiary's] reappointment." It is not at all apparent that a professor, on appeal, has the authority to countermand or clarify this document on behalf of the president of the petitioning university. In an instance such as this, when offered conflicting statements from two different university officials, we must defer to the ranking university official. Prof. Fozzard has not established that he has the authority either to speak on behalf of the petitioner, or to guarantee the beneficiary permanent, tenured, or tenure-track employment. Without such evidence, Prof. Fozzard's desire to continue employing the beneficiary cannot carry the same weight as a letter signed on behalf of the president of the petitioning university.

Finally, Prof. Fozzard has stated that the petitioner "intends to employ [the beneficiary] as a research associate to work on this grant" which extends only until 2005. Prof. Fozzard does not state the justification for employing the beneficiary beyond that date, if the beneficiary's employment is tied to the grant.

Counsel cites a dictionary definition of "permanent": "continuing or enduring without fundamental or marked change; stable; long-lasting," and contends that an uninterrupted series of consecutive one-year appointments would meet this definition. However, a one-year appointment is not "long-lasting," and if the beneficiary's appointment is officially set to end on a given date, then a renewal extending past that date is arguably a fundamental and marked change in the terms of employment. Furthermore, an appointment which requires repeated renewals is not "stable" because, left alone, it would terminate after one year, rather than continuing indefinitely.

Changing the terms of the beneficiary's employment after the fact cannot render the petition approvable. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), and Matter of Katigbak, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Because the petitioner cannot, after the fact, alter the terms of employment, the petitioner must show that, as of the petition's filing date, it had offered the beneficiary a permanent, tenured, or tenure-track position. For the reasons outlined above, an after-the-fact letter from a professor cannot overcome an official, formal university communication which specifically limits the

duration of the beneficiary's employment and makes no assurances of continued employment. Similarly, counsel's arguments on appeal do not persuade us that an employment letter clearly limiting the beneficiary to a one-year appointment is strong evidence of permanent or indefinite employment. The short-term nature of the beneficiary's appointment, coupled with Prof. Fozzard's statement linking the beneficiary's employment to a specific project, suggest that the beneficiary's position is essentially that of a temporary postdoctoral researcher rather than a permanent member of the petitioning university's staff or faculty.¹

Furthermore, Prof. Fozzard's statement on appeal does not conform to the plain wording of 8 C.F.R. 204.5(i)(3)(iii), which requires the submission of "[a]n offer of employment . . . in the form of a letter from . . . [a] United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field." The record does not contain any job offer letter, offering the beneficiary a permanent position. Instead, the letter contains a job offer letter offering the beneficiary a one-year position; an assurance from counsel to the Service that the position is permanent; and an assurance from a professor to the Service that the petitioner intends to employ the beneficiary permanently. The offer contains no letter, from the petitioner directly to the beneficiary, directly and unambiguously offering the beneficiary a permanent research position. Without this evidence, the petitioner simply has not satisfied 8 C.F.R. 204.5(i)(3)(iii) and the petition cannot be approved.

The petitioner has not satisfactorily established that, as of the petition's filing date, it had extended to the petitioner an offer of permanent, indefinite, tenured, or tenure-track employment, as required by the plain language of both the statute and the regulations. Therefore, the petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

¹We note that, as of October 22, 2001, a search of the faculty and staff directory at the petitioner's web site states "no records found" with regard to the beneficiary's name. A search for Prof. Fozzard's name, made for comparison purposes, yields positive results.