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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

File:

[Redacted]

Office: TEXAS SERVICE CENTER

Date:

FEB 06 2003

IN RE: Petitioner:
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:

[Redacted]

PUBLIC COPY

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, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner, a biopharmaceutical company, seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(B), as an outstanding researcher. The director denied the petition based on the finding that the petitioner has not established that it is able to pay the beneficiary the proffered wage of \$50,000 per year, or that the beneficiary has earned international recognition as outstanding in his academic field.

The director's finding regarding the petitioner's ability to pay the beneficiary's wage was based on tax returns that show significant losses. Prior to the denial of the petition, however, the petitioner had submitted copies of the beneficiary's W-2 forms for 2000 and 2001. These forms establish that in 2001, the year the petition was filed, the petitioner in fact paid the beneficiary \$51,520.80, an amount slightly in excess of the proffered annual wage of \$50,000. Given this evidence that the petitioner has in fact paid the beneficiary the proffered wage, it is difficult now to conclude that the petitioner was not able to do so. Tax records also indicate several million dollars in ready cash. Because the petitioning entity is still at an early stage of its business, it continues to rely on venture capital rather than earnings, but there is no indication that its reserves will be exhausted in the near future. For the above reasons, we withdraw the director's finding that the petitioner has not established its ability to pay the beneficiary the proffered wage.

The remaining issue concerns the petitioner's failure to establish that the beneficiary has earned international recognition as an outstanding researcher, as required by 8 C.F.R. 204.5(i)(3)(i). Examination of the record does reveal deficiencies in this regard. For example, the available evidence suggests that the beneficiary's reputation as outstanding is largely limited to institutions in the state of Florida where the beneficiary has worked and/or studied. Evidence that the beneficiary's work has been disseminated internationally does not necessarily demonstrate that such work is generally regarded as outstanding. The director, however, did not discuss these deficiencies in the decision.

The director stated "[t]he beneficiary has only been out of school for 4 years – not really enough time to distinguish himself internationally." The regulations require only three years of experience, which can include student experience if that student experience is recognized as outstanding. While it would likely be rare for a researcher to earn international recognition as outstanding after only four years, to deny the petition on that basis is arbitrary and not grounded in any statute, regulation or case law. If the beneficiary has not had time to earn international recognition, then deficiencies will manifest themselves within the regulatory criteria at 8 C.F.R.

¹ Obviously, in the event that the petition is approved and the petitioner subsequently loses its ability to pay the beneficiary before the beneficiary becomes a lawful permanent resident, the Service may revisit this issue in the context of an application for an immigrant visa or application to adjust status.

204.5(i)(3)(i). The director's decision does not specify how the petitioner has failed to meet those regulatory criteria. The director merely announced the summary conclusion that the beneficiary does not qualify for the classification sought, while misleadingly suggesting that the length of the petitioner's prior employment is a material issue in this proceeding. While the record does appear to contain some impediments to the approval of the petition, the director's decision did not advise the petitioner of those impediments and thereby afford the petitioner the opportunity to overcome them.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for Examinations for review.