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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 09 2003

IN RE: Petitioner: [redacted]
Beneficiary:

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)

PUBLIC COPY

ON BEHALF OF PETITIONER:

[redacted]

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a university that 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 as a research scientist. The director determined that the petitioner had not established that it has offered the beneficiary a tenured or tenure-track position as the statute and regulations require.

Section 203(b)(1)(B)(iii)(II) of the Act states that an alien seeking classification as an outstanding researcher must seek to enter the United States for a "position with a university or institution of higher education to conduct research in the [academic] area." Regulations at 8 C.F.R. § 204.5(i)(3)(iii)(B) require "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 requirement that the position be permanent derives from statutory language requiring that the position be "comparable" to a tenured or tenure-track position as a professor.

The only issue raised in the director's decision is whether the position offered to the beneficiary qualifies as permanent. Accompanying the initial filing is a letter dated March 4, 2002, from Dr. [redacted] professor and head of the petitioner's Department of Biochemistry, Molecular Biology and Biophysics. Dr. [redacted] states "we wish to retain [the beneficiary's] services with an offer of permanent employment as a Research Associate." This letter is not, itself, a letter offering the beneficiary permanent employment. Rather, it is a letter to the Immigration and Naturalization Service (now the Bureau) indicating the petitioner's "wish" to make such an offer to the beneficiary.

On September 24, 2002, the director instructed the petitioner to "provide a copy of the beneficiary's contract or the formal offer of employment the University has submitted unto [sic] the alien." In response, the petitioner submits copies of various documents, most of which are letters from D[redacted]. Counsel quotes from 8 C.F.R. § 204.5(i)(3)(iii)(B), cited above, and states that the petitioner has complied with this regulation "by offering [the beneficiary] a permanent research position in his field of nuclear magnetic resonance and submitting letters in support of this offer." Counsel states that the director's request for "a contract or letter . . . goes beyond the regulations governing Outstanding Researcher petitions." Considering that the cited regulation expressly requires "a letter . . . offering the alien a permanent research position," it is not clear how the director "goes beyond the regulations" by requesting a letter offering the alien a permanent research position. A letter to the U.S. government, stating that the beneficiary has been offered a permanent position, is not a job offer. It is, rather, a claim about, and a description of, a job offer.

Counsel states that the petitioning university "does not enter into such contracts with its employees," but counsel does not elaborate as to what documentation the university maintains with regard to its permanent employees. The university's personnel records presumably distinguish between permanent and non-permanent employees, but counsel forecloses this area of

inquiry by simply declaring that the university is under no obligation to document the terms of the job offer it claims to have made.

Much of the documentation in the record consists of letters from Dr. [redacted] such as a letter dated June 25, 2002, in which Dr. [redacted] informs the director that the beneficiary "currently holds a permanent, full-time position" with the petitioning university. Counsel argues that the petitioning university has, in effect, endorsed Dr [redacted] statements because the petitioner's associate general counsel, Barbara Shiels, signed a Form G-28 authorizing counsel to represent the petitioner in this proceeding. It remains that Dr [redacted] the only university employee to sign any document describing the beneficiary's position as permanent, and the petitioner has not provided any documentation from its personnel office to establish that Dr. [redacted] is authorized, on behalf of the university, to extend permanent offers of employment.

In a new letter dated November 12, 2002, Dr. [redacted] states that "all research associate positions are renewed on a yearly basis," which indicates that the position expires automatically on a fixed date, with or without good cause for termination, unless the petitioning university takes active steps to extend the employment. Such employment differs from permanent employment, which continues unless and until the university takes active steps to terminate the employment. Dr [redacted] states "the University has provided a letter for [the beneficiary's] concurrently filed I-485 [adjustment application], confirming that it has extended its offer of a permanent full-time position." This letter, however, is also signed by Dr [redacted] and thus it amounts to repetition rather than corroboration.

The director denied the petition, acknowledging the above letters but stating "this evidence is insufficient to demonstrate that the petitioner's employment offer is of permanent duration. Specifically, counsel and the petitioner have failed to submit any evidence to demonstrate that Barbara Shiels and Dr [redacted] have hiring authority within the university system." The director also referred to the pertinent regulation at 8 C.F.R. § 204.5(i)(3)(iii)(B), which requires "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." A letter to the immigration authorities does not offer the alien anything because the alien is not the recipient of that letter. At most, such a letter can only describe the job offer made to the alien.

The director also observed that "Dr [redacted] November 12, 2002, letter states that the university's offer of employment to the beneficiary is an annually renewable, full-time position. This is not the same thing as a permanent employment offer. . . . A position that ends on a fixed date is by definition temporary rather than permanent regardless of the employer's desire to extend the term of the employment."

On appeal, the petitioner submits copies of previously submitted letters and new arguments from counsel. Counsel asserts that the petitioner has submitted "sufficient evidence" to establish a permanent job offer, but does not address the director's finding that at no time has the petitioner ever submitted a copy of a letter from the petitioner to the beneficiary containing an offer of employment. Instead, the record contains multiple letters from one professor stating that such an offer has been made. The petitioner already employed the beneficiary prior to the petition's filing

date, but the record contains no contemporaneous documentation from the time that the job offer was actually made.

Counsel states that the regulations do not require "evidence that the Head of the Department had hiring authority at the University." The regulations do, however, require a job offer letter, as discussed above. Because the petitioner is either unwilling or unable to produce such a letter, the petitioner has instead relied entirely on the assertions of Dr. [redacted] (the professor who signed the I-140 petition form). Because Dr [redacted] is the only employee of the petitioning university who has expressly endorsed this petition, his standing is of immediate and obvious relevance. If D[redacted] has authority to hire permanent employees, then it should be a simple matter to produce corroborating documentation from the petitioning university. If, on the other hand, Dr. [redacted] does not have the authority to hire permanent employees, then Dr. [redacted] cannot personally extend a qualifying offer of permanent employment.

The regulation at 8 C.F.R. § 103.2(b)(2)(i) states, in pertinent part:

> The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document . . . does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence . . . pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

In this instance, the primary evidence would be a letter from the petitioner to the beneficiary, offering the beneficiary permanent employment. When the director requested this primary evidence, counsel responded by claiming that the director has no authority to request it. Pursuant to the above regulation, the director was entirely justified in requesting secondary evidence in the form of proof that Dr. [redacted] is authorized to make binding offers of permanent employment on behalf of the university. Counsel's response has been, once again, to deny the director's regulatory authority to request evidence that is necessary to reach a finding of eligibility. Given the petitioner's repeated refusals to provide this primary and secondary evidence, we conclude that the primary and secondary evidence either does not exist, or else contains information that is inconsistent with claims made in support of the petition. Absent the requested primary and secondary evidence, the above-cited regulation requires a presumption of ineligibility. Furthermore, 8 C.F.R. § 103.2(b)(14) provides that "[f]ailure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition."

With regard to the director's finding that the beneficiary's employment is annually renewable, rather than permanent or indefinite, counsel states "it is not the position that is annually renewable, but the beneficiary's performance which is reviewed yearly to determine if there is

good cause for termination." This explanation is not consistent with Dr[redacted]assertion that "all research associate positions are renewed on a yearly basis." The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Another uncorroborated claim by counsel is the assertion that numerous identical petitions have been approved on behalf of other aliens employed by the petitioning university. The petitioner has not submitted the documentation relating to these other petitions, or even identified the other aliens. Furthermore, the AAO does not normally receive records of proceeding for approved petitions. Therefore, the AAO has no means to make a meaningful comparison between this petition and the other approved petitions. It remains that the petition must be amenable to approval on its own merits, relying on the evidence in its own record of proceeding. The AAO is under no obligation to research the identities of the other beneficiaries, obtain their records of proceeding, or compare them point by point with the record of proceeding now under discussion.

Counsel observes "[t]here was no question that the beneficiary met the standards of an outstanding researcher." It remains that the statute and regulations establish several conditions that must be met before a petition for an outstanding researcher can be approved. The petitioner's failure to meet one of these conditions is not in any way mitigated or excused by the petitioner's having met other conditions. In the notice of decision, the director stated "the record does indeed demonstrate the beneficiary to be an outstanding researcher," but the director then went on to discuss other grounds for denial. Because the beneficiary's reputation in the field is not among the stated grounds for denial, counsel's reference to that finding is irrelevant on appeal.

We note that the record of proceeding, as it now stands, contains only those documents which are directly relevant to the issue of the job offer, because that was the only issue disputed in the director's decision. Because the record of proceeding forwarded to the AAO does not include the evidence relating to the claim that the beneficiary is an outstanding researcher, the AAO is in no position either to endorse or to withdraw the director's finding regarding that claim. We stress that every exhibit that counsel or Dr[redacted]has identified as pertinent to the permanence of the job offer is contained in the record now before the AAO.

The petitioner has not met its statutory and regulatory obligation to submit evidence that it has offered the beneficiary a permanent position, as opposed to a renewable position that the petitioner intends to renew (but is under no obligation to renew). Therefore, the petitioner has not established a qualifying job offer pursuant to section 203(b)(1)(B)(iii)(II) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.