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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 9 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)

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 public higher education and research institution, which seeks to employ the beneficiary as a postdoctoral research fellow. The petitioner 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 director determined that the petitioner had not established that it has offered the beneficiary a permanent research position, or that the beneficiary has earned international recognition as an outstanding researcher.

The first issue raised in the director's decision is whether the petitioner has adequately documented an offer of permanent employment. Section 203(b)(1)(B)(iii)(II) of the Act, 8 U.S.C. § 1153(b)(1)(B)(iii)(II), states that an alien seeking classification as an outstanding researcher must seek to enter the United States "for a comparable [to tenured or tenure-track] position within a university or institution of higher education." 8 C.F.R. § 204.5(i)(3)(iii) requires the petitioner to submit "[a]n offer of employment from a prospective United States employer." The regulation specifies that the offer "shall be in the form of a letter from . . . [a] United States university or institution of higher learning." For research positions, 8 C.F.R. § 204.5(i)(3)(iii)(B) indicates that the job offer letter must offer "the alien a permanent research position in the alien's academic field." 8 C.F.R. § 204.5(i)(2) defines "permanent" as "for a term of unlimited or indefinite duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination."

On the I-140 petition form, the petitioner indicates that the beneficiary's postdoctoral research fellow position is permanent. In a letter accompanying the initial filing, Professor Charles R. Middaugh, who states he has "full hiring authority for the position in question," states that the postdoctoral research position offered to the beneficiary "has no fixed termination date and is therefore considered a permanent position, pending continued funding and performance."

The director instructed the petitioner to "submit a copy of your offer of employment to the beneficiary, which offers him a permanent research position in his academic field at your institution." In response, Prof. Middaugh states "I **again** verify that [the beneficiary's] position is permanent. . . . While we have not entered into a written contract of employment with [the beneficiary], his employment is considered by both the University and [the petitioner] to be employment-at-will – that is, it may continue so long as his performance is satisfactory and subject to the usual business exigencies" (emphasis in original). *Black's Law Dictionary* 545 (7th ed. 1999) defines "employment at will" as "[e]mployment that is usu. undertaken without a contract and that may be terminated at any time, by either the employer or the employee, without cause." Thus, the definition of "employment at will," which allows termination "without cause," is not consistent with the regulatory definition of "permanent," which requires "good cause for termination." Prof. Middaugh's assurance that he has no intention of exercising his right to terminate the employment without cause does not convert employment at will to *de facto* permanent employment.

In denying the petition, the director noted that the petitioner "reaffirmed the conditions of the proposed employment" but found that the petitioner has failed to submit documentation of its job offer to the petitioner. On appeal, the petitioner submits another letter from Prof. Middaugh, who again asserts that the beneficiary's position "is considered by both [the petitioner] and [the beneficiary] to be employment-at-will." Counsel maintains that the petitioner has "submitted **no less than <u>three letters</u>** which plainly and undeniably offer [the beneficiary] a permanent research position as a Postdoctoral Research Associate." All three of these letters are addressed to the director of the Nebraska Service Center and as such they do not "offer" anything to the beneficiary. All of the letters were written after the petitioner had already employed the beneficiary, and thus they describe an existing arrangement rather than set forth an offer of employment. It is not clear what formal documentation, if any, exists to show that the petitioning university (and not just Prof. Middaugh as an individual) considers the beneficiary's position to be permanent, rather than temporary, short-term professional training (which is the usual understanding of a postdoctoral research position). Employment at will (Prof. Middaugh's own description of the employment arrangement) is, by definition, distinct from permanent employment.

Counsel states "[w]e are at a loss as to how the University can make [the beneficiary's] permanent position any more clear to the Service." The director specifically requested a copy of the written offer of employment by which the University formally made the position available to the beneficiary. The petitioner has, to date, not submitted a copy of this job offer, nor has the petitioner even specifically stated whether any written offer exists or provided any other formal documentation from the university that identifies the beneficiary as a permanent employee, or otherwise specifies the terms of that employment. The only description available of the terms of the beneficiary's employment is in a series of statements by a single individual, who states that the beneficiary is employed at will (which is not the same as permanent employment).

The remaining issue in contention is whether the petitioner has established that the beneficiary is internationally recognized as outstanding in his field. Service regulations at 8 C.F.R. § 204.5(i)(3) state that a petition for an outstanding professor or researcher must be accompanied by evidence that meets at least two of six stated criteria. The petitioner contends that the beneficiary has met four of the six criteria, as discussed below.

> *Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members.*

Prof. Middaugh states that the beneficiary "is a member of the American Chemical Society (ACS). . . . **<u>Among other outstanding achievements, admission requirements include nomination by two active ACS members</u>**." Prof. Middaugh does not explain how the passive act of receiving two nominations amounts to an outstanding achievement in its own right. Prof. Middaugh adds "[a]s a result of his outstanding research achievements, [the beneficiary] has also been accepted to the American Association of Pharmaceutical Sciences (AAPS). . . . AAPS and its members are 'leaders in providing health education and counsel to the public, peers, employers, governments, and health care regulators of the world.'"

The petitioner's initial submission did not include documentation showing that either ACS or AAPS requires outstanding achievements of its members. AAPS materials in the initial submission indicate that AAPS has "over 10,000 . . . members." The size of the organization does not readily suggest stringent membership requirements that would exclude all but a few pharmaceutical scientists.

The director specifically instructed the petitioner to submit evidence of the membership criteria for ACS and AAPS. In response to this request, the petitioner has acknowledged the director's request but only partially complied with it. The petitioner submits no evidence to show what criteria one must meet to become a member of AAPS. Instead, Prof. Middaugh repeats general assertions about the goals and reputation of AAPS. If the petitioner is unable to demonstrate that the AAPS requires outstanding achievements of its members, then the petitioner had no basis to make such a claim in the first place.[1]

The petitioner has submitted documentation of ACS' membership requirements. A printout from https://center.acs.org/applications/acsmembership//join.cfm states "Membership is for Everyone" and that, to qualify for full membership, "individuals must have a bachelor's degree in a chemical science from an ACS approved program" or meet various other combinations of education and experience. Neither education nor experience is an outstanding achievement in the field. The printout submitted by the petitioner indicates that ACS is "the world's largest scientific society, an organization that's more than 163,000 members strong." It is not clear that an association can become "the world's largest" while maintaining strict, rather than open, membership requirements. An ACS application form in the record contains spaces for two nominations, as noted by the petitioner, but the form also allows applicants to indicate that they "want ACS to assist [them] in finding nominator(s)." There is no indication that the nomination process is a highly exclusive one.

> *Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation.*

Prof. Middaugh asserts that the beneficiary "has had his work cited in numerous professional international publications." Citation of the beneficiary's work, however, does not establish that the articles containing the citations are "about" the beneficiary or his work. These citations are better understood as a gauge of the field's reaction to the beneficiary's own writings, covered by a separate criterion further below.

> *Evidence of the alien's original scientific or scholarly research contributions to the academic field.*

Prof. Middaugh states that the beneficiary "is a recognized world authority in protein stabilization by di-ions as well as MicroITIES studies of anion-receptor interactions." Prof. Middaugh cites several

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[1] The membership application for AAPS, available online at https://www.aapspharmaceutica.com/membership/Membership_Application.asp, indicates that membership is available to graduate and even undergraduate students. Such individuals are still at early stages in their professional training, rather than fully qualified scientists who are in a position to accomplish outstanding achievements.

witness letters in the record. Professor Ronald T. Borchardt of the petitioning university states that "many major pharmaceutical/biotechnology companies . . . have become interested in [the beneficiary's] research results." Prof. Borchardt identifies eight of these companies, but the record contains nothing from the companies themselves to clarify their level of interest in the beneficiary's work.

Most of the witnesses writing on the beneficiary's behalf are on the faculty of the petitioning institution. These letters cannot establish, first hand, that the beneficiary's contributions have earned him international recognition as an outstanding researcher; at best, they show that the faculty of the petitioning institution believes such to be the case. Another witness, Kansas State Senator Bob Lyon, is a structural engineer and a doctoral student at the petitioning institution. Sen. Lyon claims no particular expertise in the field of pharmaceutical chemistry, which is not closely allied with structural engineering.

Only two of the witnesses represented in the initial filing are from outside of the petitioning university. One of those, Professor Hong-Yuan Chen of Nanjing University, has "known [the beneficiary] since he was admitted to the Chemistry Department at the undergraduate level." Prof. Chen states that the beneficiary excelled as an undergraduate student, but states "I am not clear about his achievements after he left Nanjing University."

The remaining witness is Professor Hubert Girault of the Swiss Federal Institute of Technology, Lausanne. Prof. Girault states "I had the pleasure to follow the work of [the beneficiary] due to my long collaboration with Prof. George Wilson," who was one of the beneficiary's instructors at the petitioning university. Prof. Girault, like Prof. Chen, offers praise for the beneficiary's abilities but says nothing about the beneficiary's specific accomplishments and contributions.

The above letters do not suggest the beneficiary's international recognition as an outstanding researcher, nor do they readily indicate that the beneficiary's contributions are well known outside of the petitioning university.

> *Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.*

Prof. Middaugh states that the beneficiary "has published two articles in scholarly peer-reviewed, international journals." Prof. Middaugh observes the importance of citation as a measure of the impact of scientific publications, and cites citation indices to show the citation frequency of the petitioner's articles. The petitioner also submits copies of four articles that contain citations of the beneficiary's work. Of the four citations, three are self-citations by individuals who had collaborated with the beneficiary on the cited articles. While self-citation is a common and accepted practice, it is no indication that the material cited has influenced a wider group of researchers. The initial submission thus contains one independent citation of an article co-authored by the beneficiary.

The director requested additional evidence to support various claims, such as the membership requirements of ACS and AAPS (discussed above), the heavy citation of the beneficiary's articles, and

industry interest in the beneficiary's work. In response, Prof. Middaugh asserts "evidence that we went to great lengths to gather was either ignored or misinterpreted."

With regard to the claim of major pharmaceutical company interest, Prof. Middaugh asserts that the beneficiary's "critical work is funded by no less than four major pharmaceutical/biotechnology companies," and the petitioner submits grant documentation showing this funding. Prof. Middaugh is silent regarding the other four pharmaceutical companies previously identified as having shown special interest in the beneficiary's work. The grant documents demonstrate the source of the funding for the projects on which the beneficiary is working, but they do not by themselves show that the projects are seen as standing out from other grant-funded projects in the same academic field.

Regarding the citation of the beneficiary's work, Prof. Middaugh states "we have provided you with proof of no less than seventeen (17) journal articles which cited [the beneficiary's] work." The petitioner submits documentation of these citations, showing nine citations of one article and eight of another, including the previously mentioned self-citations. Some of these citations appeared after the petition's filing date. The petitioner offers no comparative evidence to show that this level of citation is a relatively rare feat, indicative on its face of international recognition as an outstanding researcher.

In denying the petition, the director stated that the petitioner had satisfied only "the fifth criterion," i.e. 8 C.F.R. § 204.5(i)(3)(i)(E), pertaining to original research contributions. The director also again asserted that the record lacked corroboration for several claims that would appear to be readily amenable to documentary verification. The director concluded that the record, as a whole, does not demonstrate that the beneficiary has earned international recognition as an outstanding researcher.

On appeal, counsel asserts that the director ignored or mischaracterized crucial evidence, and that "the unmerited bias" in the director's decision "seems to imply that the decision in this case was a foregone conclusion from the very start." Counsel asserts that the beneficiary's work has attracted the praise of "**world-renowned experts** in the field." Leaving aside the lack of independent documentation of worldwide renown, it remains that most of these experts are on the faculty of the petitioning university, and those who are not on that faculty offer only very general letters on the beneficiary's behalf.

With regard to the citations of the beneficiary's work, counsel asserts that the citing authors "would not have cited [the beneficiary's] work if he had not made what they regarded as significant research achievements contributing to the body of knowledge in the field." Without statements from the citing authors, counsel has no visible basis for speculation as to the opinions of those authors. The citations demonstrate that the authors found the beneficiary's work to be of use in their own research. The petitioner has not shown that it is a hallmark of international recognition as outstanding to publish two articles, each cited less than ten times including self-citations.

Counsel quotes 8 C.F.R. § 204.5(i)(3)(i), relating to published material about the alien, and observes that this regulation does not specifically exclude citations. Therefore, counsel argues, the citations in the record constitute published material about the alien, and the director's determination to the contrary is in violation of the Administrative Procedures Act. This argument fails because a footnoted

bibliographic citation of the petitioner's work does not cause the article containing the citation to be published material "about the alien" as the regulation requires. By counsel's logic, the beneficiary himself has written published material about E. Bunnenberg, L. Echegoyen, and A.A. Stewart, all of whom are among the hundreds of scientists named in the footnotes of the beneficiary's own published articles. A citation is a passing reference to a specific research finding; it is not published material about the individuals responsible for that finding.

Counsel quite correctly takes exception to a lengthy analysis in the decision, regarding the number of citations contained within each article. The director appears to have given undue weight to this consideration. We observe, nevertheless, that the record demonstrates that scientific articles commonly contain several dozen citations, each one citing an article with multiple co-authors. Because most scholarly articles cite dozens if not hundreds of other researchers, clearly the very act of citation is not automatically a prestigious form of recognition. More important (as the petitioner has indeed stipulated) is the frequency with which a given author's work is cited by others.

Counsel repeats Prof. Middaugh's earlier assertion that the beneficiary is a member of associations that require outstanding achievements of their members. Like Prof. Middaugh, counsel specifically mentions the beneficiary's membership in AAPS, and rather than offer any information at all about AAPS' membership requirements, counsel states "AAPS is dedicated to serve the pharmaceutical sciences, promote the economic vitality of the pharmaceutical sciences and scientists, and represent scientific interests within academia, industry and the government." The mission of AAPS is irrelevant to its membership requirements. Despite having repeatedly stressed the beneficiary's membership in AAPS, neither counsel nor the petitioner has ever provided any documentary evidence that AAPS requires outstanding achievements of its members as both counsel and the petitioner have claimed. This omission is especially significant for two reasons: first, the director specifically requested evidence about membership requirements, and was answered only with the AAPS mission statement; and second, continued reliance on the beneficiary's AAPS membership, without supporting evidence, appears to represent the very mischaracterization of evidence that counsel condemns on appeal.

Counsel contends that the director failed to evaluate the evidence of record. When viewed as a whole, the record presents a picture of the beneficiary as a successful researcher at a comparatively early stage of a promising career. The faculty of the petitioning university has high praise for the beneficiary's work, but such praise from one university is not international recognition, regardless of the individual reputations of the faculty members. The petitioner has employed the beneficiary not as a research professor, but as a postdoctoral research fellow earning $26,000 per year, which is less than a quarter of the income commanded by some full professors. Postdoctoral positions are generally viewed not as career positions, but as advanced training which serves as a stepping stone leading eventually to permanent placement at a university or other research institution.

We note here that the Association of American Universities (of which the petitioner is a member) has defined a postdoctoral appointment as "temporary" and "preparatory for a full-time academic and/or research career," rather than a permanent career position in its own right. A survey conducted by that association found that, in many scientific fields, "a postdoctoral appointment has become the *de facto*

terminal academic credential."[2] Prof. Middaugh himself, on his *curriculum vitae*, indicates that his own status as a postdoctoral research fellow lasted less than two years.

The record as a whole is not inconsistent with a promising career, but the record does not credibly show that such promise has yet resulted in international recognition as an outstanding researcher. Counsel has accused the director of relying upon "unfairly applied (and totally unreachable) standards." One alien's inability to meet a given set of standards does not prove those standards to be "totally unreachable" by more highly qualified aliens. While the director's reasoning in the denial decision is not entirely flawless, it contains enough soundly reasoned arguments to support and justify the outcome of that decision.

The petitioner has not met its statutory and regulatory obligation to submit evidence that it has offered the beneficiary permanent employment (as opposed to employment at will, which allows for termination without cause). 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. Furthermore, the petitioner has not satisfactorily established that the beneficiary is internationally recognized as outstanding pursuant to section 203(b)(1)(B)(i) of the Act.

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.

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[2] Source: the Association of American Universities' Committee on Postdoctoral Education, *Report and Recommendations* (March 31, 1998). This same report indicates that a postdoctoral researcher "has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." This report reinforces AAO's position that publication of scholarly articles is not automatically evidence of international recognition; we must consider the research community's reaction to those articles.