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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

APR 0 ? 2004

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

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 of the Administrative Appeals Office 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.

for Marie Johnson

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 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 in the United States as a research assistant professor. The director determined that the petitioner had not established that it had offered the beneficiary a qualifying, permanent position.

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

> (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 --
> >
> > > (i) the alien is recognized internationally as outstanding in a specific academic area,
> > >
> > > (ii) the alien has at least 3 years of experience in teaching or research in the academic area, and
> > >
> > > (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.

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

> (i) Evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition . . . ;
>
> (ii) Evidence that the alien has at least three years of experience in teaching and/or research in the academic field . . . ; and
>
> (iii) 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. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

Pursuant to regulations at 8 C.F.R. § 204.5(i)(2), "permanent," in reference to a research position, means 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.

In an introductory letter accompanying the initial submission, counsel states "[t]he position of Postdoctoral Researcher is a permanent position," although "postdoctoral researcher" is not the job title specified by the petitioner on the I-140 petition form itself. The petitioner promoted the beneficiary from postdoctoral fellow to research assistant professor in September 2002, a few months before the December 2002 filing of the petition. The initial submission also includes letters from faculty members of the petitioning university, but these letters are addressed to immigration authorities rather than to the beneficiary, and they do not discuss the terms of the job offer.

The regulation at 8 C.F.R. § 204.5(i)(3)(iii)(B) requires that evidence of a job offer must be 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. A letter to immigration authorities, describing the position, is not a letter offering the alien the position. The documentation submitted with the initial position does not include any actual job offer letter, nor any other documentation signed by both the beneficiary and an authorized official of the petitioning university, specifying the terms of employment and officially establishing the employer/employee relationship.

On March 12, 2003, the director instructed the petitioner to submit "evidence that the university's hiring officials and human resources department consider the beneficiary's employment to be permanent rather than a typical, temporary postdoctoral position, a renewable annual contract or other non-permanent and therefore non-qualifying type of employment."

In response, the petitioner has submitted a letter, dated April 3, 2003, and jointly signed by Dr. Cheryl M. Heesch and Dr. Edward H. Blaine, both on the faculty of the petitioning university. The letter expresses the petitioner's "expectation that [the beneficiary] will continue her important research efforts . . . for the foreseeable future." The letter also states that the petitioner "intends to employ [the beneficiary] indefinitely unless . . . there is good cause for termination in the future." This is not a letter from the employer, offering the beneficiary a permanent research position, as required by Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 204.5(i)(3)(iii)(B). The letter describes the offer after the fact, and it is addressed not to the beneficiary, but to immigration authorities.

The petitioner has also submitted a letter from Noel Ann English, the petitioner's senior legal research associate, who states:

> This institution does not have a human resource office for faculty, so it falls to me as the person who currently oversees faculty hiring to respond to your inquiry. . . .
>
> [The beneficiary] is currently employed . . . in the position of Research Assistant Professor. This is a non-tenurable position. Tenured faculty, here as elsewhere, have continuous appointments; they are the only employees at the University who have what we might consider a "permanent" position. That being said, I can assure you that, while [the beneficiary] does not hold a continuous appointment, nevertheless she is not in a temporary position. . . .
>
> She has a renewable appointment with no defined ending date (as opposed to temporary employees whose appointments are time-limited). It is reasonable for her to have a legitimate expectation of reappointment based on current university contract rules.

The director denied the petition, stating that an annually renewable contract does not secure permanent employment. On appeal, counsel asserts:

> [CIS] is equating "permanent" with "perpetual" employment instead of the more liberal – and functional – definition provided in the Regulations. Even when funded on renewable grants, University-level research positions can be held to hold a reasonable expectation of future employment. Indeed, even many tenure track positions are subject to annual contract, yet they are considered "permanent" under the regulatory definition.

The regulations distinguish between tenure-track teaching positions and permanent research positions, and therefore the pertinent regulations do not equate the two terms. Counsel cites other regulations which offer various definitions of "permanent," such as 8 C.F.R. § 214.2(h)(6)(B) and 20 C.F.R. § 656.22(c)(2). These regulations do not pertain to the classification sought in this proceeding, and the petitioner does not have discretion to locate a more favorable definition of "permanent" in lieu of the definition set forth at 8 C.F.R. § 204.5(i)(2).

A new letter from Dr. Heesch, Dr. Blaine, and Dr. James S. Coleman, the petitioner's vice provost for Research, refers to "the attached . . . [p]olicy statement that is available on the [university's] website." This policy statement indicates that the university "defines a 'permanent' position, for the purposes of this policy, in the case where there is a reasonable expectation that funding is available for at least three years." Here again, the petitioner has sought to introduce its own definition of "permanent." The policy statement is marked "last modified: June 12, 2003," six weeks before the appeal was filed. The policy statement does not indicate that annual contract renewals are automatic, requiring no action on the part of the university.

Beyond the above, the petitioner's definition of "permanent" as "a reasonable expectation that funding is available for at least three years" raises the question of whether the position ceases to be "permanent" as the end of the funding period approaches. For instance, a "permanent" position, funded through June 30, 2008, would appear to cease to be "permanent" in July 2005 because it is no longer funded for at least three years. This illustrates the difficulty of introducing an operational definition of "permanent" based on arbitrary factors outside the regulations.

The petitioner has submitted nothing to show that the annual contract renewal is automatic, requiring no action on the part of the university administration, or that the university must show cause for termination in order to allow an annual contract to lapse without renewal. Therefore, the available evidence indicates that

the petitioner *could* terminate the beneficiary's employment without cause, simply by failing to renew the annual contract. There is no formal agreement making the position permanent or indefinite, nor (according to university officials) is there an apparatus in place for entering into such an agreement. The expectation of continued employment required by the regulation must derive from the nature of the employment agreement, rather than on the employer's informal assurance that it intends to keep renewing the beneficiary's contract.

Previously, Noel Ann English, "the person who currently oversees faculty hiring," had specifically stated that the beneficiary's position is not "what we might consider a 'permanent' position." The petitioner's subsequent revision of what it means by "permanent" does not change the fundamental basis for the director's finding.

Pursuant to the above discussion, the director's initial finding was sufficient to warrant denial of the petition, and the available evidence supports that decision. Review of the record, however, reveals another issue which merits discussion here. Because we are upholding the director's decision, discussion of this additional issue does not alter the outcome of our appellate decision.

The director, in the notice of decision, did not address the issue of whether the beneficiary qualifies for classification as an outstanding researcher.

CIS regulations at 8 C.F.R. § 204.5(i)(3)(i) state that a petition for an outstanding professor or researcher must be accompanied by evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition. Such evidence shall consist of at least two of the following:

> (A) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;
>
> (B) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;
>
> (C) 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;
>
> (D) Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;
>
> (E) Evidence of the alien's original scientific or scholarly research contributions to the academic field; or
>
> (F) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

The petitioner's "index of exhibits," accompanying the initial submission, refers to the beneficiary's publications and memberships, as well as six witness letters.

The beneficiary is a member of the International Society for Heart Research, a "student member" of the Shock Society, and "an active member in good standing" of the International Endotoxin Society. The record contains no evidence to show that any of these associations require outstanding achievements of their

members. Therefore, these memberships cannot satisfy 8 C.F.R. § 204.5(i)(3)(i)(B). We note that the membership from the Shock Society states "In Recognition and Certification of Being Elected Student Member / 2001," although the beneficiary completed her doctorate five years earlier, in 1996.

The petitioner submits copies abstracts of several conference presentations. There is no evidence that the beneficiary has written articles published in international journals, or that her presentations have earned her international recognition as an outstanding researcher. Such recognition is not an inevitable or automatic result of publication or conference presentations.

The six witness letters submitted with the petition are all from individuals named as references on the beneficiary's *curriculum vitae*. Two of the witnesses are on the faculty of the petitioning university, and three are on the faculty of the A.A. Bogomoletz Institute of Physiology in Kiev, where the beneficiary earned her doctorate during the 1990s. The remaining witness is an official of the Ludwig Boltzmann Institute for Experimental and Clinical Traumatology, where the beneficiary had trained as a postdoctoral researcher in 2000-2001. Because the petitioner has worked and studied at those institutions, it is not a sign of international recognition that the faculties there are familiar with the beneficiary's work, and the assertions of these witnesses cannot show first-hand that the beneficiary's work is widely recognized outside of the institutions where she has worked and studied.

The evidence submitted with the petition shows that the beneficiary has been an active and productive researcher in her field, but it does not demonstrate that she has earned international recognition as an outstanding researcher. Thus, beyond the director's finding that the position offered does not appear to be permanent, we also find that the petitioner has not established that the beneficiary qualifies for the classification sought. The apparent lack of international recognition is also consistent with the petitioner's offer of what appears to be a relatively entry-level position, rather than the high-ranking and highly paid faculty position that one would reasonably expect for a researcher who is not merely well-trained, but also internationally recognized as being outstanding in her field.

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.