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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

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[redacted]

FEB 20 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 Mari 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, a hospital and medical research facility, seeks to employ the beneficiary in the United States as a research fellow. 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. The lack of a fixed ending date is necessary, but not sufficient, to meet the above definition.

In a letter addressed to the director, rather than to the beneficiary the petitioner's vice president for Risk Management/Corporate Compliance, states that the petitioner "has offered [the beneficiary] a full-time, regular position as a Research Fellow." The letter refers to the position as a "continuing, regular appointment" but does not indicate that the job offered is a permanent one.

Because the initially submitted letter does not conform to CIS requirements, the director instructed the petitioner to "[s]ubmit evidence that the position offered the alien is a . . . permanent research position." In response, the petitioner submits a copy of the initial job offer letter sent to the beneficiary in February 1999. In this letter research instructor, offers the beneficiary "a position of Postdoctoral Fellow in my laboratory. . . . This position is guaranteed for two years." This letter plainly offers the beneficiary a temporary position.

The petitioner also submits a newly-written letter from the petitioner's vice president and general counsel. states "[t]his letter confirms that the position offered is a permanent research position and not a temporary or part-time position." asserts that the petitioner had originally offered the beneficiary a temporary postdoctoral position, but that the beneficiary "was later promoted to the position of Research Fellow." Ms. Stautberg asserts that "[t]his position does not require written contracts."

The director denied the petition, noting assertion that the beneficiary's "position is guaranteed for two years." The director, noting that the petitioner must submit an actual job offer letter rather than simply a description of the terms of employment, concluded that "the original job offer is for a temporary, albeit renewable job, and assurances from . [are] not in the form of a job offer to the beneficiary."

On appeal, counsel states that the original job offer letter "offered [the beneficiary] a temporary position for two years . . . **as that status must be temporary** by BCIS regulation. [The beneficiary] subsequently assumed a permanent research position without a defined ending date." Counsel does not identify the "BCIS regulation" that required the original job offer to be temporary. Counsel claims that the petitioner has since promoted the beneficiary to a permanent position, despite the fact that there has, so far, been no change in the beneficiary's nonimmigrant status.

The petitioner's submission on appeal includes a new letter, addressed to the beneficiary, from the petitioner's vice president of Human Resources. states that the petitioner "hereby confirms its prior oral offer to you of a full-time research position. . . . This oral offer was subsequent to the offer given to you . . . by letter dated February 1999. This prior oral offer was for a permanent position as defined by the BCIS regulations because it had no defined termination date." provides no date for the claimed oral offer of permanent employment.[1]

in a new letter, repeats the assertion that "research fellow positions are permanent research position[s] as defined by the BCIS regulations because these positions do not have a defined termination date." Lack of a "defined termination date" is not sufficient to establish that a position qualifies as permanent under CIS regulations. Those regulations, as cited above, also indicate that the alien must have an expectation of continued employment unless there is good cause for termination. The job offer letters do not address this issue. The position, as described, could represent employment at will, defined 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." *Black's Law Dictionary* at 545 (7th ed. 1999). Such employment has no fixed termination date, but there is no expectation that the employment will continue unless terminated for good cause. The petitioner has not shown that its modified job offer fully conforms to the regulatory definition of "permanent."

Furthermore, 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 CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998), and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. Pursuant to the above case law, the petitioner must establish that it had offered the beneficiary a permanent position no later than the petition's filing date. Several officials of the petitioning entity have offered letters, but none of them specify when the petitioner extended an offer of permanent employment to the beneficiary. Thus, the record contains no evidence that the petitioner had offered the beneficiary permanent employment prior to the petition's filing date. It is not readily apparent that the petitioner would convert a temporary postdoctoral appointment to a permanent position without executing any paperwork in the process, yet the record contains no contemporaneous documentation to establish the beneficiary's claimed change of employment status.

The evidence indicates that the petitioner offered the beneficiary a temporary postdoctoral position, with a fixed ending date, prior to the filing of the petition. The assertion that the petitioner later promoted the beneficiary to a permanent position is vague and unsupported by contemporaneous documentation, and the petitioner's definition of "permanent" is incomplete when compared to the controlling regulatory definition.

The above finding is sufficient to warrant dismissal of the appeal. Review of the record, however, reveals another issue pertinent to the question of eligibility. As discussed below, we find that the record does not establish that the beneficiary qualifies as an outstanding researcher as the statute and regulations contemplate that classification.

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[1] Information in the record indicates that the American Association of Immunologists considered the beneficiary's position to be "postdoctoral" as late as June 2002.

CIS regulations at 8 C.F.R. § 204.5(i)(3)(i) require evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition. The petitioner must submit evidence to fulfill at least two of six listed criteria. The petitioner claims to have fulfilled the following criteria:

> *Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field.*

Counsel states that the beneficiary "was awarded with a graduate fellowship by the Indian Institute of Science (IISc), Bangalore, India, to support his post Master's Degree research that led to a Ph.D. degree." The petitioner has submitted background evidence about IISc, but there is no evidence that the beneficiary received the fellowship. The only supporting documentation cited by counsel is the beneficiary's own resume, which amounts to a claim rather than evidence to substantiate that claim.

Apart from the lack of evidence, the petitioner has not shown that a graduate fellowship from IISc is internationally recognized as a major prize or award, rather than merit-based financial assistance similar to that offered at countless other degree-granting institutions. General information concerning IISc's overall reputation does not establish the status of its student fellowships.

Counsel adds that the beneficiary "also received qualification in the Graduate Aptitude Test in Engineering (GATE)-93. GATE is an all-India examination . . . to identify meritorious and highly motivated candidates for admission to Post Graduate Programs in the fields of Engineering, Technology, Architecture and Pharmacy at the national level and to serve as benchmark for normalization of the Undergraduate Engineering Education in India." Background materials in the record state "[a]dmission to Postgraduate Courses, with MHRD Scholarship/Assistantship, in Engineering/ Technology/Architecture/Pharmacy at Colleges/Institutes will be open only to those who qualify in GATE. Some Colleges/Institutes specify GATE as mandatory qualification even for admission of self-financing students." Elsewhere, materials in the record indicate "nearly 60,000 students write GATE every year." From the descriptions in the record, GATE appears to be roughly analogous to the GRE, LSAT, MCAT, and other standardized tests administered to students who seek admission to graduate programs. Taking a widely administered, near-mandatory admissions test is not a major prize or award, regardless of one's score. The beneficiary's percentile score on the GATE in Chemistry was 89.59, indicating that the beneficiary ranked at roughly #186 out of the 1,787 examinees from whom that percentile was derived.

The record contains no evidence that the beneficiary has received anything that qualifies as a major prize or award.

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

Counsel cites the beneficiary's membership in the American Society for Biochemistry and Molecular Biology (ASBMB); the American Society for Cell Biology (ACSB); the American Association of Immunologists (AAI); the Federation of American Societies for Experimental Biology (FASEB); and the American Association for the Advancement of Science (AAAS).

According to materials in the record, "[r]egular membership [in ASBMB] is available to any individual who holds a doctorate [and] has published since the receipt of a doctoral degree at least one paper in a refereed journal devoted to biochemistry and molecular biology. The applicant must also be sponsored by one Regular member of the Society." The petitioner has not shown that publishing one paper after receiving a doctorate is an outstanding achievement in the beneficiary's academic field.

Other materials in the record state "[m]embership in the ASCB is open to all scientists, who have education or research experience in cell biology or an allied field. Full members should have a Ph.D. or other professional degree . . . or have equivalent experience in scientific research. Successful application requires sponsorship by two Society members." Receiving a doctorate is not an outstanding achievement, but rather the expected outcome of participation in a doctoral program. Sponsorship by other members is passive on the beneficiary's part, rather than an achievement.

Regarding the beneficiary's AAAS membership, AAAS documents in the record state that membership is "[o]pen to all." No one aware of this information could possibly claim in good faith that AAAS requires outstanding achievements of its members, yet counsel lists AAAS among "scientific organizations which require significant accomplishments." The petitioner's own submission proves counsel's assertion to be false, which inevitably colors the overall credibility of counsel's interpretation and commentary regarding the evidence of record.

FASEB does not have individual members. Rather, its members are various professional societies, which in turn admit individual members. In the beneficiary's case, ASBMB is a member of FASEB. Because ASBMB has been shown not to require outstanding achievements of its members, the beneficiary's membership in a FASEB member society is non-qualifying.

A letter from an AAI official indicates that the beneficiary "was accepted as a Trainee member of . . . AAI on June 6, 2002. . . .To be a Trainee member, the applicant . . . may be a post-doctoral trainee in an immunology [sic] or related field. A signature of an AAI sponsor and a program official/department head is required." Being a postdoctoral trainee is not an outstanding achievement.

> *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.*

Counsel states that the record contains "scholarly publications which discuss the [beneficiary's] research and findings." The record shows that one of the beneficiary's published articles was cited five times by other researchers. Each citation was one of dozens in a given article. The articles contain passing references to the beneficiary's work. These references are each, at most, one sentence long. The citing articles are not "about the alien's work." Rather, they are about an area of common interest shared by those authors and by the beneficiary. The petitioner has not shown that the beneficiary's work has been the primary focus of any published materials by others.

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

The petitioner has submitted several witness letters. All but one of the witnesses are the beneficiary's professors and collaborators, and their statements cannot establish first-hand that the beneficiary's achievements have earned him international recognition as an outstanding researcher. The most independent witness appears to be Dr. Jonathan Yewdell of the National Institute of Allergy and Infectious Diseases. Dr. Yewdell states that the beneficiary's work with proteasomes, which "play in important role in the immune system," has resulted in a "fundamental discovery [that] is very important [and] could broadly impact health care in the United States." This letter, while not without weight, does not demonstrate that the beneficiary's work has earned him international recognition as an outstanding researcher.

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

The petitioner submits copies of several of the beneficiary's published articles. Counsel states that the journals "publish only original and novel contributions to science." The petitioner also submits what appears to be a list of every article published in September-December of 2002 that was written or co-written by researchers at the petitioning hospital. The list identifies 150 articles. That a single research facility could produce such a copious volume of published work in the space of only a few months tends to indicate that the very act of writing a published article is not inherently demonstrative of international recognition as an outstanding researcher. If the beneficiary is to stand out (hence "outstanding") from his peers by virtue of his publication record, the petitioner must do more than simply show that the beneficiary has produced published work. Indeed, many of the petitioner's witnesses have written far more than the beneficiary has. Citations are generally a reliable indicator of a given article's impact. The petitioner has documented that one of the beneficiary's articles has been cited five times since its 1999 publication; there is no evidence of any citations for any of the beneficiary's other work.

The weight of the evidence, when all factors are considered, indicates that the beneficiary is at an early stage of his career and that he is only just beginning to attract notice in wider circles. As noted above, we affirm the director's finding regarding the job offer, and therefore the appeal would have been dismissed even without this additional finding that the beneficiary is not an outstanding researcher.

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.