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U.S. Citizenship and Immigration Services

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[redacted]

29 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: SELF-REPRESENTED

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.

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 investigator. The director determined that the petitioner had not established that the petitioner has offered permanent employment to the beneficiary.

On appeal, the petitioner submits additional documentation pertaining to the beneficiary's position and the petitioner's employment policies.

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.

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:

> (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. Experience in teaching or research while working on an advanced degree will only be acceptable if the alien has acquired the degree, and if the teaching duties were such

that he or she had full responsibility for the class taught or if the research conducted toward the degree has been recognized within the academic field as outstanding. Evidence of teaching and/or research experience shall be in the form of letter(s) from former or current employer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien; 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.

The regulation at 8 C.F.R. § 204.5(i)(2) offers the following definition: "*Permanent*, in reference to a research position, means either tenured, tenure-track, or 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."

In a letter dated April 26, 2002, Professor John A. Williams, chair of the petitioner's Department of Physiology, describes the beneficiary's position:

> [The beneficiary's] promotion to Research Investigator . . . has been approved both by the Department of Physiology and the Dean's office of the Medical School to start May 1, 2002.
>
> This is a permanent, full-time, faculty position for research scientists providing fringe benefits, including health insurance. He will receive an annual salary of $42,000 per year. Most research and teaching positions at the [petitioning university] are approved on an annually renewable basis, using the fiscal year period of July through June. Renewal each year is contingent upon satisfactory performance of duties and availability of research funds. It is expected that [the beneficiary's] appointment will be renewed indefinitely on an annual basis, provided [the beneficiary] continues to perform his duties satisfactorily and provided research funding continues at the expected level.

We note that the above is not a letter from the petitioning university offering the alien a permanent research position in the alien's academic field, as required by 8 C.F.R. § 204.5(i)(3)(iii)(B). An employer extends a job offer to an individual, not to immigration authorities. Prof. Williams' letter, addressed to the Nebraska Service Center, describes the job offer but is not, itself, a job offer letter.

Prof. Williams also signed a memorandum to the petitioner's International Center, Office of Immigration Advising for International Faculty and Staff, citing the regulatory definition of "permanent," and certifying "[t]he position being offered to [the beneficiary] is permanent."

The director advised the petitioner that Prof. Williams' letter of April 26, 2002 "does not clearly demonstrate that the beneficiary has been extended a permanent offer of employment. Specifically, the letter states the employment offer is annually renewable and contingent upon the availability of research funding." The director instructed the petitioner to "submit a letter offering the alien . . . a permanent offer of employment. . . . It is expected that all concerned parties, including the Chancellor and the beneficiary, will sign the letter."

In response, the petitioner's faculty/staff immigration specialist, Julie L. Barth-Jones, states "the position of Research Investigator is considered a **permanent** but **non-tenured**, non-instructional faculty position. Since faculty members, including tenure-track faculty, are expected to apply for and receive extramural grants to contribute toward their funding, there is a periodic evaluation; in this case, on an annual basis." She adds that the petitioning university expects that the beneficiary "will be able to show sufficient funding at that time and will continue his employment indefinitely."

Prof. Williams states, in a new letter, that the beneficiary holds "a permanent full-time position," and that "[m]ost research and teaching positions at the [petitioning university] are approved on an annually renewable basis."

The petitioner has also submitted a copy of the petitioner's actual job offer letter, dated April 5, 2002, signed by both Prof. Williams and (on April 8, 2002) the beneficiary. The letter states, in pertinent part: "I am pleased to offer you an appointment as Research Investigator. . . . This appointment and corresponding salary will be guaranteed for a three-year period. . . . Decisions on annual salary increases, reappointment, and promotion will be based on scientific productivity, research funding and the needs of the Department."

The director denied the petition, stating "[w]hile the record appears to demonstrate that the beneficiary is an outstanding researcher, the petitioner has failed to satisfy the Service that the beneficiary has been extended an offer of permanent employment by the university, as is required by governing regulations." The director noted Prof. Williams' statement that the beneficiary's "appointment . . . will be guaranteed for a three-year period."

On appeal, the petitioner submits copies of various computer-generated documents relating to the beneficiary's appointment, with blank spaces after the heading "End Date." One of these documents also states "Appt Period: 12 Months." These documents also indicate that the beneficiary is a "Regular" employee, as opposed to a "Temporary" employee.

In a new letter, Prof. Williams notes that the beneficiary's "appointment document in fact does not include an ending date." He does not explain why, in his job offer letter to the beneficiary, he stated that the "appointment . . . will be guaranteed for a three-year period."

The petitioner's "Standard Practice Guide," submitted on appeal, contains the following definitions:

> REGULAR EMPLOYEE: A staff member whose employment is either full or part-time and is reasonably expected to continue indefinitely.
>
> TEMPORARY EMPLOYEE: Any non-student employee whose employment either full or part-time in a specific position which is irregular, sporadic or casual or is fixed at the time of employment to not exceed 12 consecutive months and is established for:

1. A specific project.
2. Relief for regular employee absence.
3. Augmenting regular staff occasioned by resignations, dismissals, increased work loads, or other conditions that may create a short term need.

From the above definitions, it is clear that the petitioner relies upon a fairly restrictive definition of the term "temporary employee." For instance, a postdoctoral researcher would not qualify as a "temporary employee" under the petitioner's definition of that term, even though postdoctoral positions are very broadly recognized as training appointments of a few years' duration, rather than permanent career positions. The "Standard Practice Guide" does not discuss postdoctoral appointments at all, and therefore some classes of employment at the petitioning university clearly fall outside the general descriptions on that document. The above document does not resolve the issue in contention; we are not obliged to conclude that every appointment that lasts longer than twelve months constitutes "permanent" employment as the regulations define that term.

The beneficiary's employment documents contain numerous references to an "annually renewable basis" and a "three-year period," which are meaningless if the beneficiary's appointment had no specified expiration date at the time of appointment. From the available evidence, it appears considerably more likely that the appointment will automatically terminate unless the petitioner takes active steps to renew it. Employment under these circumstances is not permanent, regardless of whether or not the petitioner intends to renew the appointment upon its expiration. Prof. Williams' assertion that "most" of the petitioner's research and teaching positions are annually renewable is beside the point, because the regulatory requirements are not discretionary, and the employment policies of a given university cannot override the regulations. Furthermore, the assertion that "most" positions are subject to annual review and renewal implies that some positions are not subject to those terms. Nothing in the petitioner's newly submitted documentation establishes that the beneficiary's position is inherently permanent, rather than a succession of renewable one-year appointments.

The petitioner argues that, because the petitioner intends to renew the beneficiary's appointment, the beneficiary has "an expectation of continued employment" as stated in the regulatory definition at 8 C.F.R. § 104.5(i)(2). From the construction of that definition, "an expectation of continued employment" is not, by itself, sufficient grounds to call a position "permanent." Annually renewed appointments are, intrinsically, neither unlimited nor indefinite.

For the reasons discussed above, we cannot conclude that the petitioner has established that the beneficiary's position is permanent. Therefore, the petitioner has not met the necessary conditions to establish eligibility.

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.