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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

[redacted]

FILE: LIN 02 230 52332 Office: NEBRASKA SERVICE CENTER Date: MAR 23 2004

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.

Mari Johnson
for 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 at the petitioner's College of Agriculture, Food, and Natural Resources (CAFNR). The director determined that the petitioner had not established that it had offered the beneficiary a qualifying, permanent position. The director offered no finding as to whether the beneficiary qualifies for classification as an outstanding researcher.

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 filing of the petition, Richard Porter, the petitioner's coordinator of International Students and Scholars, states that the petitioner "wishes to employ [the beneficiary] permanently in the capacity of Research Associate Professor." Mr. Porter, in listing the exhibits accompanying the petition, refers to "Exhibit 3: OFFER OF A PERMANENT TENURE TRACK POSITION" in the form of "[a] letter from the employer." A divider in the record also calls the letter an "OFFER OF A PERMANENT TENURE TRACK POSITION." This letter, from Professor Michael F. Smith, interim unit leader of the petitioner's Animal Sciences Unit, is addressed to the Nebraska Service Center and reads, in part, "[t]he Department of Animal Science intends to employ [the beneficiary] on a full-time basis as a Research Assistant Professor. . . . His employment is expected to continue after he has been granted permanent residence."

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 letters quoted above are not job offer letters. They do not extend an offer of employment to the beneficiary; rather, they provide to CIS a description of the job offer extended to the beneficiary. Furthermore, the assertion that the beneficiary's "employment is expected to continue" is not sufficient to show that the position is either "permanent" or "tenure-track," both terms repeatedly used in descriptions of Michael Smith's letter.

The director informed the petitioner that Prof. Smith's letter "does not state or even imply that the beneficiary has been offered full-time, permanent employment with the university." 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 submits letters from Richard Porter, who refers to the beneficiary's position as "professional track," and from officials who, according to Mr. Porter, have "the right to make statements regarding policy implementation on behalf of the provost."

Noel Ann English, senior legal research associate, 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 he is not in a temporary position. . . .
>
> He has a renewable appointment with no defined ending date (as opposed to temporary employees whose appointments are time-limited). It is reasonable for him to have a legitimate expectation of reappointment based on current university contract rules. The term used by CAFNR to designate such a position is "Professional Track Academic Faculty."

Prof. Smith clarifies that the beneficiary "is not employed . . . in a postdoctoral position," as the director had implied in the request for evidence. Prof. Smith repeatedly describes the beneficiary's position as "full-time, professional track," and states "[t]here is an annual renewal of the contract but this is true of all administrative and research positions on campus and is a formality, providing that the employee's performance is adequate and the department has the necessary salary resources available."

The petitioner submits an excerpt of CAFNR's by-laws, pertaining to professional track academic faculty, but this document says nothing about the duration of research faculty appointments except for the assertion that such appointments are "non-tenure track." Richard Porter, in his second letter, does not mention, let alone explain, his earlier statement that the beneficiary's position is "tenure track." This demonstrably incorrect information in the petitioner's initial description of the job offer illustrates why direct documentation is preferable over testimonial claims.

The director denied the petition, stating that an annually renewable contract does not secure permanent employment. On appeal, Richard Porter states that the petitioner's evidence "complies exactly with the definition of 'permanent' in the regulations," because "the appointment is renewable with no definite ending date" and "all parties expect [the beneficiary's] employment to continue with annual reappointments, unless there is good cause for termination."

The annual renewal requirement shows that the petitioner's employment does have an ending date, specifically the expiration date of the contract. If the petitioner fails to take active steps to renew this contract, the employment is terminated, regardless of whether cause for termination exists. We are not persuaded by Mr. Porter's argument that the appointment is, in effect, indefinite because "there is no limitation on the number of consecutive annual appointments."

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.

As discussed above, the petitioner originally represented the beneficiary's position as both "permanent" and "tenure track." Subsequent submissions indicated that the position is "non tenure-track." Noel Ann English, "the person who currently oversees faculty hiring," states that the beneficiary's position is not "what we might consider a 'permanent' position," which forecloses the conclusion that the university considers the beneficiary's appointment to be a permanent position. The regulations require an offer of permanent employment, and provide no exemption for universities that consider tenured faculty to be their only permanent employees. The petitioner's evidence does not meet the regulatory requirements, and in some respects the materials in the record raise more questions than they answer.

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.