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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 31 2004

IN RE: Petitioner: Beneficiary: [redacted]

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.

Marc 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 laboratory research associate. 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 submitted with the initial filing on April 7, 2003, counsel states that the beneficiary "is being sought for continued employment . . . at a level comparable to a tenure track position." Dr. [redacted] assistant professor at the petitioning university, states:

> [The beneficiary] has been a member of my research group for nearly two years, serving as a post-doctoral research associate. . . .
>
> Although [the petitioner's] research position . . . is not, by its nature, within our University's tenure or tenure track classification, as his supervisor I can verify that it is at a level where he can ordinarily expect continued employment with the University absent good cause for termination.

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 voluminous 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. The petitioner has produced no legally enforceable document showing that the petitioner cannot terminate the beneficiary's employment without cause. It cannot suffice for the petitioner simply to assert its intent to continue the beneficiary's employment.

On August 13, 2003, the director instructed the petitioner to "submit a complete copy of the actual offer of employment made by [the petitioner] to [the beneficiary]." In response, the petitioner has submitted a new letter, dated August 25, 2003, from Dr. [redacted] to the beneficiary. The letter reads, in pertinent part, "[t]his is to confirm my continuing offer to you of appointment in my laboratory as a research associate. . . . I can verify that this position is at a level where you can ordinarily expect continued employment with the University subject to satisfactory performance and funding."

The director denied the petition on October 20, 2003, stating that the petitioner has not shown that the position is permanent, rather than a typical, short-term postdoctoral appointment. On appeal, counsel states:

> At the time that the employment offer of August 25, 2003 was submitted under the Request for Evidence, an application for continued funding of the research project for which [the beneficiary's] continuing employment i[s] sought, had been submitted but official approval had not yet been received, which limited Petitioner's ability to commit to a long term offer of employment. Since that time, significant funding has been confirmed by the National Institute of Health. Thus, the Petitioner can, and does, extend its offer of employment for an indefinite future.

The petitioner submits another new letter, dated October 27, 2003, signed by both Dr. and by Professor stating in part "[m]y laboratory has received significant research funding, thereby allowing your continued employment for an indefinite period of time." Counsel indicates that the funding that pays the beneficiary's salary relates to a particular "research project." If the beneficiary's employment is tied to one particular project, then the justification for that employment would appear to end when the project ends. The petitioner has not indicated that the project (or its funding) is perpetual, or else so long-term as to be effectively permanent. The record does not indicate what happens to the beneficiary's position upon the conclusion of the funded project.

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 a petition must be amenable to approval as of its filing date. In this instance, counsel stipulates on appeal that, as late as August 25, 2003, the petitioner lacked sufficient funds "to commit to a long term offer of employment." The newest letter is consistent with this assertion. This suggests that the petitioner, as of April 7, 2003, was not in a position "to commit to a long term offer of employment."

Also, the newest letter, submitted on appeal, fails to address several issues. The petitioner has never submitted job offer documentation that dates from, or before, the April 7, 2003 filing date. When the director noted the absence of such documentation, the petitioner responded by creating new documentation, thus leaving open the question of what documentation (if any) existed as of the filing date. In his first letter on the beneficiary's behalf, Dr. referred to the beneficiary as a postdoctoral research associate, a position which, although it may lack a specific, fixed ending date, is traditionally and widely recognized as a short-term appointment, primarily for training purposes, rather than a career position. None of the subsequent submissions refer to any formal promotion, or indicate that such a promotion is scheduled to take place.

In a subsequent brief, counsel asserts that the director's decision discusses numerous points that were not included in the earlier request for evidence. To some extent, these points relate to the basic issue that the record contains no letter from the university, offering the beneficiary a permanent position. The regulations do not indicate that a letter from any given faculty member shall be considered a letter from the university; the petitioner has not demonstrated that assistant professors have the authority to make binding offers of permanent employment, and the job offer has not been shown to be permanent. Also, to date, the record still lacks contemporaneous evidence of the job offer.

Also, while the director's decision contains specific observations that are not found in the earlier request for evidence, the petitioner is now, on appeal, demonstrably aware of these shortcomings. The only new material submitted on appeal is a letter which does not address those shortcomings, and adds an additional admission that, several months after the filing date, the petitioner was not in a position to guarantee the beneficiary's wages (which are tied to a specific project rather than to the petitioner's general budget).

The record does not establish that the beneficiary holds a permanent position that the petitioner cannot terminate without cause, rather than an inherently temporary position that is likely to persist for the few years that most researchers remain in postdoctoral positions before moving on to other positions. Therefore, the petitioner has not established that it has offered the beneficiary a qualifying, permanent position.

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.