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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: CALIFORNIA SERVICE CENTER Date: MAR 31 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:

[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, California Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner manufactures wireless communication products. 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 permanently in the United States as a chief technical-engineering research manager. 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 . . .

(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 petition was filed on February 13, 2003. On April 21, 2003, the director instructed the petitioner to submit further evidence to establish (1) the beneficiary's international recognition as an outstanding researcher, (2) the petitioner's ability to pay the beneficiary's proffered wage of $95,000 per year; and (3) the beneficiary's duties. The regulations require that the petitioner seeks to employ the beneficiary in a full-time research position. The petitioner responded to this request with voluminous documents.

On October 9, 2003, the director denied the petition on two grounds: (1) "the petitioner does not appear to have achieved documented accomplishments in the field, as required by regulations," and (2) "the beneficiary appears to function as both an engineer and manager."

Regarding the beneficiary's work as a researcher, the petitioner has submitted ample documentation to indicate that the beneficiary's primary duties involve research, rather than routine engineering duties or managerial tasks. We concur with counsel's assertion on appeal that the director's conclusion relied upon a flawed and selective reading of the evidence of record. We hereby withdraw the relevant portion of the director's finding.

The record is more ambiguous with regard to the petitioner's claim of documented accomplishments in an academic field. The beneficiary's publication of articles appears to have ceased upon his involvement with the petitioning company. Counsel asserts that the petitioner has numerous patents pending, but most of the patent applications in the record are provisional applications. Provisional patent applications are essentially "place holders," submitted only to secure an early filing date; the United States Patent and Trademark Office (USPTO) does not adjudicate provisional applications, and considers them abandoned after 12 months unless a complete application is filed during that time. A search of the USPTO's database of approved patents, accessible at http://www.uspto.gov/patft/index.html, does not show that any patents with the petitioner as assignee have been approved as of March 2, 2004.

Professor Sujit Dey of the University of California, San Diego, states that the beneficiary is the "holder of 19 patents in the area of digital communications." Although the beneficiary's name appears on several provisional patent applications, the USPTO's online database, referenced above, does not list any approved patents showing the beneficiary as an inventor. An individual does not become the "holder" of a patent simply by being listed on a provisional patent application. The petitioner has since listed the beneficiary as an inventor on regular (non-provisional) patent applications, but these were not filed until after the petition's filing date, and thus cannot be considered, pursuant to *Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998) and *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971).

Absent first-hand documentation from patent-issuing authorities, the claim that either the beneficiary or the petitioner holds any patents is neither reliable nor credible. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent

objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

Despite the above, counsel is correct that the director erred by failing to mention this issue in the request for evidence. The director should afford the petitioner an opportunity to overcome this issue before a new decision is rendered. Given the conflicting information regarding patents, the director should specify that the petitioner must submit first-hand, objective, documentary evidence of its research accomplishments, rather than witness statements alleging that such accomplishments exist.

In denying the petition, the director did not address the issue of whether the beneficiary qualifies as an internationally recognized outstanding researcher. The director's April 21, 2003 request for evidence mentioned the criteria at 8 C.F.R. § 204.5(i)(3)(i), but the issue does not resurface in the denial notice. Any future decision must address this central issue.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.