



U.S. Citizenship
and Immigration
Services

B-2

[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date: JUN 30 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.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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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 seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B), as an outstanding professor or researcher. The petitioner seeks to employ the beneficiary as a "Physician Scientist" in the Departments of Anatomic and Clinical Pathology. The director determined the petitioner had not established that it extended an offer of permanent employment to the beneficiary.

Section 203(b) of the Act states, in pertinent part, that:

(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.

The regulation at 8 C.F.R. § 204.5(i)(3) states that a petition for an outstanding professor or researcher must be accompanied by:

(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.

As used in this section, the term "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. 8 C.F.R. § 204.5(i)(2).

The petition was filed on December 23, 2002. A letter accompanying the petition, dated November 26, 2002, from ██████████ Chairman, Department of Clinical Pathology, Cleveland Clinic Foundation, states: "We are currently seeking to recruit [the beneficiary] to our faculty and intend to provide an encouraging and supportive environment for him to pursue his research efforts in the future." Page ten of ██████████ letter further states:

[W]e are now recruiting him on a long-term basis to the faculty of the Department of Anatomic Pathology at Cleveland Clinic. He will first complete his current work in Hematopathology followed by his appointment to the position of Molecular Pathology Project Staff in which he will focus on translational research in the molecular pathology of solid tumors.

The evidence accompanying the petition included no formal job offer letter, i.e., a letter from the petitioner addressed to the beneficiary that sets forth a binding offer of employment, including specific terms thereof. The regulation at 8 C.F.R. § 204.5(i)(3)(iii)(C), however, specifically states that "[t]he offer of employment shall be in the form of a letter from...a department, division, or institute of a private employer offering the alien a permanent research position in the alien's academic field." [emphasis added ██████████] letter indicates that the beneficiary is employed by the Cleveland Clinic, but it is not an offer of *permanent* employment addressed to the beneficiary. Rather, it is a letter to the "Immigration and Naturalization Service" which discusses (among other things) the petitioner's intention to "recruit [the beneficiary] to [its] faculty" after he "first complete[s] his current work in Hematopathology." The above letter does not constitute a formal offer of permanent employment; indeed, it implies that the beneficiary has already accepted an earlier job offer (i.e., what ██████████ refers to as the beneficiary's "current work in Hematopathology.")¹ There is no evidence from the petitioner, pre-dating the petition's filing date, indicating that the petitioner had offered the beneficiary a *permanent* research position in Hematopathology or on the "Molecular Pathology Project Staff."

¹ The record contains a Certificate of Eligibility for Exchange Visitor (J-1) Status, Form IAP-66, stating that from July 1, 2002, to June 30, 2003 the beneficiary was "sponsored as a first year pathology-anatomic and clinical/hematology fellow in [the] Cleveland Clinic Foundation Program."

On September 22, 2003, the director requested specific documentation pertaining to the absence of a job offer letter from the petitioner to the beneficiary. The director's request for evidence stated: "Please submit a complete copy of the actual offer of employment made by The Cleveland Clinic Foundation to [the beneficiary]."

In response, the petitioner submitted two additional letters from [REDACTED] dated September 25, 2003 and October 1, 2003 (both were addressed to "United States Citizenship and Immigration Services" (CIS) rather than the beneficiary). [REDACTED] September 25, 2003 letter states:

LETTER CONFIRMING STATURE OF CLEVELAND CLINIC AS A PRIVATE EMPLOYER OFFERING [THE BENEFICIARY] A PERMANENT RESEARCH POSITION IN HIS ACADEMIC FIELD PER 8 CFR § 204.5(i)(3)(iii)(C)

To whom it may concern:

We are pleased to confirm our continued offer of employment to [the beneficiary]. [The beneficiary] will continue to be employed at the Cleveland Clinic Foundation, a private, non-profit group practice that includes a research institute, education foundation, hospital and outpatient services.

[REDACTED] October 1, 2003 letter states:

LETTER OF ONGOING INDEFINITE EMPLOYMENT OF [THE BENEFICIARY]

OFFER OF EMPLOYMENT

To whom it may concern:

We are pleased to confirm [the beneficiary's] ongoing and indefinite employment at the Cleveland Clinic Foundation, a preeminent academic and research institution providing cutting edge medical services. [The beneficiary] is employed as a Physician Scientist in the Departments of Anatomic and Clinical Pathology. [The beneficiary] receives an annual salary of \$47,089 (plus fringe benefits) per year.

The regulation at 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "*Effect where evidence submitted in response to a request does not establish eligibility at the time of filing.* An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." The letters submitted in response to the director's request for evidence fail to demonstrate that a permanent job offer from the Cleveland Clinic to the beneficiary existed as of the petition's filing date (December 23, 2002).

The director denied the petition, stating:

The petition as initially filed contained a twelve-page letter by [REDACTED] that provides a variety of relevant information about the petitioner and the beneficiary's qualifications. The initial evidence did not, however, include a copy of a letter by the petitioner offering the beneficiary a permanent research position.

In correspondence dated September 22, 2003, the petitioner was requested to submit a complete copy of The Cleveland Clinic Foundation's actual offer of employment to the beneficiary. The petitioner's response was received on October 7, 2003, and has been incorporated into the record for consideration.

In responding, the petitioner has not furnished the requested evidence. Counsel states "[w]e would like to bring the Service's attention to the fact that the I-140 petition included a lengthy support letter by Dr. Raymond Tubbs where the offer of employment and the credentials of the institution were enumerated."

[CIS] initially found and on re-examination reaffirms that Dr. Tubbs' letter does not constitute an offer by the petitioner to the alien of a permanent research position. It is not addressed to the prospective employee, it lacks even basic terms of employment (e.g. compensation, start date, moving allowances, etc.). As to prospective employment, the letter briefly states "...we are now recruiting him to the faculty of the Department of Anatomic Pathology at Cleveland Clinic. He will first complete his current work in Hematopathology followed by his appointment to the position of Molecular Pathology Staff."

The record indicates the beneficiary has been employed by the petitioner since 1997. No representations have been made that the terms of the beneficiary's past employment have not been committed to writing, nor that the terms of any future employment will not be committed to writing. Irrespective of the petitioner's personnel practices, the regulation requires that an offer of a permanent research position be submitted as initial evidence for this visa classification. Title 8, Code of Federal Regulations, Part 103.2(b), states: "An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form."

In responding, the petitioner has submitted two additional letters by Dr. Tubbs, both addressed to [CIS].... For reasons similar to those described above, neither letter constitutes an offer of a permanent research position made by The Cleveland Clinic Foundation to the alien.

In evaluating whether a given offer of employment is permanent within the meaning of the regulation, [CIS] is willing to consider all evidence having a bearing on the issue, but must necessarily examine the specific terms contained in the offer of employment made by the employing institution. It is precisely that document that was requested. Title 8, Code of Federal Regulations, Part 103.2(b)(14) states: "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition."

The missing documentary evidence is material to eligibility for the benefit sought. The petition is denied pursuant to Title 8, Code of Federal Regulations, Part 103.2.

On appeal, counsel states:

[The beneficiary's] past appointments at Cleveland Clinic in temporary nonimmigrant status are of no relevance to the I-140 petition. The I-140 was based upon the recruitment of [the beneficiary] to a permanent research position – not his past nonimmigrant status as a temporary worker. We are unclear why this is even an issue of concern to the Service.

The director's decision, however, does not cite the beneficiary's "past nonimmigrant status" as a temporary worker as an issue of concern or as a ground for denial. Rather, it was the ambiguous statements in Dr. Tubbs' November 26, 2002 letter that raised valid concerns regarding the existence of a permanent job offer at the time of filing. Regardless, it was the petitioner that submitted documentation of the beneficiary's "past nonimmigrant status."²

Counsel further states: "If the Service desired a particular format for the offer letter it should have specified so in the Request for Evidence, which it failed to do so. The petitioner cannot be expected to provide the Service with a format of an offer letter that was unspecified and unclear."

Contrary to counsel's observations, we find that the director's request was indeed specific and clear. The director requested the petitioner to "[p]lease submit a complete copy of the actual offer of employment made by The Cleveland Clinic Foundation to [the beneficiary]." Rather than providing "a complete copy of the actual offer of employment...made to [the beneficiary]," the petitioner responded by submitting two separate employment confirmation letters issued subsequent to the petition's filing date and addressed from The Cleveland Clinic Foundation to CIS.

In support of the appeal, the petitioner presents three additional letters, all of which are now addressed to the beneficiary. The first letter, dated June 30, 2003, from [REDACTED], Chairman, Department of Anatomic Pathology, Cleveland Clinic Foundation, states: "I am really thrilled we have the opportunity to recruit you to stay on as Associate Staff in the Department of Anatomic Pathology. Through our discussions over the months, it is my understanding that you would like to begin your responsibilities on or about January 1, 2004."

The second letter, dated November 12, 2003, from [REDACTED] Chief of Staff and Vice Chairman of the Board of Governors, Cleveland Clinic Foundation, states:

On behalf of the Board of Governors of The Cleveland Clinic Foundation, I am pleased to offer you a promotion to the Associate Staff in the Department of Anatomic Pathology...effective January 1, 2004.

If you accept this appointment and agree to be bound by the Medical Bylaws and the Manual of Major Policies for the Professional Staff of The Cleveland Clinic Foundation as they apply to you, please sign and date the enclosed copy of this letter and return it to me.

² The record contains six of the beneficiary's "Certificate[s] of Eligibility for Exchange Visitor (J-1) Status."

The third and most recent letter, dated January 2, 2004, bears the signatures of Dr. Goldblum, Dr. Tubbs, and the beneficiary. This letter discusses the position offered, the beneficiary's salary, the duration of his employment, and his starting date. The letter states:

PERMANENT JOB OFFER TO [THE BENEFICIARY] IN RESEARCH POSITION IN THE DEPARTMENTS OF ANATOMIC AND CLINICAL PATHOLOGY PER 8 CFR § 204.5(i)(3)(iii)(C)

This letter clarifies the Cleveland Clinic's permanent job offer to you. **Prior to filing an Immigrant Petition on your behalf..., we offered you a permanent research position as a Physician Scientist** in the Division of Pathology and Laboratory Medicine, Department of Clinical Pathology. [Emphasis added]

It is the absence of first-hand evidence of the original job offer made "[p]rior to filing an Immigrant Petition on [the beneficiary's] behalf" that is the primary issue on which the director's decision rests. The petitioner's failure to present contemporaneous evidence of its original job offer to the beneficiary for "a permanent research position as a Physician Scientist" is a crucial omission from the record. While the record contains recent letters from Cleveland Clinic offering the beneficiary "a promotion to the Associate Staff in the Department of Anatomic Pathology," there is no official correspondence (predating the petition's filing date) regarding his original job offer for that of "a permanent research position as a Physician Scientist...in the Department of Clinical Pathology." If such a permanent job offer did indeed exist as of the petition's filing date, it is not clear as to why the petitioner, which was afforded ample opportunity to provide such evidence, has failed to do so even now at the appellate stage. Rather, the petitioner has provided a January 2, 2004 letter "clarify[ing] the Cleveland Clinic's permanent job offer to [the beneficiary]." In this case, the record contains no evidence of a job offer that existed at the time of filing and which sets forth a binding offer of permanent employment to the beneficiary. See *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Immigration and Naturalization Service (legacy INS) held that a petitioner must establish eligibility at the time of filing.

Pursuant to the regulations, the petitioner's failure to provide contemporaneous evidence of the original permanent job offer creates a presumption of ineligibility. The regulation at 8 C.F.R. § 103.2(b)(2)(i) states, in pertinent part:

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue.

In this case, the petitioner has not presented the original permanent job offer letter (pre-dating the petition), nor has it provided contemporaneous secondary evidence from the Cleveland Clinic's personnel office, for example, demonstrating that such a job offer existed as of December 23, 2002.

For the above stated reasons, we find the petitioner has not established that it extended an offer of permanent employment to the beneficiary as of the filing date of the petition. The record does not contain any qualifying documentation, pre-dating the petition's filing date, that initiated an employer-employee relationship between the petitioner and the beneficiary or otherwise extended a permanent job offer from the petitioner to the beneficiary. Therefore, the petitioner has not established eligibility pursuant to 8 C.F.R. § 204.5(i)(3)(iii).

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.