



BB

U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted] **Public Copy**

11 DEC 2006

File: [Redacted] Office: Nebraska Service Center Date:

IN RE: Petitioner: [Redacted]
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)

IN BEHALF OF PETITIONER:

[Redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification 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 employment as a research fellow at a biomedical research facility. The director denied the petition because aliens are not eligible to self-petition under this classification.

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.

Service regulations at 8 C.F.R. 204.5(c) state, in pertinent part:

Any United States employer desiring and intending to employ an alien may file a petition for classification under the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act. An alien, or any person in the alien's

behalf, may file a petition for classification under section 203(b)(1)(A) or 203(b)(4) of the Act.

Service regulations at 8 C.F.R. 204.5(i)(1) state "[a]ny United States employer desiring and intending to employ a professor or researcher who is outstanding in an academic field under section 203(b)(1)(B) of the Act may file and I-140 visa petition for such classification."

Citing 8 C.F.R. 204.5(c), but not 8 C.F.R. 204.5(i)(1), the director denied the petition, and stated "[o]nly a United States employer can file a petition for an alien under this classification. The record indicates that the alien-petitioner has filed this petition for himself."

Counsel asserts that "no request for evidence was sent" before the director denied the petition. Counsel contends that 8 C.F.R. 103.5(a)(8) required such a notice to be sent. The cited regulation, however, requires no such notice in this matter. 8 C.F.R. 103.5(a)(8) states, in pertinent part:

If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. . . . [I]n other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence.

In this instance, the director did not find that initial evidence was missing, or that the evidence does not fully establish eligibility. Rather, the director found evidence of ineligibility. An alien simply cannot self-petition under this classification. Because the denial was based on evidence of ineligibility rather than a lack of evidence, 8 C.F.R. 103.5(a)(8) permits the director to deny the petition without first requesting additional evidence.

Counsel asserts that, in the past, the director has accepted outstanding researcher petitions from self-petitioning aliens. Counsel argues that, because 8 C.F.R. 204(c) states "[a]ny United States employer desiring and intending to employ an alien **may** file a petition" (emphasis added), rather than "**shall** file a petition," it is permissible for aliens to self-petition for the outstanding researcher classification. This argument relies on a highly selective reading of the regulation, which is clearly meant to distinguish between classifications in which aliens are, and are not, permitted to self-petition. Because the regulations do not state that an alien "may file a petition" seeking the relevant

classification, it is clearly implied that an alien may not file such a petition.

Counsel then argues:

Even assuming that in the past the acceptance of an [outstanding researcher] self-petition was inappropriate . . . , it would appear that the Service Center should at least not accept the filing in the first place or, when it does accept the filing and issue a receipt, should allow for an intent to deny so as to allow the petitioner to change to an [extraordinary ability petition] or have the prospective employer sign the [outstanding researcher petition]. That is what is being requested herein.

The appeal includes two amended petition forms as described above. Counsel, however, cites no statute, regulation, or case law that requires the director to invite an alien to change classifications or petitioners in this manner. Counsel's personal conviction that the Service "should" extend this courtesy carries no legal weight.

Counsel states that the alien and his prospective employer "will refile" these petitions. Service records indicate that both of these petitions have since been approved, and the alien has filed a Form I-485 application to adjust status, rendering any corrective action in this proceeding moot, even if the petitioner had established that corrective action was necessary in the first place. The alien petitioner has already obtained the one thing that this appellate body could provide, i.e. an approved visa petition and with it the opportunity to apply for adjustment of status.

The regulations contain no provision allowing alien professors or researchers to file petitions on their own behalf in this visa classification. By regulation, the petition must be filed by the intending U.S. employer. Therefore, the petition has not been properly filed and cannot lawfully be approved. Accordingly, the appeal must be dismissed, without prejudice to subsequent petitions properly filed by the alien or on his behalf.

ORDER: The appeal is dismissed.