



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

Public Copy



11 DEC 2007

File: EAC 99 232 51096 Office: Vermont Service Center Date:

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:



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, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

In this decision, the term "prior counsel" shall refer to Matthew Karch of Karch & Kiselev, who represented the petitioner prior to the filing of the appeal. The term "counsel" shall refer to the present attorney of record.

The petitioner is a genetic research and development firm. 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 biological researcher. The director determined that the petitioner has not established that (1) it employs at least three full-time researchers, (2) it has documented accomplishments in an academic field, (3) there exists a valid employment offer, or (4) the beneficiary is internationally recognized as an outstanding researcher.

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(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. Such evidence shall consist of at least two of the following:

(A) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;

(B) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;

(C) Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;

(D) Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;

(E) Evidence of the alien's original scientific or scholarly research contributions to the academic field; or

(F) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field;

(ii) Evidence that the alien has at least three years of experience in teaching and/or research in the academic field. Experience in teaching or research while working on an advanced degree will only be acceptable if the alien has acquired the degree, and if the teaching duties were such that he or she had full responsibility for the class taught or if the research conducted toward the degree has been recognized within the academic field as outstanding. Evidence of teaching and/or research experience shall be in the form of letter(s) from former or current employer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien; 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.

The first issue in the director's decision is whether the petitioning entity employs at least three full-time researchers.

8 C.F.R. 204.5(i)(3)(iii)(C), cited above, states that a private entity seeking to employ an outstanding researcher "must demonstrate that it employs at least three persons full-time in research positions." In a letter accompanying the petition, Dr. Yuri Gleba, CEO of the petitioning company, asserts "[w]e currently employ three full time researchers and have plans to expand this number to over fifty within the coming months and years." Elsewhere in the same letter, Dr. Gleba states "our firm . . . has fourteen full time researchers." He does not explain this discrepancy. Evidence elsewhere in the record suggests that Dr. Gleba may have been counting researchers at other institutions, with which the petitioner has made various contractual agreements, but such individuals are not permanent or full-time employees of the petitioning company.

The Form I-140 petition, which Dr. Gleba signed on penalty of perjury, indicates that the petitioning firm had a total of four employees as of the filing date. The initial filing contained no documentary evidence to establish the number of full-time researchers employed by the petitioner as of the filing date. The petitioner did not yet employ the beneficiary when the petition was filed, so the petitioner is certainly not one of the three researchers claimed.

The director instructed the petitioner to submit documentary evidence that it employs three or more full-time researchers. In response, the petitioner has submitted a new letter from the petitioner's president, Dr. Newell F. Bascomb, who asserts that the petitioner "employs 6 people at the Princeton Research site as shown on the attached payroll statement. The number of employees should be 12 to 15 by the end of 2000." The "attached payroll statement" is not in the record, nor does prior counsel identify it as an exhibit in his accompanying cover letter.

Prior counsel adds that "three full-time researchers were the company's founders." The record establishes that these three researchers are operating in at least two different countries. All of the company's founders have corporate titles which suggest administrative or supervisory duties which do not constitute research. Despite prior counsel's assertions to the contrary, nothing in the record establishes that these individuals, at the time of filing, were working full-time as researchers for the petitioning entity. Research work for other entities does not constitute research for the petitioner, nor does administrative or managerial work for the petitioning company.

One of the three founders is Dr. Hans-Ulrich Koop, who operates the petitioner's Munich office. Dr. Koop has also retained his prior post as a professor at the University of Munich. Dr. Gleba has also retained a position as the director of the Kiev-based International Institute of Cell Biology. Thus, at least two of the petitioner's three founding researchers continue to hold positions which appear to involve major duties and responsibilities for institutions unconnected with the petitioning employer.

Also, Dr. Koop has worked and continues to work in Germany, rather than in the United States. The regulatory language at 8 C.F.R. 204.5(i)(3)(iii)(C) (which closely mirrors the statutory language at section 203(b)(1)(B)(iii)(III) of the Act) states that the "department, division, or institute of a private employer" must employ "at least three persons." The regulation refers to a "United States employer," and the statute specifies that "the alien seeks to enter the United States" to work for "the department, division, or institute." We construe two relevant points from this language. First, the "department, division, or institute" must employ at least three researchers in the United States. Employees based overseas, such as Dr. Koop in Munich, cannot count toward the total. Second, the statutory and regulatory requirement of three researchers does not apply to the overall corporation, but rather to the "department, division, or institute of a private employer." The petitioner has not shown that its Hamburg office is the same division, department, or institute as the office in Princeton where the beneficiary seeks employment. The record contains several references to the petitioner's "Princeton Research Center," which is clearly distinct from any research facility in Germany. We note that the use of the terms "Inc." and even "Inc. (USA)" in reference to the U.S. entity, and "AG" in reference to the German entity, suggests that the German company may be a separate legal entity altogether.¹

The director denied the petition, in part because the petitioner had not shown that it employed at least three full-time researchers

¹Documents on appeal refer to three apparently separate entities, an "AG" based in Munich, a "GmbH" based in Halle, and an "Inc." in Princeton.

as of the petition's filing date. On appeal, the petitioner submits wage reports and other documentation showing the company's employment situation as of late 2000. This evidence is irrelevant to the number of full-time researchers the petitioner employed in July 1999 when it filed the petition.

If the petitioner wishes to retain the July 1999 priority date, we can give no favorable consideration to any subsequent additions to its payroll. 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 Service requirements. See Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 13, 1998), and Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. The Service can only consider the petitioner's subsequent growth in the context of a new petition with a later priority date.

The evidence submitted with the petition and subsequently does not establish that the petitioner employed at least three full-time researchers in the United States as of the petition's filing date.

The next issue regards the requirement that the petitioner have documented research accomplishments in an academic field.

8 C.F.R. 204.5(i)(3)(iii)(C), cited above, states that a private entity seeking to employ an outstanding researcher "must demonstrate . . . that it has achieved documented accomplishments in an academic field." Dr. Gleba, in his letter accompanying the petition, states:

[The petitioning company] was established in 1999 to solve the imminent problem of transgene management in the post-genomics era of agricultural biotechnology and to bring the speed and efficiency of crop engineering up to that of gene discovery. [Our] Transgene Operating Systems are a suite of technologies that allow for rapid, efficient and precise transgene introduction, integration, and movement into a crop/variety of interest. . . .

Genomics, the science of rapid gene sequencing and determination of gene function, will provide a rapidly increasing number of novel and useful genes for engineering crop plants. Customized technology will soon become essential for managing these transgenes. . . . The management of this plethora of genes in the plant will untangle with [our company's] comprehensive and integrated suite of technologies.

Dr. Gleba states that the Service should refer to his company's web site for more information, but submits no actual documentation regarding the petitioning entity's achievements. (The petitioner has subsequently submitted printouts from its web site, but these

printouts generally reflect elements of the site that did not yet exist as of the petition's filing date.)

We note that Dr. Gleba and the beneficiary have collaborated on published articles in the past. This research was not conducted under the petitioner's aegis, and indeed predates the existence of the petitioning firm by over a decade. The fact that some of the petitioner's employees have, individually, produced published research in the past does not establish that the petitioner, as an entity, has produced such research.

Dr. Gleba discusses the overall goals of his company, but this letter is not documentation of specific accomplishments. The record indicates that the petitioning company was founded in February 1999, five months before the petition was filed, and therefore has had little time to accumulate documented research accomplishments. Future goals and ongoing projects are not research accomplishments.

The director instructed the petitioner to submit evidence of documented research accomplishments. In response, the petitioner's president, Dr. Newell Bascomb, states that the petitioning entity "is a new company and we do not have publications yet. However we do have intellectual property as evidenced by three patent applications." The record does not contain any documentation of these patent applications.

Documentation from the petitioner's web site, submitted by the petitioner, states:

Initial versions of the transgene operating systems will be available within two years. Implementation of the business plan will enable [the petitioner] to generate about 200 man-years of research and product development in 3 years. The investment will allow filing of critical patents, development and marketing of its first products, and allow the Company to gain and maintain the position of market leader.

The web site printout is dated June 27, 2000. The above passage, and others like it, repeatedly and consistently use the future tense to refer to what the petitioner hopes to achieve in the future. Elsewhere, the site refers to the petitioner's "integrated suite of technologies" but does not indicate where or when these technologies were developed. We note that, shortly before they founded the petitioning company, the three founders were all employed by American Cyanamid and thus apparently had the opportunity to conduct research together. Because the record does not contain any documentation of the petitioner's claimed patent applications, we cannot conclude that the proprietary technology was developed at, and credited to, the petitioning company. The first months of the petitioner's existence appear to have been largely devoted to securing capital rather than to conducting

actual research. The web site devotes considerable space to soliciting investments and discussing future plans.

The petitioner also submits a press release, dated January 20, 2000, which states that the petitioner "is pleased to announce the official opening of its first research center at the end of January." Given the context of the press release, this statement is ambiguous; it may refer simply to the petitioner's first research center in Germany, rather than its first research center anywhere. Still, the press release does not mention any already-existing research facilities, either in the U.S. or anywhere else.

On appeal, the petitioner submits a list of its research facilities. This document states that "operations started in June, 2000" at the "Research Center Princeton." There is no indication that the petitioner had any operational research facility in the United States before that date, which falls nearly a year after the petition's filing date. The petitioner's list of "research contracts" indicates a contract with American Cyanamid, dated September 1999, after the filing date. The only U.S. research contract said to be in effect as of July 1999 was at Large Scale Biology Corp. in Vacaville, California, dated April 1999.

A July 23, 1999 press release, first submitted on appeal, states that the petitioner "is currently operating research labs in Kiev, Ukraine, with labs opening soon in Germany and the U.S." Thus, as of July 1999, the petitioner operated no research laboratories in the United States.

Also submitted on appeal is a letter indicating that the petitioner filed a patent application on August 5, 1999, several weeks after the filing date. Other patent applications were filed in January and March of 2000. This evidence indicates that the "three patent applications" to which Dr. Bascomb had referred in his letter of late February 2000 had not yet been filed as of the petition's filing date.

While the founders of the petitioning entity are accomplished researchers in their own right, the record does not contain any documentation of research accomplishments by the petitioner that existed as of the petition's filing date.

The third issue in dispute concerns the requirement of a qualifying offer of permanent employment. The initial filing of the petition did not include a letter from the petitioner, offering the beneficiary a permanent research position, as required by 8 C.F.R. 204.5(i)(3)(iii)(C). Dr. Yuri Gleba, in a letter accompanying the petition, states that the beneficiary "is in the United States with an offer of permanent employment from our firm," but this assertion is not itself a job offer letter from the petitioner; rather, it is a claim that a job offer has been made.

The director instructed the petitioner to submit documentary evidence of a permanent job offer. In response, the petitioner has submitted a letter to the beneficiary from Dr. Newell Bascomb, stating "I am pleased to offer you the position of Group Leader of Cell Biology and Transformation as we discussed."

In denying the petition, the director stated "[t]he record does not establish that there is a valid offer of employment." On appeal, counsel asserts that Dr. Bascomb has offered the beneficiary "a permanent full-time job with no particular termination date in mind," but it remains that the job offer letter does not state that the job offered is permanent or indefinite. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaiqbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Also, this letter is dated February 23, 2000, and thus it does not establish that any formal job offer existed as of the petition's July 1999 filing date.

We note another passage from Dr. Bascomb's letter: "As we develop our benefits plan and company guidelines we will make these options available as well." The letter contains several references to the beneficiary's ability to "develop" the company. These statements reinforce our finding that the petitioning company was still in its initial "start-up" stages when it filed the petition, and was not an established company with its own record of documented achievements and an active staff of full-time researchers.

The final issue is whether the beneficiary is internationally recognized as an outstanding researcher. Dr. Yuri Gleba states that the beneficiary "is a world-renowned expert in the field of cell biology. For the past twenty-three years, [the beneficiary] has been a leader among academic researchers in plant biotechnology." He states that the petitioner meets the following regulatory criteria:

Evidence of the alien's original scientific or scholarly research contributions to the academic field.

Dr. Gleba states that the beneficiary "has made many important discoveries in the field." The record contains a number of witness letters attesting to the beneficiary's research accomplishments. All of the initial letters are from individuals who had worked directly with the beneficiary, or at institutions where the beneficiary had worked. Indeed, one of these witnesses is Dr. Gleba of the petitioning company; Dr. Gleba had supervised the beneficiary's postdoctoral work. Such letters, by their nature, cannot directly establish that the beneficiary has earned a reputation beyond the institutions where she has worked.

Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

The record contains copies of several of the beneficiary's published articles, dating back to the early 1980s. The record indicates that many of the journals carrying her work are internationally circulated. For many of these articles, Dr. Gleba collaborated with the beneficiary and other researchers. One of the beneficiary's most recent articles appeared in the prestigious Proceedings of the National Academy of Sciences.

The director requested further evidence to establish the beneficiary's international recognition as an outstanding researcher. In response, prior counsel asserts:

[S]ubmission of scholarly articles is for the sole purpose of proving original scientific research. . . . Therefore the publication of scholarly articles not only satisfies the evidentiary requirement of the authorship of scholarly books or articles in the field but likewise satisfies the requirement of evidence of original scientific research.

We cannot accept prior counsel's contention that satisfaction of one of the regulatory criteria automatically establishes satisfaction of a second criterion, especially when satisfaction of two criteria is sufficient to establish eligibility. Prior counsel's argument implies that the existence of a separate criterion for original contributions is essentially redundant, and thus that the very existence of that criterion in the regulations amounts to Service error.

We hold that the six regulatory criteria represent categories of evidence by which a petitioner can establish a beneficiary's reputation, but it does not follow that all evidence that can be pigeonholed into a given criterion automatically satisfies that criterion. For instance, if an alien publishes an article in an international journal, but that article does not influence other researchers or attract attention in the field, then we should not conclude that, because of the article, the alien is internationally recognized as outstanding. Thus, while an alien can establish an international reputation through international publications, it does not follow that every alien published in that way has an international reputation. International recognition involves more than simply sending one's work across national boundaries, and international recognition as an outstanding researcher requires evidence that one stands above one's peers in the field.

The director requested further evidence, observing that "greater weight will be given to documentation submitted by experts . . . who are clearly independent of the beneficiary." In response, the petitioner has submitted further witness letters. Prior counsel asserts that the petitioner encountered difficulty obtaining these letters; nevertheless, the petitioner has sought a highly exclusive visa classification for the beneficiary, and such a classification is not meant to be simple to obtain. Indeed, by its nature, the classification is inherently out of the reach of most researchers.

Professor Elizabeth D. Earle, chair of the Department of Plant Breeding at Cornell University, states:

[The beneficiary] has produced several different types of agriculturally important protoplast fusion-derived plants and has conducted detailed analysis of these materials at multiple levels. I find her work very impressive. . . . She has published a series of excellent papers presenting these studies in high quality peer reviewed journals. I have seen many papers dealing with protoplast fusion, but few have the scientific depth of these. . . .

Although I have long been aware of [the beneficiary's] accomplishments in the area of protoplast fusion, I only recently learned of her work in quite a different area: transforming the plastids in a crucifer crop (Lesquerella) and obtaining fertile progeny from the transformants. This is a rare achievement. . . . Plastid transformation has many important benefits for genetic modification of crops (e.g., high gene expression with no pollen dispersal), so [the beneficiary's] success in extending the range of the technique is very significant.

Dr. Aidyn Mouradov, scientific director of NovaFlora, Inc., states "I follow [the beneficiary's] articles and meeting presentations since our scientific interests are widely overlapping." Dr. Mouradov discusses technical details of four of the beneficiary's scientific papers, stating that the findings expressed therein are "very important from a practical point of view" and also from a scientific standpoint. Dr. Mouradov states that the "papers show the classical example how perfect research ends up with commercially important results." Other independent witnesses offer additional support for the petition, attesting to the significance of the beneficiary's work. While these witnesses are all in the United States, it is significant that they are commenting, for the most part, on research which the beneficiary conducted in Europe.

The director denied the petition, stating:

The record contains copies of articles that cites [sic] the beneficiary's work as a team member. However, the beneficiary's individual research contributions have not been shown to have garnered international recognition within the field of Engineering. It has not been shown that his accomplishments, as an individual, have been published in scholarly journals with international circulation. . . .

The record indicates that the beneficiary is competent and knowledgeable and it appears that the beneficiary does have some contributive research contributions [sic]. The record lacks sufficient documentary evidence making it clear the beneficiary's research and achievements are recognized internationally by way of publicized research media and/or

world renowned researchers in the beneficiary's field of endeavor.

The first of the above two paragraphs appears to have been copied from another decision; the beneficiary is not an engineer, and the masculine pronoun "his" does not apply to the female beneficiary. More importantly, the director does not explain the rejection of articles written "as a team." Given the highly specialized state of scientific research, team research is overwhelmingly the norm throughout the sciences. While one might argue that articles for which the beneficiary was the first author carry more weight than articles for which the beneficiary does not have primary credit, there is no apparent justification for the assertion that the beneficiary must be the sole author for a given article to meet the pertinent criterion.

On appeal, the petitioner offers no new evidence to establish the beneficiary's international recognition, instead arguing through counsel that the previously submitted evidence is sufficient.

The record shows that the beneficiary has an extensive publication record in international journals, and independent witnesses have attested to the significance of the beneficiary's published work and her original contributions. The director acknowledges the beneficiary's contributions, and the rationale for rejecting the beneficiary's published work is inadequate. Based on the evidence presented, we conclude that the petitioner has established that the beneficiary is internationally recognized.

Despite this last finding, we cannot approve the petition because of the other underlying deficiencies. We find that the petitioner filed this petition prematurely, before the petitioning company had assembled a staff of working researchers and accumulated its own documented research accomplishments. Evidence in the record suggests that the petitioner's work did not begin in earnest until some months after the petition's filing. The record contains no documentation to establish that the petitioner had formally offered permanent employment to the beneficiary as of the filing date. After-the-fact references to oral assurances of employment, and statements to the Service that a job offer has been made, do not constitute a job offer in the form of a letter to the beneficiary offering permanent employment. For all these reasons, the petition on its face is not approvable, and any changes in the petitioner's circumstances after the filing date cannot retroactively make the petition approvable.

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.