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U.S. Department of Justice
Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[Redacted]

File: [Redacted] Office: Nebraska Service Center Date: JUL 26 2002

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]

Public Copy

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 is a university that 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 director determined that the petitioner had not established that it has offered the beneficiary a permanent position as the statute and regulations require, or that it would be able to continue to pay the beneficiary's salary.

Sections 203(b)(1)(B)(iii)(I) and (II) of the Act state that an alien seeking classification as an outstanding professor researcher must seek to enter the United States "for a tenured position (or tenure-track position) within a university or institution of higher education" or "for a comparable position with a university or institution of higher education to conduct research in the area." Service regulations at 8 C.F.R. 204.5(i)(3)(iii)(B) mirror this requirement, requiring "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."

In a letter accompanying the initial submission, [REDACTED] Department Administrator – Pathology at the petitioning university, states that the beneficiary's "research is supported by grants that have been in place for many years and are expected to continue. We expect his employment will last longer than one year." This letter, addressed to the Service rather than to the beneficiary, is not a job offer letter, and "longer than one year" is not necessarily permanent.

Because the above letter does not conform to the Service's requirements, the director instructed the petitioner to "submit a copy of [the petitioner's] offer of employment to the beneficiary." The director cited the regulation at 8 C.F.R. 204.5(i)(3)(iii), which plainly indicates that a job offer letter must accompany the petition.

In response to the director's notice, the petitioner submitted another letter from [REDACTED] stating "[a] postdoctoral position is not a tenure-track position and thus we cannot say the position will be available to [the beneficiary] forever. Nevertheless, the position is available to him as long as funding continues, and funding is reasonably expected to continue indefinitely." Ms. [REDACTED] noted that "postdoctoral positions are funded by outside grants," and that the grants supporting the beneficiary's position "have been in place for many years and we expect them to continue in the future."

Accompanying the letter is an excerpt from the pertinent regulations, highlighting the regulatory definition of "permanent" from 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 expectation of continued employment is only part of the definition. The petitioner has not shown that the beneficiary's appointment is of indefinite or unlimited duration, rather than a limited-term position which (although subject to renewal) has a fixed expiration date.

The director denied the petition, observing that "the petitioner has elected not to furnish, as requested, a copy of the actual offer of employment made to the beneficiary. The document is material because it can be presumed to outline actual terms of employment." The director also noted that postdoctoral positions tend to be inherently temporary in nature, and the petitioner has not established that such is not the case with the beneficiary's position.

The director also questioned whether the petitioner has established that it will be able to pay the beneficiary's wage; the petitioner has repeatedly indicated that the beneficiary's salary is dependent on outside funding which, while expected to continue, is not guaranteed.

On appeal, counsel states that he "misunderstood the [request for evidence] and did not realize the original offer of employment was requested." Counsel asserts that, when the petitioner first hired the beneficiary, "there was no formal (written) offer of employment." The petitioner submits a new letter from the beneficiary's supervisor, Professor Kasturi Haldar, who states "we fully intend to continue employing [the beneficiary] for an [sic] indefinite future and do not envision terminating his employment at any particular time unless there is a good cause."

Prof. Haldar asserts that the university "originally hired [the beneficiary] . . . as a postdoctoral Fellow/Research Associate. His initial appointment was for the period October 1, 2000 to April 30, 2002." While Prof. Haldar asserts that the beneficiary's employment is now indefinite, he does not state the beneficiary's current job title, or specify when, if ever, the beneficiary ceased to be a postdoctoral fellow or research associate.

The record contains no official university documentation, such as a signed contract (dated prior to the petition's filing date), to show that the beneficiary's appointment as a research associate is indefinite. Given the traditionally temporary nature of postdoctoral positions, the assurance of Prof. Haldar, without supporting documentation, cannot suffice in this regard. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).¹ The burden of proof is on the petitioner to establish that, as of the

¹ The absence of official documentation is crucial, because the petitioning university's own policies (freely available over the World Wide Web) indicate that postdoctoral fellow and research associate positions are temporary. According to the university's Department of Human Resources Policies and Procedures Manual (available online at www.northwestern.edu/hr/policies/hrpolint.htm), the appointment term of a postdoctoral fellow has a "maximum of 6 yrs," while that of a research associate is "[l]imited to funding period of grant or contract." The petitioner has produced no evidence that the beneficiary's position is funded by an open-ended grant, rather than a succession of short-term grants. The manual indicates that all postdoctoral fellowships and research associate appointments must be approved by the university's vice president for Research. That official's policy regarding research staff appointments (available online at www.northwestern.edu/research/policies/res-appointments.html) states "[r]esearch associates . . . are not members of the faculty and are ineligible for tenure." The policy, which expressly includes both research associates and postdoctoral fellows, states that "[a]ppointments are for a fixed term

petition's February 14, 2001 filing date, the petitioner had extended to the beneficiary a formal, binding offer of tenured, tenure-track, or permanent employment. From the available evidence, the petitioner appears to employ the beneficiary in what is essentially a training position rather than as a permanent member of the petitioner's faculty or research staff.

With regard to the petitioner's ability to pay the beneficiary's wage, the petitioner has repeatedly indicated that the beneficiary's wage is paid solely by outside grants. While the petitioner expects this outside funding to continue, that continuation is clearly beyond the petitioner's control. It is one thing for a university department to draw its budget from a variety of sources, including external grants, and it is also true that few if any institutions operate under absolute guarantees of financial security and solvency. In this instance, however, the beneficiary's continued employment is plainly contingent not on the overall financial health of the petitioning university, but on the continued availability of grant money from an unspecified outside source that, presumably, does not answer to the university. The vague and undocumented assertion that the petitioner has received these grant funds "for some time" serves to underscore the conclusion that the university has not made lasting arrangements for the permanent or indefinite employment of the beneficiary. The beneficiary's employment appears to be linked to the particular project for which the grant was obtained, rather than to the university as a whole. As noted above, a university official has already stated "we cannot say the position will be available to [the beneficiary] forever."

Even if the petitioner expects to continue employing the beneficiary, the employment is not truly permanent or indefinite if the appointment must repeatedly be extended or renewed. An appointment that would expire unless the employer takes active steps to continue it is not permanent. The petitioner has already stipulated that the position is not tenure-track, and therefore arguments about the conditional nature of tenure-track employment would not apply.

The petitioner has not met its statutory and regulatory obligation to submit evidence that it has offered the beneficiary a permanent position. The petitioner has answered the director's questions regarding its ability to pay the beneficiary only by asserting that it expects to be able to pay the wage. Therefore, the petitioner has not established a qualifying job offer pursuant to section 203(b)(1)(B)(iii)(I) of the Act and the petition may not be approved.

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.

of up to three years." Given this university documentation that places strict limits on the appointment terms of both postdoctoral fellows and research associates (both job titles ascribed to the beneficiary), a simple, unsupported declaration by a professor cannot serve to demonstrate that university policy has been waived or suspended on this beneficiary's behalf. Furthermore, a professor's informal statement of the university's intent to continue to employ the beneficiary does not represent a binding offer of permanent employment.