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U.S. Department of Justice

Immigration and Naturalization Service

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



File: [Redacted]

Office: Nebraska Service Center

Date: JUL 30 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: Self-represented

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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

We note that the record contains a Form G-28 Notice of Entry of Appearance of Attorney or Representative. This form, however, indicates that the attorney represents only the alien beneficiary, who has no standing in this matter. There is no comparable form to indicate that the petitioning university is represented by counsel. The beneficiary's attorney can, of course, enter into representation as counsel upon the submission of a properly executed Form G-28 signed by a university official with standing to make such attestations on the university's behalf.

The petitioner is a university. 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 in the United States as a postdoctoral research associate. The director determined that the identity of the petitioner was not clear, and that the position had not been shown to be permanent.

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.

On April 7, 2001, a petition was submitted, seeking to classify the beneficiary as an outstanding professor or researcher. The Form I-140 petition identified the alien beneficiary as the petitioner. The alien beneficiary, rather than any representative of the prospective employer, had signed part 8 of the Form I-140. Thus, the Form I-140 indicated in several ways that the alien beneficiary was filing the petition on his own behalf. The information on the Form I-140 failed to specify whether the position offered to the beneficiary (that of postdoctoral associate) was permanent or temporary.

In a letter accompanying the petition, [REDACTED] states that the university "wishes to continue employing [the beneficiary] as a Research Associate. . . . As you know, there are no guaranteed research positions at the University" because funding is contingent on sometimes unpredictable factors. Be that as it may, the petitioning university has several different employment types: tenured, tenure-track, annual renewable contracts, multiple year contracts, etc. While even a tenured professor could lose his or her job if the university encounters serious financial troubles, nevertheless that professor's employment is more secure than a worker with an annual renewable contract, whose employment ends at the close of the year unless active steps are taken to renew the contract. A position that would end on a fixed date, unless the employer intervened, is by definition temporary rather than permanent regardless of the employer's desire to extend the term of employment. Because a postdoctoral position is generally temporary in nature,¹ the burden is on the petitioner to establish that this particular postdoctoral position is designed to continue indefinitely, i.e. that it has no fixed termination date.

On May 31, 2001, the director instructed the petitioner to submit a new petition form, signed "by an authorized official of the University," specifying whether the position is permanent or temporary. The director also requested a copy of "the actual job offer to the beneficiary plus any available additional evidence that the position qualifies as permanent." By regulation, every petition filed under this classification must be filed by a U.S. employer rather than by the alien beneficiary (see 8 C.F.R. 204.5(i)(1)) and the petition "must be accompanied by" evidence of a permanent job offer (see 8 C.F.R. 204.5(i)(3)(iii)(B)). Because the job offer must "accompany" the petition, documentation of a qualifying permanent job offer must exist as of the petition's filing date. It cannot suffice for the petitioner to issue, or amend, the job offer after the filing date. 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 petitions for employment-based immigrant classification must be approvable as of the filing date of the visa petition, rather than contingent on qualifying developments that take place after that filing date.

In response, the petitioner submitted a new petition form, bearing an illegible signature. Nothing submitted with the new form identified the signer, specified the signer's title, or even plainly identified the signer as an official of the petitioning university. The beneficiary's attorney

¹ The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were that "the appointment is temporary" and "viewed as preparatory for a full-time academic and/or research career." The petitioning university is a member of the Association of American Universities.

prepared the form. In the section marked "Is this a permanent position? yes no," the beneficiary's attorney initially marked "no." This response was obscured with correction fluid, and an "x" was placed in the "yes" box.

A new job offer letter from [REDACTED] to the beneficiary (dated July 1, 2000, nearly three months after the initial submission of the petition) states "I am most pleased to continue your position a research associate in my laboratory. . . . This full-time position . . . is contingent upon satisfactory progress and availability of funds." [REDACTED] reference to the "continuation" of the position suggests a renewal of a temporary position rather than a permanent one. It also indicates that the petitioner is still in that temporary position, rather than being offered another, permanent position; a change of position would not be a "continuation."

The director denied the petition, acknowledging the Service's receipt of the amended petition form but stating that the identity and title of the signer cannot be determined from the illegible signature on the Form I-140. The director also found that the petitioner has failed to demonstrate that the position offered to the beneficiary is permanent, rather than a temporary one of three to five years duration.

On appeal, the petitioner submits a third Form I-140 petition, this one signed by Prof. Mayo, with his name and title written alongside his signature. The beneficiary's attorney states that the previous Form I-140 did not identify the signer because the director had not required such identification. We note that, on appeal, the attorney does not identify the individual who had signed the previous Form I-140. Despite the considerable confusion regarding the petition forms, the record contains sufficient evidence of the university's initial and continued involvement that we can consider the petition properly filed.

With the appeal, the petitioner submits yet another letter from [REDACTED] who asserts that it is the petitioner's salary, rather than position, that is contingent on the availability of funding. [REDACTED] states "the research associate position is offered to [the beneficiary] for an unspecified period of time and constitutes a full time, permanent offer of employment." [REDACTED] offers a new job offer letter, dated July 2, 2001, which is largely identical to the July 1, 2001 letter except for the insertion of the word "permanent" in the description of the position.

There is no indication that the July 2, 2001 letter actually existed on July 2, 2001; it was not included in the petitioner's supplemental submission of July 18, 2001. If the letter did not exist until September 2001 (when it was submitted on appeal), simply backdating the letter cannot suffice to show that its terms were in effect prior to the date it was actually created.

The petitioner, by submitting a third signed Form I-140 and a new job offer letter, has overcome the specific objections cited in the director's decision, but it is not clear that the petition can now be approved. We note the somewhat inconsistent descriptions in [REDACTED] various job offer letters, although [REDACTED] asserts that the successive letters simply clarify, rather than alter, the terms of employment. We note the absence from the record of any documentation from the petitioning university's human resources office pertaining to the job offer and its specific terms. 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).

Because the petitioner is the university itself, rather than [REDACTED] as an individual, we must see evidence that the university's hiring officials and human resources department consider the beneficiary's employment to be permanent rather than as a typical, temporary postdoctoral position, a renewable annual contract, or other non-permanent and therefore non-qualifying type of employment. Such documentation ought to be readily available from the university, and can take many forms, for example:

- an executed contract between the university and the beneficiary, signed and dated no later than the petition's filing date;
- official university guidelines indicating that postdoctoral research associates are normally considered permanent employees; or
- university documents indicating that, while postdoctoral positions are generally temporary, a specific, written exception had been made for this beneficiary on or before the petition's filing date.

Absent clear documentary evidence that the petitioning university (and not only Prof. Mayo) considered the employment to be permanent as of the petition's filing date, we cannot conclude that the position qualifies under the pertinent statute and regulations. The director must allow the petitioning university an opportunity to submit evidence of the type described above. If the petitioner is unable to meet this burden, then the petition cannot be approved.

Beyond the issues addressed in the director's decision, we note that the director did not specify any conclusion as to whether or not the beneficiary qualifies as an outstanding researcher, i.e. one who has earned international recognition in his field. If, following the submission of additional documentation pertaining to the nature of the beneficiary's employment, the director concludes that the petitioner has overcome the originally stated grounds for denial, the director cannot issue a new decision without first considering the issue of whether or not the beneficiary qualifies as an outstanding researcher as the statute and regulations define that term.

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 Associate Commissioner for Examinations for review.