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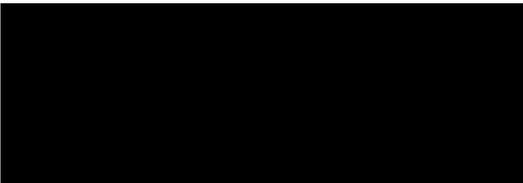
U.S. Department of Homeland Security
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Washington, DC 20536



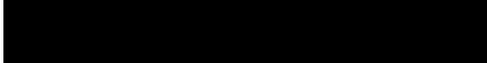
U.S. Citizenship
and Immigration
Services

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FILE: WAC 01 230 51221 Office: CALIFORNIA SERVICE CENTER Date: **FEB 10 2004**

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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

Mari Johnson

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and then reaffirmed by the director on motion. The matter is now before the Administrative Appeals Office on certification. The director's decision will be affirmed.

The petitioner, a private employer that provides "Sino-U.S. technological development consulting services," 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 Director of Science and Technological Development. The director found the petitioner had not established that the beneficiary qualifies for the classification sought.

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.

The Form I-140 petition was filed by International Solutions on April 26, 2001. In a letter accompanying the petition that was addressed to the Service Center [REDACTED] President, International Solutions, states:

Recognizing the importance of bilateral trade, exchanges of academic experience, and personnel...in the field of Science and Technology between China and the United States, our newly established enterprise aspires to devote to this lofty objective with [sic] the talent, contact, and outstanding knowledge of [the beneficiary]. Without the beneficiary, our project and planning would not be able to proceed.

[W]e humbly request your kind consideration in approving our petition to employ [the beneficiary] as the Director of our Science and Technological Development Department...

On January 24, 2002, the director issued a request for evidence (RFE) pertaining to the regulatory requirements set forth at 8 C.F.R. § 204.5(i)(3). On page 3 of the RFE, the director instructed the petitioner to “[s]ubmit an offer of employment in the form of an original, signed letter...offering the beneficiary a tenured or tenure-track teaching position in the beneficiary’s academic field or...a permanent research position in [his]academic field.” The petitioner was also requested to submit evidence demonstrating that it “employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.” Additionally, the petitioner was instructed to provide evidence of its “ability to pay the beneficiary’s wage.”

In response to the RFE, the petitioner submitted an offer of employment, dated March 22, 2002, from MTI Corporation, a provider of data storage, storage management and data protection solutions, and information pertaining to that company. MTI Corporation, however, is not the petitioning U.S. employer. The petitioning U.S. employer in this matter, International Solutions, failed to provide evidence of its own job offer, its ability to pay the beneficiary’s wage, its employment of at least three persons in full-time research positions, and the beneficiary’s documented accomplishments in the academic field.

The regulation at 8 C.F.R. § 204.5(i)(3)(iii) clearly states that an offer of permanent employment is to be submitted as part of the initial evidence accompanying the petition. We note, however, that the evidence initially presented to the director, and in response to the director’s request for evidence, included no 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. Instead, the petitioner has presented evidence of a job offer from MTI Corporation dated March 22, 2002.

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 March 22, 2002 job offer letter and the supporting documentation pertaining to MTI Corporation fail to establish the beneficiary's eligibility as of the filing date of the petition. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). New circumstances that did not exist as of the filing date cannot retroactively establish eligibility as of that date. Furthermore, in regard to the petitioner's attempt to alter the petition and declare MTI Corporation as the new prospective employer, we note that 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 CIS requirements. *See Matter of Izummi*, 22 I&N 169 (Comm. 1998). The standard for amending a petition is whether the petition was approvable on the date it was filed. Any amendment based on facts that come into existence after the filing date (such as a new job offer), must be made in a new petition with a new filing date.

The director denied the petition, noting that the petitioner had not established an offer of a permanent research position to the beneficiary, that it employs a least three persons in full-time research positions, and that it has the ability to pay the beneficiary's wage. The director also concluded that the beneficiary had not fulfilled at least two of the regulatory criteria at 8 C.F.R. § 204.5(i)(3)(i).

Counsel argues that "[t]he director...ignored or neglected to address the issue of change of employer which was submitted in a package sent to the director as a direct response to the director's request for additional information dated January 24, 2002." Counsel adds that "the full information on the new employer, MTI, which is a NASDAQ stock company, [was] enclosed for...consideration."

Although the director afforded the petitioning entity the opportunity to submit evidence of its own job offer, its ability to pay the beneficiary's wage, its employment of at least three persons in full-time research positions, and its documented accomplishments in the academic field, the petitioner chose to ignore the director's request and instead submitted evidence pertaining to a separate prospective employer. Based on the petitioner's response to the RFE (including the information about the new prospective employer), the director concluded that the petitioner, International Solutions, no longer desired and intended to employ the beneficiary.

Section 204(a)(1)(F) of the Act states: "Any employer desiring and intending to employ within the United States an alien entitled to classification under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) may file a petition...for such classification."

The regulation at 8 C.F.R. § 204.5(c) states: "Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act."

The regulation at 8 C.F.R. § 204.5(i)(1) states: "Any 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 an I-140 visa petition for such classification."

In the Service Motion affirming the denial of the petition, dated March 26, 2003, the director responded to counsel's argument, stating:

The Form 1-140 petition indicates that International Solutions and not MTI intended to employ the beneficiary as a professor or researcher. It appears that the new employer [MTI] should have filed its own petition.... The president of International Solutions [REDACTED] indicates that a change of employer took place on or about the time the Service requested...further evidence.

Under the circumstances of this particular case, the statute and corresponding regulations contain no provision for the beneficiary to alter the petition and change employers.¹ Here, the job offer presented must originate from the petitioning U.S. employer. Because International Solutions filed the petition in this case, a formal job offer must be presented by that company, and the existence of new a job offer from a different company cannot remedy the absence of qualifying evidence from International Solutions. In this matter, the documentation from MTI Corporation, including its job offer letter, is irrelevant because that company is not the petitioning U.S. employer. As stated by the director, if MTI Corporation now seeks to employ the beneficiary, then it should file a new petition.

The director's motion also stated that "the evidence of record did not show that the beneficiary was internationally recognized as outstanding in a specific academic area." We have reviewed the evidence presented under the criteria at 8 C.F.R. § 204.5(i)(3)(i) and we concur with the director's conclusion. It is important to note here that the controlling purpose of the regulation is to establish international recognition, and any evidence submitted to meet the criteria must therefore be to some extent indicative of international recognition.

Beyond the director's decision, it should be noted that many of the documents submitted with regard to the beneficiary's individual qualifications are accompanied by translations that do not identify the translator and otherwise fail to meet the requirements at 8 C.F.R. § 103.2(b)(3). In addition, at least one of the translations for a notice of acceptance was certified in 1999, nearly one year before the original Chinese language document was issued. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

For the above stated reasons, the petitioner has not established that the beneficiary is qualified for the benefit sought. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The director's decision is affirmed and the petition remains denied.

¹ Section 106(c) of the American Competitiveness in the Twenty-First Century Act (AC21), Public Law 106-313, provides that "A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F) of the Act] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed." However, the record does not establish that the beneficiary meets these requirements.