

B3



U.S. Citizenship
and Immigration
Services



FILE: LIN 03 079 52573 Office: NEBRASKA SERVICE CENTER Date: SEP 07 2004

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)

ON BEHALF OF PETITIONER:
[Redacted]

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

Robert P. Wiemann, Director
Administrative Appeals Office

PUBLIC COPY

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner identifies itself as a "Minerals Biotechnology Company." It 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 "Vice President of Research and Development." The director determined the petitioner had not established that it employs at least three persons full-time in research positions. The director also determined that the petitioner had not established its ability to pay the beneficiary the proffered wage.

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.

As used in this section, the term "academic field," means a body of specialized knowledge offered for study at an accredited United States university or institution of higher education. 8 C.F.R. § 204.5(i)(2). In this case, the beneficiary's academic field is Mining Engineering. The beneficiary holds a Ph.D. in Mining Engineering from Queen's University at Kingston (Ontario, Canada). The beneficiary specializes in extractive metallurgy and the "use of biological agents for mineral processing."

The first issue to be determined in this matter is whether the petitioner has established that it employed at least three other persons full-time in research positions as of the petition's filing date of January 10, 2003.

In response to the director's request for evidence of "persons employed in full-time research positions," the petitioner submitted one-paragraph position descriptions for [REDACTED] (President [REDACTED]), [REDACTED] (Executive Vice President), [REDACTED] (Senior Vice President, Research [REDACTED]) Senior [REDACTED] and the alien beneficiary (Vice President, Research and Development).

The director found that the information presented was not adequate to demonstrate that the petitioner employed at least three full-time researchers. The director's decision stated:

As noted above, to be eligible for the requested classification the prospective department, division or institute of a private employer must demonstrate that it employs at least three persons full-time in research positions. In response to the [request for evidence], the petitioner submitted a list of five persons comprising its "research staff," including the firm's President; Executive Vice President; Senior Vice President, Research; Vice President, Research and Development; and Senior Research Metallurgist.

Review of the list indicates that each of the five persons has academic credentials in metallurgy or other science/technology fields. Given the size and apparent organization of the petitioner, it can be assumed that each person listed is engaged to some extent in research management and decision-making, if not actual research itself. The question that must be resolved is whether at least three of the listed persons are employed full-time in a research position.

One of the listed persons is the alien beneficiary. Since both statute and regulation prescribe a minim[um] number of full-time researchers as a threshold criterion for a private employer to seek this immigrant classification in behalf of an alien beneficiary, the alien beneficiary cannot be counted toward that threshold.

In determining whether the four other persons listed are full-time researchers, it is the duties of a position rather than its title that are dispositive. Of the four, it appears that only the Senior Research Metallurgist [REDACTED] is engaged sufficiently in research activities to be deemed to have a full-time research position.

On appeal, counsel states: "In its denial, [Citizenship and Immigration Services (CIS)] simply concluded that...the beneficiary could not be counted as one of the three full-time researchers required under the regulations. However, [CIS] provided no legal basis for its conclusion."

Section 203(b)(1)(B)(iii)(III) of the Act, 8 U.S.C. § 1153(b)(1)(B)(iii)(III), directs that an alien may qualify as a priority worker based on an offer of employment from a private research department, division, or institute, only "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 requirement of three full-time research employees is also set forth in 8 C.F.R. § 204.5(i)(3)(C)(iii). The petitioner contends that it has met this requirement, with the intended alien beneficiary qualifying as one of its full-time research employees. The alien beneficiary is currently employed in a nonimmigrant classification.

Neither the statute nor the legislative history clearly indicates whether the alien beneficiary can himself be the third full time research employee for purposes of a private entity's eligibility to file a visa petition under § 203(b)(1)(B). H.Rep. 101-723(I), 1990 USCCAN 6710, 6739 indicates that a private employer is eligible to file this petition "if there are at least three persons employed full-time in research." Like the statute itself, however, the legislative history neither endorses nor forecloses the petitioner's argument. Nor does the issue appear to have arisen during the rulemaking process. See 56 Fed. Reg. 60,897 (November 29, 1991) (final rule) and *id.* 30.703 (July 5, 1991) (proposed rule).

That said, it is worth noting that section 203(b)(1)(B)(iii)(III) of the Act, 8 U.S.C. § 1153(b)(1)(B)(iii)(III), requires that "the alien seeks to enter the United States" to work for "a department, division, or institute of a private employer" that "employs at least 3 persons full-time in research activities." The phrases "seeks to enter" and "employs at least 3 persons" are both in the present tense. If an alien researcher is currently outside the United States, and intends to enter the United States with an immigrant visa, then the prospective employer must already employ at least three full-time researchers in the relevant department, division, or institute. In such a case, the three researchers obviously do not include the alien. Thus, the statutory construction demonstrates that the alien seeks to become the fourth researcher in a company that already employs three *other* researchers. In instances where the alien is already in the United States as a nonimmigrant, and the alien has joined *two* other researchers to become the *third* researcher, then the employer does not satisfy the statutory construction.

There is no regulatory or statutory justification for the arbitrary assumption that a company too small to petition for a worker who is still overseas can, nevertheless, petition for that same worker if the worker is already in the United States as a nonimmigrant. Therefore, we concur with the director's finding that the position held by the alien beneficiary shall not be counted as one of the three persons involved full-time in research activities. The AAO concludes that, even if the alien beneficiary is lawfully employed in a nonimmigrant classification, the petitioner may not count the alien beneficiary toward the requirement of "3 persons [employed] full-time in research activities." The apparent purpose of 203(b)(1)(B)(iii)(III) is to limit

this immigrant visa classification to well-established research institutes. If the – by definition temporary – employment of a nonimmigrant alien can be counted toward this requirement then it would appear that hiring three nonimmigrant aliens could make all three of them eligible. This result would, with little effort, render the three employees requirement meaningless.¹

Counsel further states that CIS “misinterpreted the evidence in concluding that [the] petitioner only employed one full-time researcher other than the beneficiary.” In the appellate brief, counsel does not challenge the director’s finding that [REDACTED] (President) and [REDACTED] (Senior Vice President, Research) do not hold full-time research positions. On page nine of the brief, counsel states: “[The] petitioner...concede[s] that [REDACTED] are not individually in full-time research positions because they do not spend the majority of their time conducting research.”

The appellate submission includes a letter from Desmond Kearns, Chairman and Chief Executive Officer, GeoBiotics, acknowledging that [REDACTED] “is currently semi-retired and spends 20% of his time serving as the Company’s Senior Vice President of Research” and that [REDACTED] devotes 50% of his time to research activities...with the other 50% of his time spent on overall management and business development.”

Aside from [REDACTED] the beneficiary, and [REDACTED] the Senior Research Metallurgist who the director found to qualify as a full-time researcher), the only remaining employee to be evaluated who held a position with the petitioner at the time of filing is [REDACTED] Executive Vice President. On appeal, the letter from [REDACTED] describes [REDACTED] job duties as follows:

[REDACTED] is the Executive Vice President of Engineering for the Company and holds Bachelor of Science and Master of Science degrees in Metallurgy from leading universities in South Africa and Canada and has served in that capacity since 1999. He is a Metallurgical Engineer with more than 30 years experience in research, process development, design, commissioning and operation of metallurgical plants throughout the world, including extensive experience in developing processes for the treatment of refractory metal ores and concentrates. He researches, evaluates and analyzes upstream and downstream mineral processes to determine how they can be integrated with and complemented by the Company’s bioleaching technologies in order to create fully integrated metals recovery processes. He also monitors the research activities and developments of competing technology companies to determine the strengths and weaknesses of their technologies and how to adapt and modify our technologies to be competitive. He is also responsible for estimating the capital and operating costs of the Company’s technologies and determining how they can be made more cost effective. He is responsible for integrating GeoBiotics’ research findings into engineering designs for pilot scale and commercial scale mineral processing plants [REDACTED] devotes 100% of his time to these research activities.

Contrary to the preceding statement, it is not apparent that the majority of [REDACTED] duties described above constitute “research activities.” Performing such tasks as monitoring GeoBiotics’ competitors, estimating operating costs and finding ways to make GeoBiotics’ technologies more cost effective, and analyzing

¹ Granted, for at least some nonimmigrant classifications, the position itself need not be temporary, but the alien must be coming temporarily to the United States.

existing mineral process technologies in use throughout the mining industry are more akin to production management or executive marketing responsibilities rather than qualifying research in the alien's academic field.

At the appellate stage, the petitioner now (for the first time) claims the existence of an additional full-time research position. Counsel explains that "this research position was filled by [REDACTED]" at the time the petitioner submitted the original petition on behalf of [the beneficiary]." The petitioner's most recent letter from [REDACTED] states:

[REDACTED] has been a member of the Company's research staff in Australia since early 2004. He succeeded Dianne Satalic who left the Company in mid-2003. This position was not included in our original documentation for two reasons: first, the position was not filled in December 2003 when we submitted the additional information requested by...CIS with respect to identification of our full-time research staff; and second, we did not anticipate that the examiner would exclude [the beneficiary] from our count of full-time researchers. [REDACTED] position has been an existing full-time position for a number of years and was filled by [REDACTED] at the time we submitted the original petition on behalf of [the beneficiary] in January 2003. [REDACTED] holds a Bachelor of Applied Science in Metallurgy from the University of New South Wales in Australia and has approximately 28 years experience in mineral processing. [REDACTED] is responsible for identifying potential applications of the Company's technologies in Australia and [REDACTED] designing and conducting research and test programs to determine the amenability of these mineral deposits to treatment with the Company's technologies, and analyzing and evaluating whether and how the Company's technologies should be modified and adapted in order to be able to treat the mineral ores.

Information from the petitioner regarding [REDACTED] position, his qualifications, and current responsibilities is irrelevant to the matter at hand because he did not work for the petitioner as of the filing date of the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

We note here that on October 2, 2003, the director issued a notice requesting that the petitioner "confirm and identify the persons employed full-time in research positions." A cover letter from counsel responding to that request specifically stated: "Evidence included in response to this request is documentation from the company identifying the five employees who conduct extensive research for the company." The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Where, as here, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the additional position to be considered, it should have submitted evidence regarding the existence of that position at the time of filing or in response to the director's request for evidence. *Id.* In this matter, the appeal will be adjudicated

based on the record of proceeding before the director. Under these circumstances, any consideration at all given to the sufficiency of evidence submitted on appeal is entirely discretionary.

Even if we were to accept the petitioner's latest assertions about the existence of [REDACTED] research position at the time of filing, the petitioner has not provided adequate evidence to establish that the positions held by [REDACTED] constitute "full-time research positions" in the academic field of mining engineering/metallurgy. The petitioner has not established that performing production management functions (such as those performed by [REDACTED] or engineering adaptations and modifications of existing mining industry technologies created by others (such as those currently performed by [REDACTED] constitute qualifying research in an academic field for the purpose of Section 203(b)(1)(B) of the Act. Furthermore, the position descriptions themselves, which are unaccompanied by any supporting evidence, are not dispositive. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without evidence documenting Diane Satalic and Murray Bath's research efforts in the field of mining engineering, we are not persuaded that their primary activities involve "research" in the academic field rather than mostly engineering, production management, or company-related marketing research tasks.

While the petitioner has presented evidence showing that GeoBiotics has generated several patents and research publications, there is no first-hand evidence indicating that [REDACTED] were primary contributors to that research. For example, the petitioner claims to hold several patents in mining technology; however, no patents naming Ms. Satalic or Mr. Bath as inventors have been presented here. The record contains a "List of Research Papers" (17) published and presented by individuals such as the beneficiary and [REDACTED] but there is no indication that Diane Satalic or Murray Bath authored research papers on behalf of GeoBiotics. The absence of such documentation is a significant omission from the record.

For the reasons set forth above, the position descriptions offered by the petitioner are not adequate to demonstrate that [REDACTED] represent the second and third full-time researchers employed by the petitioner as of the filing date.

The remaining issue to be determined is whether petitioner has demonstrated its ability to pay the beneficiary the proffered wage. The proffered wage as stated on the Form I-140, Petition for Alien Worker, is \$125,000 annually.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The appellate submission included the beneficiary's Form W-2s, Wage and Tax Statements, for 2002 and 2003 reflecting total compensation paid to beneficiary by the petitioner in the amount of \$124,999.92 in each

year. In determining the petitioner's ability to pay the proffered wage during a given period, CIS may examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the evidence presented on appeal is adequate to establish that the petitioner employed and paid the beneficiary the proffered wage in 2002 and 2003. The \$.08 differential from the salary amount on the Form I-140 is negligible. It is concluded, therefore, that the petitioner has established that it had the ability to pay the salary offered as of the filing date of the petition and continuing to present.

It remains, however, that the evidence in the record is not adequate to demonstrate that the petitioner employed at least three persons full-time in research positions as of the petition's filing date of January 10, 2003.

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.