



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



B3

FILE: [REDACTED]
LIN 03 180 52381

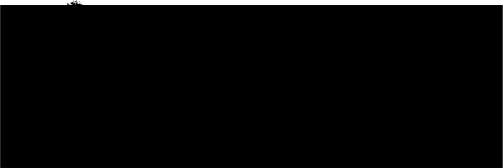
Office: NEBRASKA SERVICE CENTER

Date: AUG 31 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as 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:



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.

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 Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a state 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). According to the petition, the petitioner seeks to employ the beneficiary "permanently" in the United States as an instructor, including research responsibilities. The director determined that the petitioner had not established that it had offered the beneficiary a permanent job as of the date of filing.

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.

(Emphasis added.) The regulation at 8 C.F.R. § 204.5(i)(3)(iii) provides that a petition must be accompanied by:

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.

(Emphasis added.) The regulation at 8 C.F.R. § 204.5(i)(2), provides, in pertinent part:

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.

(Underlined emphasis added.) On Part 6 of the petition, the petitioner indicated that the proposed job title was "instructor," involving "research and teaching in signal transduction of cells." The petitioner indicated on the petition that the job offered was a permanent position. The petitioner submitted a letter from Dr. [REDACTED] Head of the petitioner's Division of Renal Diseases and Hypertension, addressed to the director. In her initial cover letter, [REDACTED] quotes Dr. [REDACTED] states:

[The beneficiary] has been appointed, effective February 1, 2002, to a regular, full-time, permanent faculty position as Instructor of Medicine in the Division of Renal diseases and Hypertension, Department of Medicine, [at the petitioning university.] [The beneficiary's] annual salary is \$47,380. We consider [the beneficiary's] appointment to be permanent and ongoing, and one that is renewable annually based on mutual agreement.

On March 17, 2004, the director requested the actual offer for employment made by the petitioner to the beneficiary. In response, the petitioner submitted a November 28, 2001 letter from Dr. [REDACTED] and Dr. [REDACTED] offering the beneficiary a position as an instructor. This letter indicates that the appointment is effective February 1, 2002. Thus, this offer is for the same position discussed by Dr. [REDACTED] in his initial letter. The November 28, 2001 letter states that the position "is an indeterminate appointment with no specified end date." The letter continues, however, that the position is contingent not simply on sufficient funding in general, but funding for two specified projects, [REDACTED] and [REDACTED]. The letter also includes the following paragraph as required by state law:

Your employment contract is subject to termination by either party to such contract at any time during its term, and you shall be deemed to be an employee-at-will. No compensation, whether as a buy-out of the remaining term of the contract, as liquidated damages, or as any other form of remuneration, shall be owed or paid to you upon or after termination of such contract except for compensation that was earned prior to the date of termination.

The petitioner also submitted a letter from Dr. [REDACTED] and Dr. [REDACTED] originally submitted with the beneficiary's Application to Register Permanent Residence or Adjust States, Form I-485. This letter provides:

[The beneficiary] has been appointed, effective February 1, 2002, to a regular, full-time permanent faculty position as Instructor of Medicine in the Division of Renal Diseases and Hypertension, Department of Medicine, [at the petitioning university]. [The beneficiary's] appointment is considered to be permanent and ongoing, and one that is annually renewable annually based on mutual agreement.

In her cover letter submitted in response to the director's request for additional evidence, Ms. [REDACTED] asserts that according to the Rules of Regents, the petitioner offers tenured appointments, indeterminate appointments and limited appointments. Ms. [REDACTED] further asserts that the beneficiary's position is an indeterminate appointment, which are "not made for a specified period of time but whose continuance is dependent each year upon inclusion in the approved budget."

The director concluded that the petitioner had not offered the beneficiary either a tenure-track or permanent position. On appeal, counsel concedes that the November 28, 2001 letter does not offer the beneficiary a permanent position, but asserts that subsequent to that appointment and prior to the filing of the petition, the petitioner expressed its "intent" that the beneficiary's position be permanent, as defined in the regulations.

At the outset, we note that the first consideration is whether the petitioner has offered the beneficiary a teaching or research position. We note that the definition of permanent, quoted above, relates only to research positions. A teaching position would need to be tenure-track. Section 203(b)(1)(B)(iii)(I) of the Act; 8 C.F.R. § 204.5(i)(3)(iii)(A).

The position listed on the petition and in every letter is that of "instructor," a title that implies primarily teaching responsibilities. The November 28, 2001 job offer letter includes teaching as the beneficiary's first responsibility. As determined by the director and not contested by the petitioner, the beneficiary has not been offered a tenure-track position. As the offer of a non-tenure track teaching position is insufficient according to section 203(b)(1)(B)(iii)(I), no inquiry into whether the position is "permanent" is required.

While the most persuasive conclusion is that the "instructor" position is primarily a teaching position with research responsibilities included, we acknowledge that, according to the same letter, the beneficiary's position is conditioned on the funding for two research projects. We cannot ignore that most, if not all, teaching and professor positions in the sciences involve at least some research, which does not render them researcher positions. Nevertheless, given the implication that the beneficiary was primarily hired to work on two specific research projects, it could be reasonably argued that the beneficiary's instructor position is primarily a "research" position. Thus, we will also examine whether the position offered to the beneficiary, "instructor," meets the regulatory definition of permanent.

On appeal, counsel asserts:

[The petitioner] has established its intention of employing the alien in a permanent, full-time position based on its current and prospective employment of the alien, its credibility, its existing staff arrangements, and its specific written offer letters that fully and directly establish the [petitioner's] intention of employing the alien for an existing position "for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation

of continued employment[,]" thereby meeting the regulatory standard for "permanent" at 8 C.F.R. § 204.5(i)(2).

Counsel notes that the November 28, 2001 letter offers "an indeterminate appointment with no specified end date," suggesting the petitioner wanted "the flexibility to determine if [the beneficiary] may be a viable candidate for permanent employment." Counsel concedes that the 2001 letter offers only "at-will" employment with the possibility of a permanent relationship in the future. Counsel continues:

However, the intent to employ [the beneficiary] permanently had been solidified before the filing of the I-140 petition. This is precisely why Drs. ██████████ and Anderson memorialized in written form the offer of employment in the form of a letter dated January 25, 2003 and the offer of employment was reiterated in the substantive letter dated May 14, 2003 by Ms. ██████████

Counsel then reiterates the other letters submitted in response to the request for additional evidence, asserting that the director, in his denial, was only concerned with the "cosmetic format of the documents." Counsel then cites several non-precedent decisions by this office that are not binding upon us. Specifically, counsel cites decisions where the AAO, according to counsel, held that employment contingent on funding or subject to annual reviews can be considered permanent. The decisions provided by counsel on appeal are brief, with little discussion of the complete record of proceedings. One case specifically notes that the beneficiary in that case could only be fired "for cause," a fact not present in the matter before us.

In addition, counsel asserts that a 2001 AAO decision found that where annual contracts are the "norm," an annual contract could be sufficient evidence of a permanent job offer. The petitioner submits evidence that it issues term contracts to its professors. Counsel seriously mischaracterizes the actual 2001 AAO decision. In that decision, which counsel submits, the AAO dismissed the appeal, distinguishing the beneficiary's one-year contract from the more permanent offers presumably made to full professors. While noting that the record in that case did not suggest that full professors were subject to one-year contracts, the AAO did not state or imply that if one-year contracts were the norm for full professors, such contracts would be considered permanent.

While we are cognizant that some universities may typically offer term or at-will contracts to their faculty, their personnel structure does not relieve us from applying the regulations as written. We note that whether or not professor positions are "permanent" as defined in the pertinent regulations, they are typically tenure or tenure-track. Thus, they are qualifying positions pursuant to the statute and regulations quoted above regardless of whether they meet the regulatory definition of "permanent." The beneficiary, however, has not been hired into a tenure-track position, as stated above.

The proposed employment listed on the petition is that of "instructor." The November 28, 2001 job offer letter offers the beneficiary the position of "instructor" as of February 1, 2002. The letters addressed to the director all purport to reference the beneficiary's position as an instructor as of February 1, 2002. Thus, while it is certainly conceivable for a university to hire an individual in a term position and, subsequent to filing a petition pursuant to section 203(b)(1)(B), make a new offer of a permanent position, that does not appear to be the case in the matter before us. The only job offer in the record is the offer of an instructor position. The petitioner has not established that the instructor position can be either at-will or require cause for termination or non-renewal, depending on the appointment. Thus, we do not agree with counsel that the November 28, 2001 letter is

irrelevant. Rather, that letter is the only job offer in the record of proceedings.¹ Whatever the petitioner's "intention," it remains that the beneficiary's position can be terminated "at-will," with renewal only if mutually agreeable. Thus, whatever the beneficiary's personal expectation of employment may be, the petitioner may end the employment relationship without cause, violating an integral part of the definition of "permanent" quoted above.

The lack of a permanent job offer from the petitioner to the beneficiary is sufficient grounds for denial.

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.

¹ The failure in the regulations to require a job offer "addressed to the beneficiary" does not imply that a letter to the director can be considered a job offer. Such language would be redundant as an offer can only be made to an offeree.