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U.S. Citizenship
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FEB 04 2005

FILE: LIN 03 107 51420 Office: NEBRASKA SERVICE CENTER Date:

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:

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.

for 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 university. 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 a "Research Associate." The director determined the petitioner had not established that it extended an offer of permanent employment to the beneficiary.

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:

(ii) 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 "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. 8 C.F.R. § 204.5(i)(2).

This petition was filed on February 13, 2003. The petition was accompanied by two letters addressed to the "Immigration and Naturalization Service" from [REDACTED] Director, Liquid Crystal Institute, Kent State University.

[REDACTED] February 5, 2003 letter states:

[The beneficiary] is a full-time Research Associate in the Liquid Crystal Institute of Kent State University and is receiving an annual salary of \$29,000 with the usual fringe benefits. The position offered to [the beneficiary] is not temporary; there is no set date when he must leave his position. His employment will continue unless he is terminated, as set forth in University and departmental policies, procedures, by-laws and contracts, etc.

[REDACTED] November 14, 2002 letter states: "In January 2002, [the beneficiary] was offered the position of Research Associate." The record, however, included no evidence of the January 2002 job offer from the petitioner to the beneficiary for the Research Associate position.

The regulation at 8 C.F.R. § 204.5(i)(3)(iii)(B) specifically requires that "[t]he offer of employment shall be in the form of 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." [emphasis added] The evidence accompanying the petition included no formal job offer letter, i.e., a letter from the petitioner addressed to the beneficiary that sets forth a binding offer of employment. [REDACTED] February 5, 2003 letter indicates that the beneficiary is employed by Kent State University, but it is not an offer of permanent employment addressed to the beneficiary. Rather, it is a letter to the "Immigration and Naturalization Service" verifying the petitioner's intention to continue employing the beneficiary. This letter does not constitute a formal offer of employment; indeed, it indicates that the beneficiary has already accepted an offer made earlier (i.e., the January 2002 Research Associate position job offer cited in [REDACTED] November 14, 2002 letter). The record does not contain any documentation, pre-dating the petition's filing date, that initiated an employer-employee relationship between the petitioner and the beneficiary or otherwise extended a permanent job offer from the petitioner to the beneficiary. Nor is there any evidence showing that the Kent State University has a personnel system in place that grants the Director of the Liquid Crystal Institute sole authority to extend a permanent job offer to a university employee. For example, the petitioner has not provided a copy of its

official administrative hiring procedures related to permanent research positions indicating who has authority to issue job offer letters.

On October 9, 2003, the director requested specific documentation pertaining to the absence of a job offer letter from the petitioner to the beneficiary. The director's request for evidence stated: "Please submit a complete copy of the actual offer of employment made by Kent Statue University to [the beneficiary]."

In response, the petitioner submitted a letter from [REDACTED] Director, Liquid Crystal Institute, Kent State University, dated November 19, 2003 and addressed to the beneficiary. No explanation was provided regarding why the petitioner did not submit evidence of the original January 2002 Research Associate position job offer cited in [REDACTED] November 14, 2002 letter.

[REDACTED] November 19, 2003 letter states:

This letter is to confirm your continued employment with the Liquid Crystal Institute. This position is not temporary; there is no set date when you must leave the position. The annual salary is \$30,616.75, with the usual fringe benefits. As we have discussed, the job offered to you served as the basis for filing the Immigrant Petition for Alien Worker, Form I-140, on your behalf on February 14, 2003. This offer was previously reduced in writing for the Immigration Service on February 5, 2003 in a letter addressed to the Agency from [REDACTED] former Director of the Institute. However, we would like your signature on this letter to prove that you reviewed the terms of the offer before we filed the petition.

* * *

Of course, your employment should continue unless you are terminated, as set forth in University and Departmental policies, procedures, by-laws and contracts, etc. I would also like to note in this letter that as the Director, I am authorized to recommend the hiring and termination of liquid crystal research associates to the Provost, whose decision is subject to approval by the Kent State University Board of Trustees.

[REDACTED] November 19, 2003 letter is a job confirmation letter rather than the original version of "the actual offer of employment made by Kent Statue University to [the beneficiary]" (as requested by the director). The petitioner failed to provide evidence related to the original Research Associate job offer from January 2002. It is further noted that, according to [REDACTED] November 19, 2003 letter, it is the Provost (whose decision is subject to approval by the Kent State University Board of Trustees), rather than the Director of the Liquid Crystal Institute, who is authorized by the university to hire research associates. The November 19, 2003 letter from [REDACTED] indicates that the Director of the Liquid Crystal Institute must submit his hiring recommendations to the Provost for action. Therefore, without contemporaneous evidence showing that the Provost had issued the beneficiary an offer of permanent employment or had directly approved the terms of employment as stated in the letters from the Director of the Liquid Crystal Institute, we cannot conclude that a valid job offer from the university to the beneficiary existed as of this petition's filing date.

The regulation at 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 letter submitted in response to the director's request for evidence fails to demonstrate that a permanent job offer from the Kent State University to the beneficiary existed as of this petition's filing date (February 13, 2003).

The director denied the petition, stating:

Eligibility for this immigrant classification for both professors and researchers hinges on a written offer of permanent employment . . . Pursuant to binding case law, the petitioner's November 19, 2003 letter cannot, even were it otherwise acceptable evidence, retroactively demonstrate that a qualifying offer of employment existed as of February 13, 2003.

* * *

The November 19, 2003 letter is . . . problematic because it does no more than "confirm" the beneficiary's "continued employment," in regards to which the petitioner has not furnished a copy of an offer, contract or agreement between the parties.

* * *

Although both [REDACTED] refer to University by-laws, contracts, policies and procedures, the record lacks documents from Kent State University administrative and/or hiring authorities documenting the offer itself and corroborating that the nature of the position relative to other faculty there. From [REDACTED] statement, it appears that involvement by at least the office of the Provost is needed for action on faculty hiring recommendations.

We concur with the preceding observations from the director's decision. However, we withdraw the director's observations related to [REDACTED] September 26, 2000 letter.

The director's decision stated:

In a September 26, 2000 letter, [REDACTED] described the beneficiary's existing employment as being that of a "postdoctoral fellow." The Service cannot simply assume that the beneficiary's existing employment is permanent because, first, the record shows that the employment is pursuant to an H nonimmigrant visa which, by definition, is for temporary employment. Second, postdoctoral appointments generally are considered by academic institutions themselves as preparatory for permanent employment.

[REDACTED] September 26, 2000 letter was clearly superseded by [REDACTED] November 14, 2002 letter indicating that "[i]n January 2002, [the beneficiary] was offered the position of Research Associate." Therefore, contrary to the director's observation, it is apparent that the beneficiary was a Research Associate rather than a Postdoctoral Fellow as of this petition's filing date.

On appeal, counsel states that Citizenship and Immigration Services appears to deny the petition based on the conclusion that the beneficiary is employed pursuant to an H-1B visa. Here, counsel misstates the director's observation. The director's decision simply noted that the beneficiary's existing employment is under a temporary, non-immigrant visa and, therefore, it cannot be automatically assumed that a permanent job offer exists. Clearly, the director did not state that the beneficiary's employment under an H-1B non-immigrant visa is a disqualifying factor for the immigrant visa classification sought by the petitioner. The issue here is whether the petitioner had presented a valid job offer to the beneficiary for a permanent research petition as of the petition's filing date. An alien researcher can be present in the United States under H-1B status and still receive a permanent job offer.

The petitioner's failure to present contemporaneous evidence of the original job offer from the university to the beneficiary for a permanent research position as a "Research Associate" is a crucial omission from the record. If such a permanent job offer did indeed exist in January 2002 (as stated in Dr. West's November 14, 2002 letter), it is inexplicable as to why the petitioner, which was afforded ample opportunity to provide such evidence, has failed to do so even now at the appellate stage. In this case, the record contains no evidence of a job offer between the petitioner and the beneficiary that existed at the time of filing and which sets forth a binding offer of permanent employment. See *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). A petitioner must establish eligibility at the time of filing.

Pursuant to the regulations, the petitioner's failure to provide contemporaneous evidence of the original permanent job offer creates a presumption of ineligibility. The regulation at 8 C.F.R. § 103.2(b)(2)(i) states, in pertinent part:

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue.

In this case, the petitioner has not presented the original permanent job offer letter for the Research Associate position (pre-dating the petition), nor has it provided contemporaneous secondary evidence from the office of the Provost of Kent State University, for example, demonstrating that such a "permanent" job offer existed between both parties as of February 13, 2003. There is no indication that the Provost's office had approved the Director of the Liquid Crystal Institute's recommendation to offer the beneficiary a permanent research position as of this petition's filing date.

For the above stated reasons, we find petitioner has not established that it extended an offer of permanent employment to the beneficiary as of the filing date of the petition. The record does not contain any qualifying documentation, pre-dating the petition's filing date, that initiated an employer-employee relationship between the petitioner and the beneficiary or otherwise extended a permanent job offer from the petitioner to the beneficiary. Therefore, the petitioner has not established eligibility pursuant to 8 C.F.R. § 204.5(i)(3)(iii).

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.

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ORDER: The appeal is dismissed.