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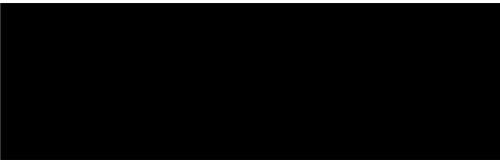
Office: NEBRASKA SERVICE CENTER

Date: FEB 25 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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner is an education and research institution. 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 in an unspecified permanent position. The director determined that the petitioner had not established that it had offered the beneficiary a permanent job as of the date of filing or that the beneficiary is recognized internationally as outstanding in his academic field, as required for classification as an outstanding researcher.

On appeal, counsel asserted that the director's statement that the evidence "must clearly demonstrate" the beneficiary's eligibility "wrongfully raises the standard of the regulations." Counsel further raised several specific arguments regarding the director's conclusions.

The AAO, in a 14-page decision, addressed all of counsel's assertions, rebutting nearly all of them. Specifically, the AAO concluded that the director had used the word "clearly" in its common form and was not applying a "clear and convincing" standard of proof. The AAO further concluded that the record did not include a qualifying job offer dated prior to the date of filing. Finally, the AAO concluded that, by a preponderance of the evidence, the petitioner had, at best, established that the beneficiary met one of the six regulatory criteria. An alien must meet at least two in order to be eligible for the classification sought.

On motion, counsel continues to argue that the director applied an incorrect standard of proof. In an attempt to address the AAO's discussion of this issue, counsel asserts that the AAO¹ concluded that the "clear and convincing" and "preponderance of the evidence" standards are the same.

Counsel misreads the AAO's previous decision. The AAO did not conclude that the two standards are the same. Rather, it concluded that the director did not apply the "clear and convincing" standard. For the reasons set forth in the AAO's previous decision, which we incorporate herein and will not repeat, we affirm that finding. We emphasize that the director's decision explains that he used the phrase "clearly demonstrated" in the request for additional evidence to request evidence that was not ambiguous. The preponderance of the evidence standard, which requires that "the greater weight of the evidence"² support the proposition to be established, requires more than ambiguous evidence. At no point did the director claim to be applying the legally defined "clear and convincing" standard of proof. Thus, we continue to hold that the director did not use too high a standard. Moreover, the AAO made it quite clear it was evaluating the beneficiary's eligibility by a preponderance of the evidence standard.

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):

¹ Counsel erroneously refers to this office as the "Board of Immigration Appeal."

² Black's Law Dictionary 1201 (7th ed. 1999).

(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)(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.

As stated in the AAO's previous decision, on Part 6 of the petition, the petitioner did not provide the job title or nontechnical description of the job for the proposed employment. In his initial cover letter, counsel asserted that exhibit 36 was a job offer letter. As discussed in the AAO's previous decision, the initial submission did not include a job offer. On May 21, 2002, the director requested "a copy of [the

petitioner's] letter to the beneficiary which offers him a permanent research position at [the petitioning] university in his academic job."

In response, the petitioner submitted a letter dated June 6, 2002, four months after the date of filing, addressed to Citizenship and Immigration Services (CIS) from [redacted] Chief of the Division of Cardiothoracic Surgery at the petitioning institution. [redacted] states that the beneficiary is working as a "Research Associate 2B/H" under a nonimmigrant visa and that the job offer "set forth on the immigrant petition for alien worker (I-140) form is still being offered to him under the same terms and conditions as those set forth on the form." [redacted] concludes that the beneficiary "has accepted the terms of employment and he will become a permanent junior faculty member of our academic staff to begin with the approval of his application for permanent residence."

The director stated that the petitioner had not submitted a copy of an employment offer made by the petitioner to the beneficiary and concluded that the petitioner had not met the regulatory evidentiary requirement of submitting a letter offering the beneficiary a permanent research position in his academic field. The director further noted that the letter submitted was dated over three months after the filing date of the petition, and was not evidence of a permanent job offer at the time of filing.

On appeal, counsel stated: "Enclosed please find the letter of employment, in accordance with the statutory criteria, from the petitioner . . . offering the beneficiary . . . a permanent position as a Research Associate." Counsel referenced exhibit 2. This exhibit includes another copy of the June 6, 2002 letter from Dr. [redacted] and a letter dated December 20, 2002 addressed to CIS from [redacted] an assistant professor of surgery at the petitioning institution, containing the same information as [redacted] letter.

The AAO agreed with the director that the regulations require an offer of employment from the petitioner to the beneficiary setting forth the title, terms and conditions of the position offered. The AAO concluded that another letter addressed to CIS that does not include the exact terms and conditions of the position offered and is dated after the date of filing could not overcome the director's clearly stated and legitimate concerns. The AAO further noted that the record contained no evidence that the petitioning institution has authorized either [redacted] to make legally binding offers of permanent employment.

On motion, counsel continues to assert that the initial submission included an offer of employment. While counsel's original cover letter for the initial submission asserted that exhibit 36 constituted the job offer,³ counsel now claims that exhibit 1 of the initial submission was the job offer. Exhibit 1 is an unsigned list of the beneficiary's alleged contributions to the field. An unsigned list of alleged contributions that fails to describe a job is not a job offer under any definition of the term. We affirm the finding that the original submission did not include a job offer.

The petitioner submits its "Guidelines for Permanent Residency Sponsorship" revised more than one month after the date of filing. The guidelines provide that "the department must be prepared to write a letter of offer stating that the employment is indefinite (i.e. permanent)." Counsel quotes this language with separate language from two paragraphs below providing that "the chair or individual's supervisor may sign these

³ As stated in our previous decision, exhibit 36 is a reference letter that makes no reference to the terms and conditions of the job offered.

forms.” Counsel asserts that these guidelines establish that professors have hiring authority. Counsel takes this language out of context. The final paragraph provides, in its entirety:

The immigration attorney handling a case may have various forms for the department to sign. Typically, the chair or individual’s supervisor may sign these forms, but each department should follow its own protocol. By signing Form I-140, “Immigration Petition for Alien Worker,” the department is committing to an indefinite (i.e. permanent) offer of employment to the individual.

This language, read in context, does not imply that all professors and supervisors have the authority to make a binding job offer on behalf of the university. Rather, a supervisor may, depending on department policy, be authorized to sign “various forms.” Finally, while the guidelines state that the petitioner considers the signing of the Form I-140 to constitute a commitment to indefinite employment, such guidelines cannot overcome the regulatory requirement for a job offer “in the form of a letter.” 8 C.F.R. § 204.5(i)(3)(iii).

On motion, the petitioner now submits an actual job offer from the petitioner to the beneficiary. The offer, however, is dated February 9, 2004. First, the director requested such an offer in very specific terms in his request for additional evidence. Thus, the submission of this evidence on motion cannot be considered. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Moreover, every letter in the record that counsel references as a job offer is dated after the date of filing. We reemphasize that, despite counsel’s assertions to the contrary, the initial submission did not include any document, addressed either to CIS or the beneficiary, purporting to offer the beneficiary a job or confirm a verbal job offer. The issuance of a permanent job offer after the date of filing is irrelevant to the beneficiary’s eligibility as of that date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The lack of a permanent job offer dated prior to the date of filing is sufficient grounds for denial in and of itself.

The regulation at 8 C.F.R. § 204.5(i)(3)(i) states that a petition for an outstanding professor or researcher must be accompanied by “[e]vidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition.” The regulation lists six criteria, of which the petitioner must satisfy at least two. On appeal, counsel asserted that the authors of the regulations did not define “outstanding” and that therefore the only controlling measure for this classification is the six criteria. The AAO rejected that argument, noting that the controlling purpose of the regulation is to establish international recognition. Thus, the AAO concluded that the petitioner could not meet his burden simply by submitting evidence relating to at least two criteria. Rather, any evidence submitted to meet these criteria must be to some extent indicative of international recognition. The petitioner claims to have satisfied the following criteria.

Documentation of the alien’s receipt of major prizes or awards for outstanding achievement in the academic field

As evidence to meet this criterion, the petitioner relies on the beneficiary’s receipt of a Rockefeller Foundation Fellowship from 1991 to 1993 and NIH research grants. The record initially contained no information from the Rockefeller Foundation confirming that the petitioner received such a fellowship. To explain the relevance of the alleged fellowship, counsel cited a letter from Dr. [REDACTED] of the petitioner’s [REDACTED] and Lung Research Institute. [REDACTED] does not indicate

that he is an official of the Rockefeller Foundation, or otherwise explain his standing to attest to the mechanism by which fellowships are awarded.

The director concluded that the selection for the fellowship was based on the merit of the proposal and could not be considered an award or prize for an achievement that has already been made.

On appeal, counsel provided general information about the Rockefeller Foundation, noting that 75 percent of proposals "cannot be considered." Counsel subsequently quoted extensively from Dr. [REDACTED] letter, concluding that as a scientist, he is able to evaluate the significance of the fellowship.

The AAO noted that while the fellowship materials submitted do indicate that the foundation receive more than 12,000 proposals for grants each year and does not consider 75 percent of them, it further states that the 75 percent cannot be considered "because their purposes fall outside the Foundations' program guidelines." More significantly, the AAO noted that the materials are discussing grants to organizations, not fellowships for recent graduates. In fact, the materials state that "as a matter of policy, the Foundation does not give money for personal aid to individuals." While such language is ambiguous, the AAO concluded that it did not support the claim that the Rockefeller Foundation itself was the institution that selected the beneficiary for the fellowship.

Further, the AAO concluded that counsel had not supported the implication in his appellate brief that every scientist is an expert on the requirements for obtaining Rockefeller Fellowships. Finally, the AAO concurred with the director that a fellowship based on a research proposal is not an award or prize recognizing and honoring past achievements as outstanding.

Similarly, the AAO concluded that the petitioner's NIH grants could not serve to meet this criterion. Every successful scientist engaged in research, of which there are hundreds of thousands, receives funding from somewhere. Obviously the past achievements of the principal investigator and, perhaps even other key personnel, are a factor in grant proposals. The funding institution has to be assured that the investigator is capable of performing the proposed research. Nevertheless, a research grant is principally designed to fund future research, and not to honor or recognize past achievements.

On motion, the petitioner addresses the AAO's concern regarding the lack of evidence that the beneficiary ever received the Rockefeller Fellowship. Specifically, the petitioner submits a letter from Lynda Mullen, Corporate Secretary for the foundation, confirming that the petitioner held a "Special Postdoctoral Fellowship" from the foundation from May 15, 1991 through November 30, 1993, that allowed him to receive "advanced training." Ms. [REDACTED] further asserts that "potential fellows are awarded funding only after serious consideration of their credentials, and of both the importance and substance of their work."

While this letter now confirms that the beneficiary did receive this fellowship, it fails to address the AAO's other concern that fellowships that fund future work or training are not awards or prizes for outstanding achievements. Nor does counsel address that concern in his brief. Thus, the petitioner has not overcome all of the AAO's concerns regarding the evidence submitted to meet this criterion.

Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members

The AAO spent two and half pages detailing the requirements of the associations of which the beneficiary is a member, such as an interest in the field, degrees, and sponsorship, and addressing counsel's assertions, including his assertion that mere participation in the field is "outstanding." As stated by the AAO, the plain language of the regulation requires membership in an organization whose membership requirements include, at a minimum, achievements that would normally be considered outstanding by experts in the field. Moreover, statutory construction includes looking at the plain meaning of the words used. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). The regulation requires membership in an organization where membership is limited to those with "outstanding achievements."

Consistent with the relatively exclusive nature of the classification sought, most professional associations do not require outstanding achievement as a condition of membership; instead, their requirements are simpler and more readily met; such as payment of dues, a minimum level of education and/or experience in a given field, etc. The AAO concluded that the unambiguous membership requirements for the associations of which the beneficiary is a member do not even remotely support counsel's characterizations of those requirements as highly exclusive. Attainment of a doctoral degree is not an "outstanding achievement" by any rational definition of "outstanding." A doctoral degree, while requiring concerted and prolonged effort, is nevertheless the expected and predictable outcome of a course of study.

Similarly, endorsement by existing members is not an outstanding achievement, and there is no indication that a prospective member's sponsors must themselves be nationally or internationally recognized. The AAO noted that counsel acknowledged that one of the associations has more than 10,000 members, but does not explain how an association with a narrow focus can grow to such size while admitting only those with distinction in the field.

The AAO further rejected membership in an association whose membership is only limited by career choice. By definition, every scientific researcher is "engaged in a scientific research activity." Counsel offered no explanation for his claim: "Only scientists or scientists to be are able to become members, which are de facto reduced to outstanding individuals." If all scientists are considered outstanding, the classification sought is rendered meaningless.

Counsel's only response on motion is as follows:

We will not address this issue as it has been amply documented. We nonetheless contend that [the beneficiary] is a member of organizations that require outstanding achievements of their members.

Our concerns with the evidence relating to this criterion were extensively set forth in our previous decision. The discussion carefully and exhaustively analyzed all of the membership requirements of the associations of which the beneficiary is a member and addressed all of counsel's assertions relating to that evidence. As counsel offers no rebuttal of that discussion on motion, we hereby incorporate that discussion into this decision and find no need to add further comment.

Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation

On motion, counsel does not challenge our previous assertion that the citations of the beneficiary's articles do not constitute published material about the beneficiary. We reaffirm that conclusion.

Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field

Counsel initially claimed that the beneficiary met this criterion but the petitioner submitted no evidence to support that claim. In response to the director's observation that no such evidence had been submitted initially, the petitioner submitted a letter from Dr. [REDACTED] an assistant professor at the petitioning institution. Dr. [REDACTED] asserts that he was requested to review manuscripts by journal editorial committees and that he forwarded those requests to the beneficiary, his collaborator.

The director noted the lack of evidence that the editors of the journals specifically requested that the beneficiary review the articles and concluded that the petitioner had not established that the beneficiary meets this criterion. On appeal, counsel asserted that the director had failed to consider Dr. [REDACTED] expertise in the field.

The AAO concluded:

Regardless of any expertise Dr. [REDACTED] has in the beneficiary's field, it remains that he is the beneficiary's supervisor and collaborator. While evidence submitted for each criterion need not establish international recognition on its own, the criteria would be meaningless as evidentiary standards for demonstrating international recognition if CIS did not evaluate whether the evidence submitted for each criterion was even remotely indicative of or consistent with international recognition. We simply cannot accept counsel's implication that the assignment of a review request specifically addressed to the beneficiary's supervisor is any way indicative of or consistent with the beneficiary's own international recognition. The issue is not whether Dr. [REDACTED] has an international reputation. The petitioner must demonstrate the beneficiary's own international recognition independent of Dr. [REDACTED]. The beneficiary does not attain international recognition simply by working for someone who receives requests to review articles and assisting with that responsibility.

Finally, we cannot ignore that scientific journals are peer reviewed and rely on many scientists to review submitted articles. Thus, peer review is routine in the field; most peer reviewers do not enjoy international recognition. Without evidence that sets the beneficiary apart from others in his field, such as evidence that he has reviewed an unusually large number of articles, received independent requests from a substantial number of journals, or served in an editorial position for a distinguished journal, we cannot conclude that the beneficiary meets this criterion.

On motion, counsel merely lists the papers reviewed by the beneficiary and discusses the nature of the journals. Such a response does not address any of the AAO's concerns. As such, we reaffirm our finding regarding this criterion.

Evidence of the alien's original scientific or scholarly research contributions to the academic field

In his initial cover letter, counsel listed several alleged contributions made by the beneficiary relating to lymphoma, breast cancer and kidney transplants. The assertions of counsel, however, do not constitute evidence. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel asserted that his assertions are supported by letters from "leading individuals in his field, as well as recognized individuals in the field as described below." As noted by the AAO, however, the letters are all from researchers and professors at the petitioning institution and a collaborator from the University of Maryland on research presented at the Third International Conference on Sodium Calcium Exchanger, New York Academy of Sciences, in 1995.

The AAO further noted that none of the letters submitted initially mention any work performed by the beneficiary relating to lymphoma, breast cancer, or kidney transplants. Rather, the beneficiary's work appears to have focused on fertility, cardiology, and gastrology. Most recently, the beneficiary has focused on a receptor active during kidney inflammation, but the evidence submitted initially did not support counsel's assertion that this work has applications in kidney transplantation. In response to the director's specific request for additional documentation of the beneficiary's work in the areas specified by counsel, counsel asserts that none of the references discussed the cancer and kidney research because it had yet to be published.

The petitioner submitted a new letter from Dr. [REDACTED] a professor at the petitioning institution, discussing these areas of research. Dr. [REDACTED] asserts that the beneficiary's gastrology work "has helped to improve the diagnostic recognition of many malignant neoplasm, including Basal cell carcinoma, Trichoblastic carcinoma, Melanoma, Squamous cell carcinoma, granular cell tumor (which has malignant variants), cutaneous lymphoma, and actinic keratosis (a precancerous lesion)." Dr. [REDACTED] further states that the beneficiary performed some basic research modifying the technique for isolating kidney measangial cells that provide critical information about the suitability of the kidney for transplant. Dr. [REDACTED] concedes, however, that the above results have yet to be published. Thus, the AAO concluded that this work is not evidence indicative of the beneficiary's international recognition as of the date of filing. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49.

The AAO concluded that the remaining reference letters mostly provide general praise of the beneficiary and the attest to the importance of his area of research with little discussion of any specific contributions or explanation of the significance of those contributions. The AAO then provided several examples.

The AAO noted that in his final decision, the director determined that the cancer research on which counsel focuses had yet to be published and concluded that such work could not be considered a contribution to the field. On page four of his appellate brief, counsel stated that the director's conclusion on this criterion is "particularly errant," but failed to specifically address the director's concerns other than to assert in conclusion that the beneficiary "has contributed greatly to the field of biochemistry through extensive writings, developments, reviews and mostly through research."

The AAO acknowledged the value of the beneficiary's research, but noted that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. The AAO concluded that the record did not establish that the beneficiary's work represented a groundbreaking advance in microbiology. While letters from supervisors and collaborators are important in providing details about the beneficiary's role in various projects, they cannot by themselves establish the beneficiary's international recognition.

On motion, counsel asserts that the beneficiary's citation record establishes his contributions to the field. As noted in our previous decision, the record does contain evidence of moderate citation. That evidence was considered in evaluating the significance of the beneficiary's publications. The regulations include original contributions, 8 C.F.R. § 204.5(i)(3)(i)(E), and scholarly articles, 8 C.F.R. § 204.5(i)(3)(i)(F), as two separate criteria. The requirement that a beneficiary meet at least two criteria would be meaningless if authorship of scholarly articles sufficiently indicative of international recognition necessitated a finding that the beneficiary meets the contributions criterion.

Obviously, the petitioner cannot satisfy this criterion simply by listing the beneficiary's past projects, and demonstrating that the beneficiary's work was "original" in that it did not merely duplicate prior research. Research work that is unoriginal would be unlikely to secure the beneficiary a master's degree, let alone classification as an outstanding researcher. Because the goal of the regulatory criteria is to demonstrate that the beneficiary has won international recognition as an outstanding researcher, it stands to reason that the beneficiary's research contributions have won comparable recognition. To argue that all original research is, by definition, "outstanding" is to weaken that adjective beyond any useful meaning, and to presume that most research is "unoriginal."

It remains that the record lacks letters from experts outside the beneficiary's immediate circle of colleagues explaining the significance of the beneficiary's alleged contributions and explaining how these contributions have influenced the field internationally.

Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field

The AAO discussed the beneficiary's publication record and noted that the director did not consider the beneficiary's citation history under this criterion. The AAO concluded that even if the beneficiary's moderate citation history was indicative of minimal international recognition, the beneficiary would meet no more than one criterion. Referencing its previous conclusions, the AAO reiterated that the beneficiary falls far short of meeting any other criteria.

On motion, counsel continues to assert that the beneficiary meets this criterion. We do not contest that assertion. As stated in our previous decision, however, the beneficiary does not meet any other criterion.

The petitioner has shown that the beneficiary is a talented researcher, who has won the respect of his collaborators, employers, and mentors. The record, however, stops far short of elevating the beneficiary to an international reputation as an outstanding researcher or professor. Therefore, 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, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of December 24, 2003 is affirmed. The petition is denied.