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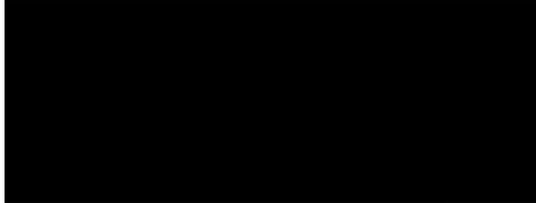
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: MAY 03 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:

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.

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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

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). The petitioner seeks to employ the beneficiary permanently in the United States as a research associate. The director appears to have concluded that the beneficiary is not recognized internationally as outstanding in his academic field, as required for classification as an outstanding researcher, but the basis of this conclusion is a subjective one based on the terms of the job offer rather than an objective analysis of the evidence submitted to meet the regulatory requirements for eligibility.

As will be discussed in more detail below, the terms of the job offer are most relevant to whether the job offer is permanent, an issue the director did not address in his final decision. Thus, we must remand the matter for a determination as to whether the job offer is permanent and as to whether the remaining evidence establishes that the beneficiary is internationally recognized as defined in the pertinent regulations discussed below.

Before analyzing the director's decision, we must address one issue raised on appeal. Specifically, the petitioner lists two other individuals for whom the petitioner has petitioned successfully, allegedly with similar evidence. Each case must be decided on a case-by-case basis on the evidence of record. The other petitions could have been issued based on different evidence or in error. The Service is not bound to treat acknowledged past errors as binding. See *Chief Probation Officers of Cal. v. Shalala*, 118 F.3d 1327 (9th Cir. 1997); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 517-518 (1994); *Sussex Engineering, Ltd. v. Montgomery*, 825 F.2d 1084 (6th Cir. 1987).

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 director's sole basis of denial was that references in a memorandum to supervision of research associates by faculty suggested that the beneficiary was not recognized internationally. The director also noted the low salary reflected in the petitioner's response to the request for additional evidence. On appeal, the petitioner asserts that many outstanding researchers work as research associates. The petitioner also submits a new letter from [REDACTED] indicating that the beneficiary's salary was reduced when his grant ended but that effective July 1, 2004, his salary has been restored to \$41,814, funded by a new grant.

While an indication that the beneficiary is underemployed for an individual of his claimed stature is an understandable concern and possibly worth noting, the ultimate basis of a conclusion as to eligibility should be based on the regulatory criteria. Thus, we cannot uphold the director's decision. The director should have evaluated the claim of the beneficiary's international recognition under the regulation at 8 C.F.R. § 204.5(i)(3)(i), which 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 then lists six criteria, of which the petitioner must satisfy at least two. It is important to note here that the controlling purpose of the regulation is to establish international recognition, and any evidence submitted to meet these criteria must therefore be to some extent indicative of international recognition. The criteria are set forth at 8 C.F.R. § 204.5(i)(3)(i):

- (A) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field
- (B) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members
- (C) 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
- (D) 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
- (E) Evidence of the alien's original scientific or scholarly research contributions to the academic field.
- (F) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

In evaluating the evidence submitted to meet some of these criteria, the director should consider whether the beneficiary's research grants, which simply fund a scientist's future work, constitute major prizes or awards. In evaluating the beneficiary's claimed contributions, the director should consider whether the beneficiary's reference letters, all from his immediate circle of colleagues, are indicative of international recognition.¹ The director should also consider whether the petitioner has documented, such as through evidence of frequent citation, the significance of the beneficiary's published articles.

The second issue is whether the job offer from the petitioner is permanent. While this issue was the basis of the director's request for additional evidence, the director's final decision does not address whether the beneficiary's job offer is permanent. Thus, we must also remand the matter for a determination on this issue.

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.

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.

On Part 6 of the petition, the petitioner indicated that the proposed employment was as a research associate and that the position was permanent. The petitioner submitted a letter addressed to the director from [REDACTED] of the petitioner's School of Engineering and Technology. [REDACTED] advises that the petitioner is offering the beneficiary a position as a research associate at an annual salary of \$41,400. [REDACTED] continues that the position is "full-time and permanent" in compliance with the definition quoted above. On March 3, 2004, the director requested a job offer "signed by someone with authority to hire permanent employees and knowledge of the institution's finances necessary to affirm that this position will not be subject to termination due to funding concerns."

¹ Merely acquiring references in more than one country through study and work in more than one country is not the type of international recognition contemplated by the statute.

In response, the petitioner submitted a letter dated March 22, 2004 from [REDACTED] confirming that the beneficiary was offered and accepted a research associate position with the petitioning university. The letter continues that the beneficiary's salary of \$26,400 is funded by a NASA grant but that in the event that this grant is not renewed, other funding will be available for the beneficiary's position. The petitioner also submitted a memorandum from [REDACTED] Vice Chancellor for Academic Affairs and [REDACTED] the Faculties to Christopher Viers, Associate Dean and Director of the Office of International Services. The memorandum reiterates that page 200 of the petitioner's academic handbook provides that research associates "have an appointment of one year or less, which is renewable." The memorandum opines that because these positions are renewable indefinitely, "these positions could be as permanent as any academic appointment short of tenure." The memorandum notes that one-year contracts are likely to be renewed, "particularly in the case of long-terms [sic] projects, ongoing research activities and grants." The memorandum notes that all "full-time academic appointees, including tenure-track and tenured faculty members, must be reviewed on an annual basis." The memorandum does not explain how the "likelihood" of contract renewal after one year is comparable to an indefinite contract that is merely reviewed annually. Finally, while the memorandum discusses discharge "before the end of an appointment" and the appeals process for such discharge, there is no indication that this process is applicable to the failure to renew a contract.

As stated above, however, the director did not question whether the job offer was for a permanent job in his final decision. On appeal, the petitioner reiterates that the job offer was permanent.

In considering this issue in any subsequent decision, the director may wish to consider whether a "likelihood" of renewal for a term contract constitutes a "term of indefinite or unlimited duration."

In light of the above, this matter will be remanded for consideration of whether the petitioner has demonstrated the beneficiary's international recognition under the regulations pertaining to this issue and whether the petitioner has offered the beneficiary a permanent job as of the date of filing. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.