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FILE: LIN 04 076 50601 Office: NEBRASKA SERVICE CENTER Date: NOV 15 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:
[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.

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 research institute. 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 in the United States as a research associate. The director determined that the petitioner had not established that it had offered the beneficiary a permanent job as of the date of filing. On appeal, the petitioner submits the beneficiary's initial job offer and letters purporting to explain the terms and conditions of the beneficiary's employment. We uphold the director's decision and further find that the petitioner has not established that the beneficiary is recognized internationally as outstanding in her academic field, as required for classification as an outstanding researcher.

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)(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.

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.

On Part 6 of the petition, the petitioner indicated that the position of research fellow was permanent. The petitioner submitted a letter from [REDACTED] Administrator for the Department of Cancer Biology, stating that the beneficiary "is employed as a full-time Research Associate." The letter further states that the beneficiary's "appointment started March 2000 and it continues successfully." This document does not constitute a job offer from the petitioner to the beneficiary. On February 11, 2005, the director requested "a copy of the offer of employment made to the beneficiary."

In response, the petitioner submitted a letter from [REDACTED], Manager of International Physician Services, asserting that "all staff" at the petitioning foundation "are given annual contracts." Ms. [REDACTED] continues that these positions "are permanent fulltime positions which are valid for an indefinite period of time until one or both parties decides to end the relationship." Dr. [REDACTED] Chair of the Department of Pathobiology, attests to the beneficiary's "permanent" employment in Dr. [REDACTED] laboratory.

The director concluded that the petitioner had not met the regulatory evidentiary requirement of submitting a letter offering the beneficiary a position for a term of indefinite or unlimited duration.

On appeal, counsel asserts that the director's decision is inconsistent with prior approvals in the same classification of petitions filed by the petitioner for other beneficiaries employed under similar terms and conditions. The records of proceeding of those petitions are not before us. Regardless, Citizenship and Immigration Services (CIS) is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Eng. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

The petitioner submits the original offer of employment issued to the beneficiary and additional letters discussing the terms and conditions of the beneficiary's employment. Finally, the petitioner submits materials about research staff positions with the petitioning foundation, defining them as "more closely related to faculty positions in university settings."

The initial job offer letter to the beneficiary, dated July 1, 2002, references "benefits and prerequisites provided to you." The letter itself does not provide the terms and conditions of employment. Contrary to counsel's assertion, we cannot conclude that the polite closing wishing the beneficiary "continuing success" creates a presumption that the position is "permanent" as defined in the regulation quoted above. The new letter from Dr. [REDACTED] dated April 5, 2005 and addressed to the beneficiary, provides:

The expectation for this position includes an indefinite term of unlimited duration. Contracts are subject to annual renewal for all faculty at the [petitioning foundation] including chairs of Departments as myself, as there is no tenure for anyone. However, your employment here is fully expected to extend well beyond the duration of each of the renewable contracts, as it is for all of our faculty, and would only be terminated for good cause.

The evidence submitted on appeal does not overcome the director's determination that the beneficiary's position is not "permanent" as defined in the regulations quoted above. While the beneficiary may have an expectation of continued employment, the use of the word "and" in the regulation at 8 C.F.R. § 204(i)(2) indicates that such an expectation is required *in addition to* an offer for a job with a term of indefinite or unlimited duration. Moreover, we cannot ignore the regulatory requirement that termination can only be for "good cause." The prior letters unambiguously stated that renewal is at the discretion of the petitioner. The record does not reconcile Dr. [REDACTED] implication that a decision not to renew a contract must be for good cause with the contradictory information from Ms. [REDACTED] that one or both party can simply decide to end the employment relationship. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record does not resolve the inconsistencies regarding whether the decision not to renew a research associate contracts is discretionary or can only be for good cause. Thus, the petitioner has not overcome the director's basis of denial.

Finally, we do not contest the petitioner's prestige and distinguished reputation or its sincerity in wishing to employ the beneficiary. As an adjudicatory body, however, we are bound by the statute and the regulations. Whether or not the statute and regulations are conducive to the petitioner's personnel policies is not a consideration for us. It remains, the lack of a permanent job offer from the petitioner to the beneficiary is sufficient grounds for denial of a petition seeking the classification sought in this proceeding.

Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary enjoys international recognition in her field. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. 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. More specifically, outstanding professors and researchers should stand apart in the academic community through eminence and distinction based on international recognition. The regulation at issue provides criteria to be used in evaluating whether a professor or researcher is deemed outstanding. 56 Fed. Reg. 30703, 30705 (1991). The petitioner claims to have satisfied the following criteria.¹

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

The petitioner submitted a 1990 award issued to the beneficiary from the Committee of Science and Technology of Shanghai, another 1990 award issued to Cancer Hospital and Shanghai Medical University from the government of Shanghai, a 1991 award issued to Huashan Hospital, Cancer Hospital and the Cancer Research Ministry from the Chinese Ministry of Public Health and a 1994 certificate issued to the beneficiary by the Chinese Committee of National Science and Technology. The petitioner also submitted evidence that the beneficiary received the Shi and Li Scholarship in 1985 and recognition as an “outstanding student” in 1984.

Scholarships and outstanding student awards are generally based on past *academic* achievement, not for accomplishments in a field of endeavor. While 8 C.F.R. § 204.5(i)(3)(A) references outstanding achievements in one’s academic field, 8 C.F.R. § 204.(i)(2) defines “academic field” as “a body of specialized knowledge offered for study.” The definition does not include typical bases for scholarships, such as grade point average and class standing. It remains, academic study is not a field of endeavor, academic or otherwise. Rather, academic study is training for a future career in an academic field. As such, scholarships in recognition of academic achievement, such as grade point average, are insufficient. Moreover, the beneficiary only competed against other students at the university at that time for the scholarship. Thus, scholarships and the beneficiary’s student award are simply not evidence of international recognition in the field. Rather, they represent high academic achievements in comparison with her fellow students.

In addition, we will not consider awards issued to institutions where the beneficiary worked as evidence of the beneficiary’s receipt of awards or prizes. Thus, the 1990 and 1991 awards issued to hospitals where the beneficiary worked are not sufficient evidence to meet this criterion.

Moreover, the 1990 award from the Committee of Science and Technology of Shanghai is a local award. Provincial or regional awards are not indicative of or consistent with international recognition.

Thus, the only award that we can consider is the 1994 award from the Chinese Committee of National Science and Technology. The commentary to the final regulation explains that the removal of the word “international” from the awards requirement from the proposed rule is “in order to accommodate the possibility that an alien might be recognized internationally as outstanding for having received a major award that is not international.”

¹ The petitioner does not claim that the beneficiary meets any criteria not discussed in this decision and the record contains no evidence relating to the omitted criteria.

56 Fed. Reg. 60899 (November 29, 1991). Thus, the absence of the word "international" does not imply that every national award will serve to meet this criterion. Rather, the commentary envisions the "possibility" that there exist "major" awards that, while not international in scope, are still indicative of international recognition.

Counsel asserted in her initial brief that the beneficiary's 1994 award "is the top academic reward for science studies in China." The record contains no evidence to support this assertion. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Regardless, for the reasons discussed above, an academic award cannot serve to meet this criterion.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

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

The petitioner submitted evidence that the beneficiary is a member of the American Thoracic Society (ATS), the American Physiological Society (APS) and the Shanghai Anti-tumor Association. The materials submitted reflect that ATS has 13,500 members and is dedicated to reducing morbidity from respiratory disorders and that APS is a "professional scientific organization" where "membership conveys a degree of recognition and certain advantages and privileges." The record contains no information about the Shanghai Anti-tumor Association. While these materials address the reputation of the societies, they do not provide the basic requirements for general membership.

As the record does not reflect that these organizations require outstanding achievements of their general membership, the petitioner has not established that the beneficiary meets this criterion.

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

While counsel has never specifically asserted that the petitioner meets this criterion, we acknowledge the submission of minimal citations of the beneficiary's articles. Articles which cite the beneficiary's work are primarily about the author's own work, not the beneficiary's work. As such, they cannot be considered published material about the beneficiary's work. Thus, the petitioner has not established that the beneficiary meets this criterion.

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

The record reflects that the beneficiary has refereed articles for *Ultrasound in Obstetrics and Gynecology*. In addition, the beneficiary volunteered to judge a competition of high school students. The e-mail providing details about the volunteer service notes: "we are still short of judges in many categories (everything except Engineering, Chemistry and Biochemistry). If you have a friend or colleague with whom you would like to share this rewarding and exhilarating experience, it is not too late to sign up." The petitioner also reviewed the work of her students while an associate professor in China.

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; not every peer reviewer enjoys international recognition. In addition, volunteering to judge the work of high school students is not judging the work of others in the same or an allied academic field. 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, served in an editorial position for a distinguished journal or was requested to serve as an external thesis examiner, we cannot conclude that the beneficiary meets this criterion.

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

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."

We will consider the reference letters below. We note, however, that the opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim of sustained national or international acclaim. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The beneficiary received her Master of Medicine degree from Shanghai Medical University in 1988. The beneficiary then worked at the university as a resident, attendant and associate professor from 1988 to 2000, spending six months in 1996 working as a research fellow at the University of Kuopio in Finland. The beneficiary began working as a research fellow for the petitioner in 2000 where she was promoted to research associate in 2002.

Dr. [REDACTED] who attended medical school with the beneficiary, praises the beneficiary's abilities as a student and lists the projects on which the beneficiary has worked since graduation, such as early detection of breast cancer. Dr. [REDACTED] does not explain how the beneficiary's work has impacted the field beyond the importance of the beneficiary's area of research.

Dr. [REDACTED] Director of the Breast Cancer Institute at Fudan University, claims personal knowledge of the beneficiary's work at Shanghai Medical University. Dr. [REDACTED] explains that the beneficiary's work

focused on the mechanism underlying cancer and early detection. Dr. [REDACTED] further notes that the beneficiary's work was supported by the China National Science Foundation and that her publications, many of which listed the beneficiary as the principle author, appeared in highly ranked international and Chinese journals and "have been widely cited." The best evidence of citations, however, is a listing in a science index or the citations themselves. The petitioner has not submitted evidence of more than two citations for any one of the beneficiary's articles. While Dr. [REDACTED] notes the government recognition received by the beneficiary for her work in China, Dr. [REDACTED] does not identify any specific breakthrough or explain how the beneficiary's work has impacted the field.

Dr. [REDACTED] a professor at the University of Kuopio, asserts that while visiting that university, the beneficiary contributed to a major research project on ovarian cancer, published in top clinical cancer journals. Dr. [REDACTED] asserts that these studies "have had a great prognostic significance in [the] clinical practice of ovarian malignancies," but does not explain the actual results of these studies or how they are being applied in clinical practice.

Dr. [REDACTED] discusses the beneficiary's work at the petitioning foundation, concluding that the beneficiary has "made original contributions to the field of gene transcription and regulation, especially in the [sic] Asthma." More specifically, the beneficiary focused on the "transcription regulation of [the] NOS2 gene which is associated with inflammatory tissue damage in Asthma." According to Dr. [REDACTED] the beneficiary's results reveal "an interesting and novel mechanism of this synergy and reveal a generalized phenomena on the molecular basis that augments the inflammatory response in Asthma." Dr. [REDACTED] predicts that the beneficiary will promote understanding of the etiology of Asthma, address important fundamental problems with this condition and develop new therapeutic approaches. Dr. [REDACTED] does not explain, however, how the beneficiary has already impacted the field beyond the typical progression inherent in the field of scientific research. Dr. [REDACTED] asserts that the beneficiary's work is "widely cited" and that he has received requests for reprints of the beneficiary's most recent article. As stated above, however, the record lacks corroborating evidence that the beneficiary is widely cited.

Dr. [REDACTED] Chairman of the Department of Cancer Biology and the petitioning foundation, asserts that the beneficiary is "centrally involved in developing and directing several ongoing key projects related to Asthma and the diagnosis and treatment of lung cancer, the number one cause of cancer deaths in the USA." Dr. [REDACTED] asserts that the beneficiary is "vital" to these efforts. Dr. [REDACTED] elaborates:

Alterations in nitric oxide levels have been found in pulmonary diseases such as Asthma and also play an important role in the development of cancer. [The beneficiary's] recent studies on cooperative transcriptional activation of Nitric Oxide Synthase 2 through STAT-1 and c-Fos proteins interaction are important to our understanding of the mechanisms of gene transcription and regulation in Asthma and lung cancer. The ongoing goal of these projects will be to address important fundamental problems as well as develop new therapeutic approaches for prevention and treatment of lung disease.

Dr. [REDACTED] concludes that the beneficiary's publication record demonstrates that she has "clearly established herself as an important contributing scientist in the field of medicine."

Dr. [REDACTED] Chief of the Pulmonary-Critical Care Medicine Branch of the National Heart, Lung and Blood Institute, indicates that he has collaborated with Dr. [REDACTED] laboratory on studies in which the beneficiary participated. Dr. [REDACTED] asserts that the beneficiary has "completed important research on the transcriptional regulation of the nitric oxide synthase gene." While Dr. Moss discusses the projected benefits of the beneficiary's projects and notes that her work has been published, he does not assert that the beneficiary's work has already impacted the field.

Dr. [REDACTED] an associate professor at Baylor College of Medicine, asserts that the beneficiary's book chapter in the book he edited "is highly important to our understanding of the mechanisms of Nitric Oxide in airway inflammation in asthma." Dr. [REDACTED] asserts that the beneficiary's "unique" studies have "demonstrated the important response elements in transcriptional regulation of the NOS2 gene and multiple mechanisms function coordinately to support Nitric Oxide Synthesis in healthy airways and high-level Nitric Oxide Synthesis in the inflamed airway." Dr. [REDACTED] describes this work as "helpful" and concludes that the beneficiary "will be an important asset to our medical scientific community."

While the beneficiary's research is no doubt of value, it can be argued 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. Any research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. The record does not establish that the beneficiary's contributions are consistent with international recognition in the field. Thus, the petitioner has not established that the beneficiary meets this criterion.

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

The petitioner submitted evidence that the beneficiary has authored several published articles and a book chapter and presented her work at scientific conferences. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition are the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This report reinforces our position that publication of scholarly articles is not automatically evidence of international recognition; we must consider the research community's reaction to those articles.

The citations submitted by the petitioner reflect no more than two citations of any one of the beneficiary's articles. Such minimal citation is not indicative of or consistent with international recognition. Thus, the petitioner has not established that the beneficiary meets this criterion.

The petitioner has shown that the beneficiary is a talented and prolific researcher, who has won the respect of her collaborators, employers, and mentors, while securing some degree of international exposure for her work. The record, however, stops 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.

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For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

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.