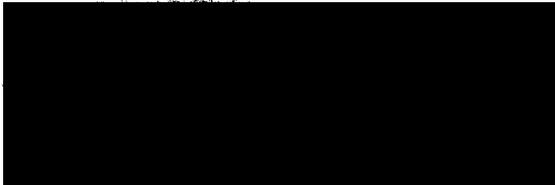




U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

SEP 09 2005

IN RE:

Petitioner:

Beneficiary:



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:



PUBLIC COPY

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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.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 research 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 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 or that the beneficiary had the necessary three years of experience.

On appeal, counsel submitted a brief and additional evidence. Counsel, however, also indicated that she would submit a brief and/or additional evidence within 30 days. Citizenship and Immigration Services (CIS) received the appeal on July 27, 2004. On August 4, 2005, this office advised by counsel by facsimile that we had received no additional submissions. Counsel responded that all documentation had been submitted July 26, 2004. Thus, we will adjudicate the appeal based on the record of proceedings, including the materials submitted with the Form I-290B Notice of Appeal.

While we find that the petitioner's appeal is not responsive to the director's concerns, we will remand the matter to allow the petitioner an opportunity to rebut additional concerns arising from materials publicly available on the petitioner's website.

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) Evidence that the alien has at least three years of experience in teaching and/or research in the academic field. Experience in teaching or research while working on an advanced degree will only be acceptable if the alien has acquired the degree, and if the teaching duties were such that he or she had full responsibility for the class taught or if the research conducted toward the degree has been recognized within the academic field as outstanding. Evidence of teaching and/or research experience shall be in the form of letter(s) from former or current employer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien.

This petition was filed on September 8, 2003 to classify the beneficiary as an outstanding researcher in the field of microbiology. Therefore, the petitioner must establish that the beneficiary had at least three years of research experience in that field as of that date. Initially, the petitioner relied on the beneficiary's curriculum vitae as evidence of the beneficiary's past experience. On appeal, the petitioner submits employment letters documenting sufficient employment. Thus, the petitioner has overcome the director's concerns regarding this issue.

In addition, the regulation at 8 C.F.R. § 204.5(i)(3)(iii) requires:

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;
- (C) A department, division, or institute of a private employer offering the alien a permanent research position in the alien's 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 a permanent position. The petitioner submitted a cover letter from [REDACTED] Head of the petitioner's Microbial Ecology

Laboratory, addressed to the director asserting that the petitioner “has offered [the beneficiary] a permanent, full-time position of Research Associate in the Department of Biological Sciences.” While [REDACTED] further asserts that the beneficiary’s contract “specifies no limited duration and can be said to be 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 petitioner did not submit the beneficiary’s actual contract. On January 23, 2004, the director requested evidence that the petitioner had offered the beneficiary a permanent job. Specifically, the director requested a contract between the petitioner and beneficiary, official guidelines reflecting that the beneficiary’s position is a permanent position at the petitioning university, or documentation reflecting that an exception has been made for the beneficiary to make the beneficiary’s job permanent as defined in the regulations.

In response, the petitioner submitted a new letter from [REDACTED] asserting that the beneficiary is a permanent employee, classified as a research associate, which is “a renewable position, unlimited in duration.” [REDACTED] further asserts no job at the petitioning university is permanent, including the President, and that the grant supporting the beneficiary’s work has been continuously funded for the past fourteen years. [REDACTED] also asserts that the beneficiary completed his probationary year and notes that research associate positions “are often turned into tenure-track faculty positions.”

The director concluded that beneficiary’s position was renewable and, thus, not permanent according the regulations quoted above. On appeal, counsel asserts that the evidence submitted was sufficient under “past adjudicatory standards.” We note that the regulations have required a “job offer” in the form of a letter offering the beneficiary a job since 1991.<sup>1</sup> Thus, the director did not err in not accepting a letter addressed to CIS. Counsel further notes that research associate positions can lead to tenure-track positions. The petitioner submits letters from tenure track professors affirming that they were once research associates. The actual terms of the position offered to the beneficiary at the time of filing is the relevant consideration, not the terms of a position the petitioner might one day offer to the beneficiary. Finally, the petitioner submits the beneficiary’s personnel action form listing no end-date for the position.

The petitioner failed to submit the requested contract and university official policy confirming that the position of research associate is a permanent position as defined in the relevant regulations, as opposed to the university’s definition. Thus, the petitioner’s response and appeal have not been responsive to the director’s concerns. Moreover, [REDACTED] characterization of the beneficiary’s job as both renewable and of unlimited duration appears contradictory.

Our review of the petitioner’s website, however, raises additional concerns of which the petitioner has not been advised. Specifically, the Provost’s page, [www.uc.edu/provost/faculty\\_affairs.htm](http://www.uc.edu/provost/faculty_affairs.htm), includes a “pdf” document regarding research associate series positions. That document provides that research associates are “unclassified, exempt positions.” Rule 30-2902, available at [www.uc.edu/trustees/rules](http://www.uc.edu/trustees/rules), provides that an “unrepresented unclassified employee *may be terminated from employment at any time* subject to the following provisions.” Subparagraph B of that rule provides that employees terminated for any reason with notice “are not grievable and constitute a discontinuation of the employee’s appointment.” We note that while subparagraph A(1) discusses termination for cause and subparagraph A(2) discusses terminations for lack of funding, subparagraph

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<sup>1</sup> The failure in the regulations to require a job offer “addressed to the beneficiary” does not imply that a letter addressed to a third party, such as the director, can be considered a job offer. Such language would be redundant as an offer can only be made to the offeree.

A(3) discusses all other terminations. Thus, it appears that research associate positions are at-will positions that do not require cause for termination and, in fact, may be terminated at the discretion of the petitioner regardless of continued funding.

These rules have now been added to the record of proceedings. Therefore, this matter will be remanded for the director to provide the petitioner an opportunity to respond to these rules, which appear inconsistent with some of the representations in the letters quoted above. We note that 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).

**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.