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FILE: [REDACTED]
LIN 03 178 50444

Office: NEBRASKA SERVICE CENTER

Date: SEP 30 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.

Mari Johnson

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. While the appeal does not succeed on its merits, we withdraw the director's decision and remand the matter for the sole purpose of affording the petitioner an opportunity to respond to derogatory information publicly available on the petitioner's own website accessed by this office.

The petitioner is a 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). According to the petition, the petitioner seeks to employ the beneficiary in the United States as a research scientist. The director determined that the petitioner had not established that it had offered the beneficiary a permanent job as of the date of filing.

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.

On Part 6 of the petition, the petitioner indicated that the proposed employment was a permanent position. The petitioner submitted a letter from Dr. Jay L. Zweier, Director of the Davis Heart and Lung Research Institute, to Citizenship and Immigration Services (CIS), affirming that the beneficiary is a research scientist in his laboratory at the petitioning university. The petitioner also submitted a grant application submitted to the American Heart Association stating that if funded as requested, the petitioner would promote the beneficiary to the rank of Assistant Professor. Neither document constitutes a job offer from the petitioner to the beneficiary. On January 16, 2004, the director requested evidence that the petitioner had extended a permanent job offer to the beneficiary, including any employment contract and the original job offer letter.

In response, counsel asserted that the position of research scientist was a permanent position comparable to tenure track. The petitioner submitted the position description for Research Scientist indicating that such staff fall within the Senior Administrative and Professional category, "may be appointed for indefinite periods of time" and that the salary is comparable to tenure track faculty. The petitioner also submitted a January 23, 2003 letter from Dr. Zweier addressed to the beneficiary offering a promotion to research scientist and a letter from Bryan Ford, Human Resources Coordinator, asserting that the position of research scientist is a "full-time permanent position." The letter, however, also references "renewal conditions."

The director noted that the January 23, 2003 letter did not address the issue of permanence 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.

On appeal, counsel asserts that the evidence submitted in support of the petition adequately establishes the permanent nature of the job offer. Counsel further asserts that the regulations do not describe the form the job offer must take. The petitioner submits a new letter from Dr. Zweier asserting that the position of research scientist is permanent and asserting that the job is covered by the petitioner's rules, regulations and policies as set forth on its website. Thomas J. Rosol, Senior Associate Vice President for Research, provides similar information, also referring us to the petitioner's website.

We concur with the director that the ordinary meaning of an “offer” requires that it be made to the offeree, not a third party. Regulatory language requiring that the offer be made “to the beneficiary” would simply be redundant. Thus, a letter addressed to CIS is not a job offer within the ordinary meaning of that phrase. Further, counsel’s assertion that any person “with common sense, and basic legal knowledge and reading skill would know” that the position is permanent is not persuasive. Specifically, the use of general words such as “permanent” is not determinative in establishing that the terms of the position meet the regulatory definition of permanent. This proposition is especially true when the assertion of permanence is contradicted by other information, sometimes in the same letter, such as Mr. Ford’s reference to “renewal.”

Significantly, the claim that the position is “permanent,” as defined in the regulation quoted above, is contradicted by the petitioner’s own policies as reflected on its website, which the petitioner has invited us to visit. The petitioner should be aware of its own publicly available policies that its representatives have invited us to review. Nevertheless, it has not been afforded an opportunity to respond to our concerns regarding its policies, which we have now made part of the record. Thus, we withdraw the director’s decision and remand the matter to the director for the sole purpose of affording the petitioner an opportunity to respond to the following information obtained from its website. The director should enclose copies of the information, summarized as follows:

1. The searchable database for job classifications available on the petitioner’s website indicates that the “TGIC” code for research scientists is “U.” The “Definitions of Codes Used in Listing of [the petitioner’s] Job Classifications” also available on the site provides that “TGIC” code “U” represents an “unclassified position.”
2. Rule 4.20(I) of the petitioner’s Appointments Policy provides: “Regular, unclassified appointments are at will.” “Applicant Resources,” at hr.osu.edu/emp/application.htm, provides that “Unclassified positions are not subject to the provisions of section 124.34 of the Ohio Revised Code, which means that employment is at-will and may be ended at any time either by you or the university.” “Employment at will” is defined as “Employment that is usu. undertaken without a contract and that may be terminated at any time, by either the employer or the employee, without cause.” Black’s Law Dictionary 545 (7th ed. 2001).
3. “Letters of Offer for Unclassified Staff, Senior Administrative and Professional,” which can be downloaded from the petitioner’s website, provides:

Language in letters of offer may create a contract. Because of this, letters should not include the following:

1. References to permanent employment, termination for just cause, probationary periods, specific expectations of performance, or salary increases.
2. Specific causes for termination or dismissal.

This language strongly suggests that the relevant issue is not whether the research scientist position falls within the Senior Administrative and Professional category, but whether the position is classified, as

unclassified employment may be terminated without cause. As quoted above, the definition of "permanent" set forth in the regulation at 8 C.F.R. § 204.5(i)(2) requires that the employment may only be terminated for cause.

In light of the above, the matter is remanded to the director for the sole purpose of advising the petitioner of the derogatory evidence publicly available on its own website and affording the petitioner an opportunity to respond pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i). We note, however, that any attempt to explain or reconcile inconsistencies in the record, which now includes the petitioner's own policies as reflected on its website, 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 (BIA 1988).

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 that, *regardless of outcome*, is to be certified to the Administrative Appeals Office for review.