

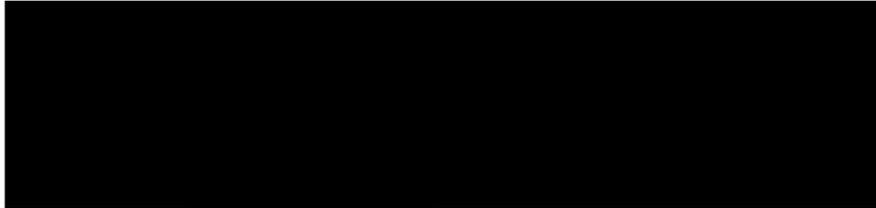
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U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: **AUG 14 2007**

IN RE:

Petitioner:

Beneficiary:



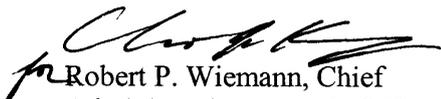
PETITION: Immigrant Petition for Alien Worker as Outstanding Professor or Researcher Pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:



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.


for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a public institution of higher learning. 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 instructor / staff 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.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, counsel's assertions regarding the required initial evidence in this matter are not persuasive and we cannot consider the evidence now submitted for the first time on appeal.

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.

(Emphasis added.) On appeal, counsel notes that the regulation requires “[a]n offer” and says “[t]he offer” shall be in the form of “a letter.” Counsel then concludes that the lack of the word “actual” and the use of the phrases: “[a]n offer” and “a letter” rather than: “the offer” and “the letter” requires only that an offer exist at the time of filing which can be demonstrated through the submission of evidence other than the actual job offer itself. Counsel then quotes from the June 6, 2006 Interoffice Memorandum from Michael Aytes, Acting Director for Domestic Operations, Citizenship and Immigration Services (CIS). Specifically, counsel asserts that Mr. Aytes states that the “offer of employment *may* be in the form of a letter from the petitioning employer.” (Emphasis added.)

Where the regulation requires a specific document such as “[a]n offer of employment,” we do not find that the lack of the phrase “the actual offer of employment” suggests that anything other than the offer itself would suffice. The regulation at 8 C.F.R. § 103.2(b)(2) provides that the unavailability of evidence creates a presumption of ineligibility and that the petitioner must demonstrate that the evidence is either unavailable or does not exist prior to relying on secondary evidence. The petitioner did not present any evidence to the director indicating that the initial job offer was either unavailable or did not exist. Thus, the director was justified in finding that the petitioner had failed to submit the required initial evidence, a qualifying job offer.

Moreover, the sentence from the memorandum by Mr. Aytes quoted by counsel appears on page four of the memorandum. The same sentence appears on page two of the memorandum without the word “may.” The AAO is bound by the Act, agency regulations, precedent decisions of the agency and

published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") The regulation at 8 C.F.R. § 204.5(i)(3)(iii) expressly states that the offer of employment "*shall* be in the form of a letter" from a qualifying employer. The language on page 4 of the memorandum by Mr. Aytes cannot supercede the plain and unambiguous language in the regulation.

Black's Law Dictionary 1111 (7th ed. 1999) defines "offer" as "the act or an instance of presenting something for acceptance" or "a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract." Black's Law Dictionary does not define "offeror" or "offeree." The online law dictionary by American Lawyer Media (ALM), available at www.law.com, defines offer as "a specific proposal to enter into an agreement with another. An offer is essential to the formation of an enforceable contract. An offer and acceptance of the offer creates the contract." Significantly, the same dictionary defines offeree as "a person or entity to whom an offer to enter into a contract is made by another (the offeror)," and offeror as "a person or entity who makes a specific proposal to another (the offeree) to enter into a contract." (Emphasis added.)

In light of the above, we concur with the director that the ordinary meaning of an "offer" requires that it be made to the offeree, not a third party. As such, regulatory language requiring that the offer be made "to the beneficiary" would simply be redundant. Thus, a letter addressed to Citizenship and Immigration Services (CIS) *affirming* the beneficiary's employment is not a job *offer* within the ordinary meaning of that phrase.

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 two letters from [REDACTED], a professor of physiology at the petitioning institution addressed to Citizenship and Immigration Services (CIS), asserting that the petitioner had offered the beneficiary a position as an instructor and staff scientist. These documents do not constitute a job offer from the petitioner to the beneficiary. On October 27, 2006, the director

requested evidence that the petitioner had extended a permanent job offer to the beneficiary. The director explicitly stated: "The document now requested is the actual offer of a permanent research position issued by the university to the alien."

In response, the petitioner submitted a November 7, 2006 letter from [REDACTED] the petitioner's Immigration Coordinator, Human Resources, addressed to the beneficiary advising that his position "is for an indefinite or unlimited duration." This letter postdates the filing of the petition.

The director concluded that the petitioner had failed to submit the required initial evidence, a job offer that predates the filing of the petition.

On appeal, the petitioner submits a November 22, 2002 letter advising the beneficiary of his appointment as instructor. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Considering the record before the director, the petitioner had not submitted the primary required initial evidence, the original job offer predating the filing date of the petition. Confirmations after the fact are not evidence of eligibility as of the date of filing. *See generally* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The petitioner had not complied with the regulation at 8 C.F.R. § 103.2(b)(2) regarding the submission of secondary evidence. Specifically, the petitioner had not demonstrated that the original job offer did not exist or was unavailable. While we do not question the credibility of those who have confirmed the beneficiary's employment, counsel has not sufficiently explained why the director should have accepted attestations about the terms and conditions in a document in lieu of the document itself. Without the initial job offer, the director was not obligated to consider the petitioner's explanations about the terms and conditions set forth in that job offer.

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.