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FILE: LIN 06 012 52421 Office: NEBRASKA SERVICE CENTER Date: **AUG 29 2007**

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The director reaffirmed the decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a higher education and research institution. 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 an “assistant professor/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, concluding that the petitioner had failed to respond to a notice of intent to deny.

On motion, counsel asserted that the petitioner had, in fact, replied to the notice of intent to deny and resubmitted that filing. The director considered the new evidence and reaffirmed the initial basis of denial, that the petitioner had not offered the beneficiary a permanent job as of the date of filing.

On appeal, counsel submits a brief, a September 12, 2006 Interoffice Memorandum from Michael Aytes, Acting Associate Director for Domestic Operations, Citizenship and Immigration Services (CIS) and additional evidence.

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.) 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 an April 6, 2005 letter from [REDACTED] Head of the petitioner's Department of Laboratory Medicine and Pathology. The letter is addressed to the beneficiary and offers him a "Research Associate (K) position." The beneficiary was further advised that he would also continue his "without salary Assistant Professor appointment type." The beneficiary was advised his annual base salary would be \$45,000. The letter references the petitioner's policies and procedures manual, available on the Internet.

The director accessed the petitioner's website and reviewed the policies for (K) appointments. Noting that (K) appointments are date specific and that renewal is discretionary and not grievable, the director concluded that the position was not permanent as defined at 8 C.F.R. § 204.5(i)(2) and issued a notice of intent to deny the petition on December 23, 2005. On March 10, 2006, the director concluded that the petitioner had failed to respond to the notice of intent to deny and denied the petition based on the reasoning set forth in the notice of intent to deny.

On motion, the petitioner resubmitted its response to the notice of intent to deny. Specifically, the petitioner submitted a brief; a statement from former Acting Deputy Director, CIS, [REDACTED]; a letter from [REDACTED] asserting that K-Track positions are for non-teaching, senior research staff and that the petitioner has sufficient funding for the beneficiary's continued employment; a letter from Dr. [REDACTED] Program Leader for the petitioner's Cancer Progression and Metastasis Program, asserting that he anticipates continued funding for the beneficiary's position in his laboratory and evidence of current funding.

The director reaffirmed the initial denial, acknowledging that "the beneficiary has the expectation of continued employment and has ample research funding until 2011," but concluding that the existence of "continuous" (G) appointments at the petitioning institution, which the director deemed more comparable with tenure-track appointments than (K) appointments, precluded a finding that the beneficiary's position was sufficiently permanent.

On appeal, the petitioner submits a letter from its Director of Human Resources, [REDACTED] explaining that it is "contrary to the policy and practice of [the petitioner] to appoint researchers under the G Series." In a new letter, [REDACTED] provides similar information. The petitioner also provided a list of senior researchers, some of whom have been employed with the petitioner for ten or more years.

In promulgating the final regulation, the Immigration and Naturalization Services, now CIS, recognized that it is unusual for colleges and universities to place researchers in tenured or tenure-track positions. Thus, the commentary to the final rule accepts that research positions “*having no fixed term* and in which the employee will *ordinarily* have an *expectation* of permanent employment” are sufficiently comparable. (Emphasis added.) *Employment-Based Immigrants*, 56 Fed. Reg. 60867, 60899 (November 29, 1991).

Unlike (J) appointments, which cannot exceed five years, (K) appointments may be renewed indefinitely. Series (K) appointments also require written notice of nonrenewal. As acknowledged by the director, the beneficiary enjoys an expectation of continued employment and the position appears well-funded. Thus, we are persuaded that the position is permanent as defined at 8 C.F.R. § 204.5(i)(2).

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 met that burden. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.