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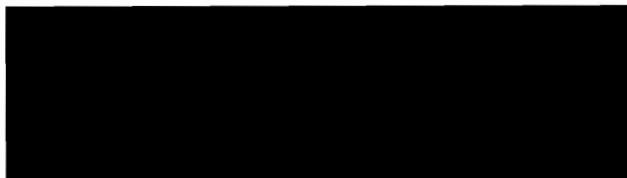
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U.S. Citizenship
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Services

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FILE: [Redacted]
LIN 07 005 52556

Office: NEBRASKA SERVICE CENTER

Date: JUL 30 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:



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, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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). The petitioner seeks to employ the beneficiary permanently in the United States as a professional research hydrologist. The director determined that the petitioner had not established that it had offered the beneficiary a qualifying position or that the beneficiary is recognized internationally as outstanding in his academic field, as required for classification as an outstanding researcher.

On appeal, the petitioner submits a statement and additional evidence. While the petitioner submits evidence on appeal that overcomes the director's valid concern regarding the job offer, the petitioner has not overcome the director's findings regarding the beneficiary's eligibility 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.

Job Offer

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."

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 a letter from [REDACTED] Head of the petitioner's Department of Hydrology and Water Resources, addressed to CIS, asserting that the petitioner "has every intention of employing [the beneficiary] for a term of indefinite duration in which he will have an expectation of continued employment." [REDACTED] further indicates that the petitioner hired the beneficiary as a visiting research associate in August 2004 and that the petitioner promoted the beneficiary to a "more advanced, professional research position" a year later. This document does not constitute a job offer from the petitioner to the beneficiary. On October 11, 2006, the director requested "a copy of the offer by the [petitioner] to [the beneficiary] of a permanent research position."

In response, the petitioner submitted another letter from [REDACTED] explaining that the petitioner has continually obtained funding for the beneficiary's position. [REDACTED] expresses his intent to continue to pursue funding for the beneficiary's position. The petitioner provided a chart of the beneficiary's funding history. The petitioner also provided official personnel policies for faculty with "continuing status," "continuing-eligible" status and "year-to-year" appointments. While those with continuing status are assured continuing employment unless they resign, are dismissed for just cause or are terminated for budgetary reasons or educational policy change, those with year-to-year appointments are not automatically terminated at the end of their term absent affirmative action to renew the appointment. Specifically, those with year-to-year appointments "are entitled to no less than 90 days notice of nonrenewal," and any decision not to renew "shall be reviewed by the dean or director of the college or division."

The director did not reach the issue of the petitioner's intent as the petitioner had failed to submit the required initial evidence in this matter, the initial job offer issued by the petitioner to the beneficiary.

On appeal, while the petitioner asserts that the director did not "formally request an offer addressed to the beneficiary," (emphasis in original), he concedes that "one possible interpretation" of the request "could be" an offer addressed to the beneficiary. The petitioner submits a "Letter of Offer" dated September 26, 2005 (prior to the filing of the petition) addressed to the beneficiary. The letter notes that the petitioner does not limit the number of renewals for year-to-year appointments and expresses an intent to "continue to seek funding for your current position." The letter expresses the petitioner's "reasonable expectation that funding for [the beneficiary's] position will continue." In addition, the petitioner submitted the beneficiary's renewal for the period October 1, 2005 through June 30, 2006.

While we find it unambiguous that the director expressly requested the job offer issued directly to the beneficiary, we are satisfied that the petitioner made a good faith effort, through the submission of extensive documentation, to respond to its understanding of the director's request. Moreover, the evidence submitted on appeal relates to the beneficiary's eligibility as of the date of filing. Thus, we will consider the evidence submitted for the first time on appeal.

In promulgating the final regulation, the Immigration and Naturalization Service, 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" as comparable. (Emphasis added.) 56 Fed. Reg. 60867, 60899 (November 29, 1991). The petitioner has employed the beneficiary since August 2004. It has continually reappointed the beneficiary and promoted him since that date, consistently securing funding for his position. As of the date of filing, the petitioner has renewed the beneficiary's appointment in his current position. The petitioner's own policies do not preclude unlimited annual renewals of year-to-year positions and, in fact, require an active procedure where a decision is reached not to renew such appointments. Thus, we are persuaded that, on appeal, the petitioner has overcome the director's conclusion that the petitioner had not established that it had offered the beneficiary a permanent position as of the date of filing.

International Recognition

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 October 6, 2006 to classify the beneficiary as an outstanding researcher in the field of hydrology. Therefore, the petitioner must establish that the beneficiary had at least three years of research experience in the field as of that date, and that the beneficiary's work has been recognized internationally within the field as outstanding.

The petitioner documented that, as of the date of filing, the beneficiary had two years of non-student research experience with the petitioner. The beneficiary also worked for several years as a consultant in Germany implementing ground water programs, performing geotechnical assessments of sites,

restoring wells, designing and evaluating restoring methods and modeling groundwater. While counsel initially asserted that this work constitutes research experience, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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). The description of the beneficiary's duties prior to pursuing his Ph.D. does not suggest that he was engaged in research. It is noted that the Merriam-Webster Dictionary 617 (2004) defines research as a "careful or diligent search" or the "studious inquiry or examination aimed at the discovery and interpretation of new knowledge." Most of the above duties appear to be primarily engineering duties. While one duty involves designing and evaluating methods, simply having design or evaluation responsibilities does not mean that an employee is necessarily a researcher. Software engineers, architects, and even artists design products, but they are not researchers. Notably, [REDACTED] Assistant Professor of Soil Science and Petrography at the University of Stuttgart-Hohenheim, asserts that the beneficiary "advanced first to a consultant hydrogeologist and then to a research hydrologist at [the petitioning university]."

As set forth in the regulation quoted above, if we are to consider the beneficiary's research experience while pursuing his Ph.D., the petitioner must demonstrate that the work during that time "has been recognized within the academic field as outstanding."

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 beneficiary must satisfy at least two.

On appeal, the petitioner asserts that the director erred in requiring that the evidence submitted to meet a given criterion demonstrate international recognition. Throughout the appeal, the petitioner asserts that the submission of evidence relating to a given criterion is sufficient to meet that criterion.

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 (July 5, 1991). The petitioner claims that the beneficiary satisfies the following criteria.¹

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.

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.

Initially, the petitioner submitted a booklet, a Master's thesis and a report that cite the beneficiary's unpublished Master's thesis. While the booklet has an ISSN number, the record contains no evidence that the thesis and report were published. In his cover letter, counsel characterized these citations as published material written by others about the beneficiary's work in the field.

The booklet, by [REDACTED], contains a figure representing "a simplified version of the aquifer model" described by the beneficiary and others. [REDACTED] notes that all past hydrologic mapping of the area, including that done by the beneficiary, indicates strongly anisotropic conditions. [REDACTED] then goes on to discuss his own work. Significantly, the booklet contains at least 135 pages and the citation of the beneficiary's thesis is on that page. Yet, the petitioner has not demonstrated that the beneficiary's thesis is referenced in the text on more than two pages.

The record also contains a letter from [REDACTED] indicating that he and the beneficiary were both working on the same site while the beneficiary studied for his Master's degree and [REDACTED] for his Ph.D. At the end of his letter, [REDACTED] acknowledges that he has worked with the beneficiary in the past. [REDACTED] confirms that the beneficiary's Master thesis "provided an essential foundation" for [REDACTED]'s Ph.D. dissertation.

The thesis, entitled "Tuebingen Geoscientific Theses" is authored by [REDACTED] and edited by [REDACTED]. It is significant that, according to his curriculum vitae, the beneficiary obtained his Master's degree in 1994 at the University of Tübingen under the direction of [REDACTED]. The beneficiary also authored an article in 1993 with [REDACTED] and [REDACTED]. The thesis bears no indicia of publication. In the manuscript, Thomas Schmid discusses his own investigation of water budget and hydrochemical nutrient balances and concludes that "further results can be found" in the beneficiary's Master thesis. Once again, the thesis contains at least 142 pages and the petitioner has not demonstrated that the beneficiary is referenced in the text on more than one page.

Finally, the beneficiary is cited in a Final Report for 1987-1994 prepared for the University of Hohenheim. [REDACTED] is listed as the director of the section that references the beneficiary, which begins on page 113. On page 124, the report lists the beneficiary's Master's thesis as one of three "very detailed investigations [that] have been carried out in order to determine the water quality." As stated above, there is no evidence that this report was published in a professional publication.

The director concluded that the above materials "appear to be about topics reported in the titles and not about the alien's work." The director then concluded that the "abbreviated citation record fails to corroborate that the beneficiary was internationally recognized even within the brief period from 1995-97."

On appeal, the petitioner asserts that [REDACTED] did not simply reference the beneficiary's work but used it as a scientific basis for a diagram "which she had modified after an original diagram" by the beneficiary. The petitioner submits the beneficiary's diagram as it appeared in his Master's thesis. While the graph and key are the same as the one used by [REDACTED], the writing at the top of the

diagram differs. The significance of these changes is unknown, as the petitioner has not provided translations. Regardless, while [REDACTED] may have started with the beneficiary's results in beginning her own work, she is principally reporting her own findings, not those of the beneficiary. [REDACTED] booklet cannot be considered to be "about" the beneficiary's work under any reasonable definition of the word "about."

The petitioner further asserts that the director was not entirely certain that the materials were not about the beneficiary's work as he used the word, "appear." While the director may have stated that the above materials "appear" to be about topics other than the beneficiary's work, we find that the materials are definitely not about the beneficiary's work. Materials which cite the beneficiary's work are primarily about the author's own work, not the beneficiary. As such, they cannot be considered published material about the beneficiary.

Moreover, while the petitioner asserts that [REDACTED] published part of his dissertation in 1995, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). As stated above, the record contains no evidence that [REDACTED] published his thesis in a professional publication. Further, as stated above, the record also lacks evidence that the final report prepared for the University of Hohenheim was published in a professional publication. Thus, the second booklet and the report cannot serve to meet the plain language of the regulation.

Finally, [REDACTED] worked at the evaluated site at the same time as the beneficiary and [REDACTED] who supervised the beneficiary's Master's thesis, and was involved in both [REDACTED]'s thesis and the report. Thus, these citations are not indicative of the beneficiary's recognition beyond his immediate circle of colleagues. It is significant that the cited material, the beneficiary's thesis, was never published and, thus, disseminated internationally.

On appeal, the petitioner submits a new article that references the beneficiary's more recent work. The citing article, however, was published after the date of filing and cannot be considered evidence of the beneficiary's eligibility as of that date. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).²

In light of the above, 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.

² We acknowledge that in his discussion of the criterion set forth at 8 C.F.R. § 204.5(i)(3)(i)(F), the petitioner asserts that *Matter of Katigbak*, 14 I&N Dec. at 49, does not apply to the facts in this case. We will address this assertion below in our own discussion of that criterion.

The petitioner submitted the beneficiary's comments on a report prepared by a Sacramento hydrologist for the Water Resources Division of the U.S. Department of the Interior. The petitioner also submitted a response to the beneficiary's comments, indicating that the author incorporated many of the beneficiary's suggestions. Significantly, the beneficiary was also working for the Water Resources Division, albeit in the Arizona District. In addition, the record reflects that the beneficiary has refereed articles for the *Journal of Water Resources Planning and Management*. [REDACTED], a program chief at the California Water Science Center and an associate editor for the *Journal of Water Resources Planning and Management*, asserts that he invited the beneficiary to review manuscripts submitted to the journal based on the beneficiary's "international reputation." It is noted that the beneficiary's collaborator, [REDACTED] is a project chief at the California Water Science Center. Thus, the beneficiary has a close connection to that center. In a separate letter, [REDACTED] acknowledges that he has known the beneficiary for two years and is familiar with the beneficiary's work with his own colleague, [REDACTED]

The director concluded that the above evidence was consistent with the beneficiary's education and experience and not indicative of international recognition in the field. On appeal, the petitioner asserts that recognition in the United States can be indicative of international recognition and that the U.S. Geological Survey report and state water issues have international significance. The petitioner further asserts that articles reviewed by the beneficiary include one by a researcher involved in international investigations and one that dealt with water sharing in East Africa. The petitioner submits a new letter from [REDACTED] reiterating that he asked the beneficiary to review manuscripts based on the beneficiary's international reputation and asserting that he was impressed with the beneficiary's reviews and will continue to recommend him for reviews.

We concur with the director that reviewing an internally generated report for the government agency with which he was affiliated is not indicative of the beneficiary's international recognition.

Moreover, 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. While we do not question [REDACTED]'s sincerity, it is the nature of the judging responsibilities themselves that are relevant to this criterion. 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, or served in an editorial position for a distinguished journal, we cannot conclude that the beneficiary meets this criterion.

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

Initially, counsel asserted that the beneficiary's thesis, publications and reference letters establish that the beneficiary meets this criterion. The director concluded that the petitioner had not established that the beneficiary's original work in the field had garnered international recognition. On appeal, the

petitioner asserts that it is not possible to measure international recognition; thus, the regulation only requires evidence that the beneficiary's research contributions are "original." The petitioner further asserts that the evidence previously submitted and a new reference letter submitted on appeal demonstrate the significance of the beneficiary's original scholarly research contributions.

As stated above and by the director in relation to this criterion, outstanding 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 (July 5, 1991). 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." More specifically, to conclude that every researcher who performs original research that adds to the general pool of knowledge meets this criterion would render this criterion meaningless.

We will consider the reference letters below. At the outset, however, we note that the opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim of international recognition. 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)).

In evaluating the reference letters, we note that letters containing mere assertions of outstanding ability, international renown or unique work are less persuasive than letters that specifically identify contributions and provide specific examples of how those contributions have *already* influenced the field. In addition, letters from independent references who were previously aware of the beneficiary through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the beneficiary and are merely responding to a solicitation to review the beneficiary's curriculum vitae and work and provide an opinion based solely on this review. Ultimately, evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. An

individual with international recognition should be able to produce unsolicited materials reflecting that recognition.

Most of the beneficiary's reference letters focus on the beneficiary's hydrologic software package, "Farm Process," co-developed with [REDACTED] who has served as a project chief for the U.S. Geological Survey (USGS) in New Mexico, Arizona and California. [REDACTED] explains:

Around 3 years ago, I have gotten [sic] notice that [the beneficiary] had coded new software to be used in conjunction with the USGS' groundwater flow model MODFLOW. His software, called "The Farm Process," integrated numerically in an unparalleled way irrigation water demand, surface-water and groundwater supply to farms. Consequently, I became a close collaborator of [the beneficiary], which enabled him to incorporate additional features into this computer code, which were particularly needed for water resources management projects in California.

[REDACTED] asserts that he and the beneficiary coauthored a handbook on the software, a peer-reviewed article and gave presentations at conferences and for agencies "such as CALFED, CADWR, the USGS and local water agencies." [REDACTED] further asserts that the beneficiary "is about to include unparalleled and cutting-edge novelties into his code, which I consider to be of major importance to water management in the United States." Specifically, he will incorporate salinity and proposes to link his model to climate change models. We cannot consider, however, any contributions that were still pending as of the date of filing. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49.

Chief of the Office of Ground Water, USGS in Reston, Virginia, asserts that its models are for nationwide use. He reiterates that "Farm Process" is designed for joint use with MODFLOW, USGS' groundwater flow model, which is the most widely used ground-water flow model in both the nation and the world. [REDACTED] predicts that the "'Farm Process' software could be applied readily in several hydrologic modeling projects in critical areas of California and New Mexico" and that the software "should be a valued 'add-on' for MODFLOW computer models in other parts of the United States and elsewhere." [REDACTED] continues that USGS has published the "Farm Process" software as an official add-on for MODFLOW and the user guide for the software, which "not only serves as a guide for the use of the 'Farm Process' but enlightens the reader about the general need for such a modeling tool and about the hydrologic science behind it." [REDACTED] does not state how many add-ons USGS has published or whether or not "Farm Process" is a widely utilized add-on. On appeal, [REDACTED] asserts that he is aware of the impact "Farm Process" is having on various projects but fails to identify projects worldwide using the software.

[REDACTED] a senior hydrologist with the New Mexico Office of the State Engineer (OSE), asserts that she met the beneficiary three years ago when he started working on a hydrologic modeling irrigation and estimating water use in the Elephant Butte Irrigation District (EBID). [REDACTED] explains that "Farm Process" is the first software that allows for estimating irrigation pumping in conjunction with a hydrologic model. She praises his abilities and asserts that his work is unique and

practical. All research, however, in order to qualify for funding and publication, must be original and present some potential benefit. [REDACTED] also discusses the potential of the beneficiary's work more specifically:

Moreover, the OSE is anxious to use [the beneficiary's] "Farm Process" for other very important matter [sic] related to water rights adjudication and interstate water management questions. His computer code *may* enable the OSE to evaluate how water use in one state impact [sic] return flows and the delivery of water to a downstream state. Hence, his code *might* play an essential role in high-level debates like interstate water negotiations.

[The beneficiary] is currently applying his "modeling tool" to a small but representative model area on the lower Rio Grande of New Mexico. We look forward to the *possibility* of using his code to simulate water allocations, return flows and streamflow deliveries for the entire Lower Rio Grande regional irrigation system.

(Emphasis added.) [REDACTED]'s speculation as to the future uses of the beneficiary's software package is not persuasive evidence of the significance of the work he had completed as of the date of filing.

[REDACTED] a professor at the petitioning institution who served on the beneficiary's doctoral committee, asserts that the beneficiary's code is being applied in New Mexico and "is expected to help estimate unrecorded agricultural pumping rates and volumes of groundwater across the Elephant Butte Irrigation District." Thus, it does not appear that, at least as of the date of filing, the beneficiary's model had already produced useful data on EBID.

[REDACTED], Associate Director of Education for Sustainability of semi-Arid Hydrology and Riparian Areas (SAHRA) at the petitioning university, asserts that the beneficiary's accomplishments include: (1) putting his scientific knowledge to use for government and non-government water managers, (2) establishing important stakeholder partnerships, (3) presenting his work at conferences and (4) authoring a pending article. [REDACTED] further asserts that the beneficiary "is currently planning on making his software compatible with Geographic Information Systems and he is working towards a Graphics User Interface." Once again, we cannot consider work that had yet to be completed as of the date of filing. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. at 49.

A National Science Foundation (NSF) report on a visit to the SAHRA site in New Mexico indicates that "Farm Process" is "a value-added activity that will accelerate knowledge and technology transfer because of the widespread acceptance of MODFLOW." The report does not, however, indicate that "Farm Process" has already gained the type of widespread acceptance of MODFLOW. Rather, it concludes that the development of the module "should be encouraged."

[REDACTED] asserts that "Farm Process" provides important new capabilities for MODFLOW and has generated interest among researchers and water managers. [REDACTED] indicates that he expects that

the reports and articles on “Farm Process’ *will* have very high readership and impact.” (Emphasis added.) While [REDACTED] asserts that the beneficiary’s collaboration with USGS scientists “has been extremely productive,” the example he provides is their current work to apply the beneficiary’s model to California’s Central Valley and the Pajaro Valley. [REDACTED] does not indicate that this work had been successful as of the date of filing.

[REDACTED], an assistant professor at the University of Stuttgart-Hohenheim who has worked with the beneficiary in Germany, asserts that the beneficiary’s model is the only one of its kind and that his code “might significantly contribute to the world’s need for the calculation of crop water requirements.”

The record contains the beneficiary’s handbook for “Farm Process,” an article accepted for publication in the *Journal of Water Resources Planning and Management*, the beneficiary’s unpublished doctoral dissertation, three presentations at annual conferences and a presentation that appears to have been limited to authorities in New Mexico. The beneficiary also authored a published article in 1993.

The preface to the beneficiary’s handbook for “Farm Process” indicates that the software is available from USGS. The record lacks evidence regarding how many copies of the software have been requested or a comparison with other add-on programs. The record contains no letters from independent water managers who have been influenced by the beneficiary’s presentations or other evidence that these presentations have proven influential or otherwise significant. Further, we cannot conclude that an unpublished dissertation or a pending article has already garnered the beneficiary international recognition for his original contributions. Finally, the record contains little evidence of the significance of the beneficiary’s work in the early 1990’s. For example, the record contains no evidence that this work has been frequently and widely cited in the field. Rather, as discussed above, his unpublished Master’s thesis is referenced by three colleagues and only once in a published booklet.

On appeal, the petitioner submits a new letter from [REDACTED] attesting to “several cases” where international researchers contacted him regarding “Farm Process.” As an example, [REDACTED] affirms being contacted by a Chinese national. [REDACTED] further asserts that the International Groundwater Modeling Center “has asked for a review of the Farm Process for international distribution.” The petitioner also submits e-mails from researchers in Australia expressing an interest in the beneficiary’s software. The petitioner has not established that, as of the date of filing, any international research or water management team had successfully utilized “Farm Process.”

While the beneficiary’s research is no doubt of value and may have significant potential, 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. While the record suggests that the beneficiary may be gaining some international exposure, at best, the petition was filed prematurely with respect to this criterion, before the effectiveness and influence of the beneficiary’s software could be gauged.

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, as of the date of filing, the beneficiary had authored one published article and a handbook for his software package that is available from USGS. The beneficiary had also presented his work at three annual conferences. The director concluded that the record lacked evidence of widespread citation or other recognition of the beneficiary's published works.

On appeal, the petitioner asserts that the existence of the articles themselves is sufficiently indicative of international recognition such that no additional evidence of the significance of these articles is required. Regardless, the petitioner asserts that a new letter from a NSF reviewer of the beneficiary's handbook establishes its significance. Further, the petitioner notes that the beneficiary's conference proceedings were peer-reviewed and that letters can demonstrate that a published book or article is internationally recognized. Finally, the petitioner asserts that the director erred in relying on *Matter of Katigbak*, 14 I&N Dec. at 49, to dismiss work that had yet to be published.

First, as stated above, the evidence submitted to meet a given criterion must be evaluated as to whether it is indicative of or consistent with international recognition if that statutory standard is to have any meaning. 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.

Second, the concept set forth in *Matter of Katigbak*, 14 I&N Dec. at 49, that an alien must be eligible as of the priority date, is not limited to the facts of that case. Significantly, that decision has now been incorporated into a CIS regulation, 8 C.F.R. § 103.2(b)(12), which requires that evidence submitted in response to a request for evidence establish "filing eligibility at the time the application or petition was filed." Moreover, we find that the reasoning behind *Matter of Katigbak*, 14 I&N Dec. at 49 is more widely applicable. That decision provides:

If the petition is approved, he has established a priority date for visa number assignment as of the date that petition was filed. A petition may not be approved for a profession for which the beneficiary is not qualified at the time of its filing. The beneficiary cannot expect to qualify subsequently by taking additional courses and

then still claim a priority date as of the date the petition was filed, a date on which he was not qualified.

Section 204 of the Act requires the filing of a visa petition for classification under section 203(a)(3). The latter section states, in pertinent part: “Visas shall next be made available to *qualified immigrants who are members* of the professions.” (Emphasis added.) It is clear that it was the intent of Congress that an alien be a recognized and fully qualified member of the professions at the time the petition is filed. Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts. To do otherwise would make a farce of the preference system and priorities set up by statute and regulation.

Id. The Regional Commissioner continued this reasoning in *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 160 (Reg. Comm. 1977). That decision reemphasizes the importance of not obtaining a priority date prior to being eligible based on future experience. In fact, despite the petitioner’s assertion to the contrary, this principle has been extended beyond the alien’s education credentials and experience. For example, an employer must establish its ability to pay the proffered wage as of the date of filing. *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Act. Reg. Comm. 1977). That decision provides that a petition should not become approvable under a new set of facts. Recognizing that *Matter of Katigbak*, 14 I. & N. Dec. at 49, was not “foursquare with the instant case” in that it dealt with the beneficiary’s eligibility, *Matter of Great Wall*, 16 I&N Dec. at 145 still applies the reasoning. The decision provides:

In sixth-preference visa petition proceedings the Service must consider the merits of the petitioner’s job offer, so that a determination can be made whether the job offer is realistic and whether the wage offer can be met, as well as determine whether the alien meets the minimum requirements to perform the offered job satisfactorily. It follows that such consideration by the Service would necessarily be focused on the circumstances at the *time of filing* of the petition. The petitioner in the instant case cannot expect to establish a priority date for visa issuance for the beneficiary when at the time of making the job offer and the filing of the petition with this Service he could not, in all reality, pay the salary as stated in the job offer.

Id. (Emphasis in original.) Finally, when evaluating revisions to a partnership agreement submitted in support of a petition seeking classification as an alien entrepreneur pursuant to section 203(b)(5) of the Act, this office relied on *Matter of Katigbak*, 14 I. & N. Dec. at 49, for the proposition that “a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts.” *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that we cannot “consider facts that come into being only subsequent to the filing of a petition.” *Id.* at 176.

The plain language of the regulation at 8 C.F.R. § 204.5(i)(3)(i)(F) requires evidence of scholarly articles “in” scholarly journals with an international circulation. An article that has only been accepted for publication as of the date of filing, and has yet to appear in a scholarly journal, is not evidence that the beneficiary has garnered international exposure, let alone international recognition. Thus, we concur with the director that the actual publication of the article is fundamental to this criterion. As such, if the publication occurs after the date of filing, then it is a fact that comes into being only subsequent to the filing of the petition and, therefore, cannot be considered. *Matter of Izummi*, 22 I&N Dec. at 176 (citing *Matter of Bardouille*, 18 I&N Dec. at 114).

In light of the above, we will consider the beneficiary’s 1993 article, handbook and conference presentations. The record is absent any evidence that the beneficiary’s 1993 article was influential or otherwise garnered any recognition in the field. Specifically, the petitioner has not submitted evidence that it has been widely cited or reference letters from independent researchers who have been influenced by this early work.

Some references indicate that the beneficiary’s handbook for “Farm Process” explains the science behind the model in addition to serving as a user’s guide for the beneficiary’s software. While we acknowledge these claims, we cannot conclude, without additional explanation, that a users guide is a *scholarly* book. Regardless, we are not persuaded that the handbook has garnered the beneficiary international recognition.

Several references assert that the beneficiary’s handbook is internationally circulated because it is available on USGS’ website. We cannot ignore that any data posted to a website is technically available internationally. We are not persuaded that every individual who has posted material that has appeared on the Internet enjoys international recognition as outstanding. Internet materials not otherwise internationally disseminated are far more persuasive when supported by evidence that not only is such material available, but has also been accessed or downloaded. Such evidence could include wide and frequent citation, letters from multiple independent researchers who have utilized the Internet materials or, less persuasively, data from the website documenting the number of downloads. Significantly, the NSF review of the handbook submitted on appeal indicates that the handbook will not even have national application unless examples of other applications and eastern water policy options are added.

While we concur with the petitioner that, in some circumstances, expert letters can document that an alien’s scholarly articles have garnered international recognition, the letters in this matter are not persuasive as they are all from individuals at institutions with which the beneficiary has collaborated. As stated above, letters from independent researchers who have been influenced by the beneficiary are far more persuasive than letters from the beneficiary’s circle of colleagues. Letters from institutions with which the beneficiary has collaborated are not comparable to wide and frequent citation by independent research teams.

In light of the above, 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 his collaborators, employers, and mentors, while securing some degree of international exposure for his 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.

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.