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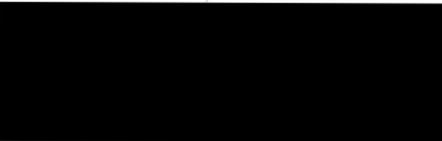


FILE: EAC 05 234 51301 Office: VERMONT SERVICE CENTER Date: MAR 09 2007

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.

3 Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on motion to reopen. The decision of the AAO will be withdrawn, and the petition will be approved.

The petitioner is a biomedical research institute. 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 postdoctoral 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.

On appeal, counsel submitted a brief and additional evidence. Subsequently, counsel submitted a June 6, 2006 Interoffice Memorandum from [REDACTED], Acting Director for Domestic Operations, Citizenship and Immigration Services (CIS). The AAO concluded that it could not consider the various assertions regarding a job offer that was not part of the record.

On motion, counsel questions the AAO's insistence that an employer comply with the requirement to submit a job offer and asserts that confirmations after the fact do not implicate the concerns expressed in *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Despite counsel's continued assertions that a job offer from the petitioner to the beneficiary is not required initial evidence, counsel includes the document with the motion.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. In this matter, new evidence is submitted in support of the motion.

We note that the evidence submitted on motion, a job offer letter dated August 18, 2003, was previously requested by the director. Nevertheless, the petitioner gave a substantive response to the director's request for additional evidence. The director's final notice of denial focused on the title of the position rather than the lack of an actual job offer. Faxed correspondence to this office suggests that counsel and other attorneys have consistently received favorable determinations in similar cases without submitting an actual job offer. Thus, based on previous experience, counsel believed that he was complying with the director's request. Given the apparent confusion as to what evidence was being requested, we will consider the new evidence. While we reject counsel's assertions that the previously submitted evidence was sufficient without the actual job offer, we find that the petitioner has now established that it had offered the beneficiary a sufficiently permanent position 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.

(Emphasis added.) In faxed correspondence to this office prior to the motion, counsel asserted that he had never submitted an actual job offer letter in support of petitions of this type. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved petitions of this type without the evidence mandated by the regulations, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As stated in our previous decision, Black's Law Dictionary 1111 (7<sup>th</sup> 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](http://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 reaffirm our conclusion that the ordinary meaning of an "offer" requires that it be made to the offeree, not a third party. 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. In support of the concurrently filed Form I-485 Application to Register Permanent Residence or Adjust Status, the petitioner submitted a June 9, 2005 letter from [REDACTED], Immigration Specialist, addressed to CIS, asserting that the beneficiary was employed as a postdoctoral researcher.

This document does not constitute a job offer from the petitioner to the beneficiary. On January 3, 2006, the director requested evidence that the petitioner had extended a permanent job offer to the beneficiary. In response, the petitioner submitted a similar letter from Ms. [REDACTED] dated December 23, 2005. Nothing that postdoctoral positions are typically for a fixed term, the director determined that the record did not establish a valid offer of permanent employment.

On appeal, counsel asserted that postdoctoral positions with the petitioning institute are not comparable to the typically temporary postdoctoral positions with universities. In support of this assertion, the petitioner submitted two letters from Dr. [REDACTED], a member of the petitioning institution, providing the same information. One of the letters is addressed to the director and one is addressed to the beneficiary, who signed the letter in 2006. The letters reference a September 1, 2003 offer. Subsequently, counsel submitted a June 6, 2006 memorandum from [REDACTED] Acting Director for [REDACTED], CIS, addressing the issue of permanent job offers in the context of the classification sought. Nothing in this memorandum, however, suggests that the original job offer is not required initial evidence.

The AAO concluded that the petitioner had not submitted the primary required initial evidence, the original job offer predating the filing date of the petition. In reaching this decision, the AAO stated that 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 AAO further noted that 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 2003 job offer does not exist or is unavailable. While the AAO did not question the credibility of Dr. [REDACTED] or Ms. [REDACTED] it concluded that counsel had not sufficiently explained why the AAO should accept attestations about the terms and conditions in a document in lieu of the document itself. Without the initial job offer, the AAO could not consider the petitioner's explanations about the terms and conditions set forth in that job offer.

On motion, counsel asserts:

At the outset, we suggest that this puts form over substance. What about companies that do not issue job offer letters? What if the original job offer letter is silent as to whether the position is permanent or temporary? Is the Service holding that even with an I-140 supported by a later issued employment letter, the petition is doomed because of the lack of or insufficiency of the original letter?

Counsel fails to acknowledge that the AAO specifically noted the lack of evidence that, in this matter, the job offer was unavailable or did not exist. Where such unavailability can be demonstrated, a petitioner may rely on secondary evidence, such as an employment contract or personnel records. 8 C.F.R. § 103.2(b)(2). Only where secondary evidence is similarly unavailable or does not exist may a petitioner rely on affidavits alone. *Id.* Thus, in situations where an employer does not issue formal job offer letters, as proposed by counsel, the employer would be able to submit secondary evidence that

such an offer was made prior to the date of filing in accordance with the regulation at 8 C.F.R. § 103.2(b)(2). The record is not persuasive, however, that universities and private research institutions with at least three full-time employees, the only eligible employers who can file petitions pursuant to section 203(b)(1)(B) of the Act, do not normally maintain any written record of their offers of employment and the terms of that employment.

Next, counsel challenges the AAO's reliance on *Matter of Katigbak*, 14 I&N Dec. at 49. Specifically, counsel notes that the letter from Dr. [REDACTED] while dated after the filing of the petition, relates back to a job offer in 2003, well before the filing of the petition. Insofar as Dr. [REDACTED] is asserting that the job offer in 2003 as extended at that time was permanent, counsel is correct. Any implication that the job was converted to a permanent position after the petition was filed, however, would be problematic. See also *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). Moreover, we continue to find that a confirmation of a prior offer is not the primary evidence required, the actual job offer. Rather, it constitutes less than an affidavit as to the existence of a job offer. Even affidavits are only permissible when the petitioner has demonstrated that primary and secondary evidence do not exist or are unavailable. 8 C.F.R. § 103.2(b)(2).

As stated above, the petitioner now submits an August 18, 2003 letter from [REDACTED] Jr., Human Resources Officer for the petitioner, addressed to the beneficiary offering the beneficiary a position as a postdoctoral associate. Nothing in the letter suggests that the position was only offered for a limited period of time.

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*" as comparable. (Emphasis added.) 56 Fed. Reg. 60867, 60899 (November 29, 1991).

The petitioner has now submitted the initial required evidence, the job offer that was extended to the beneficiary as of the date of filing. Nothing in this offer, or anything else in the record, is inconsistent with the affirmations in the record that this position *with the petitioning institute* has no fixed term. Thus, the petitioner has now satisfied its burden.

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 AAO's previous decision will be withdrawn and the petition will be approved.

**ORDER:** The decision of August 2, 2006 is withdrawn, and the petition is approved.