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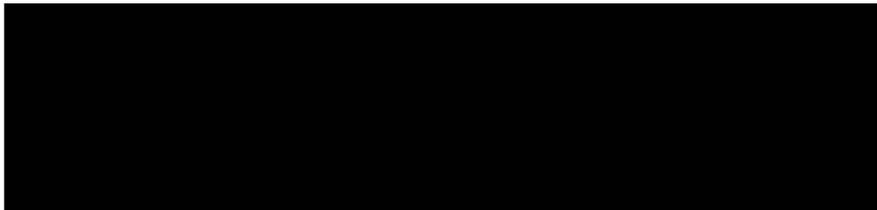
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: SEP 06 2007  
EAC 06 038 50651

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

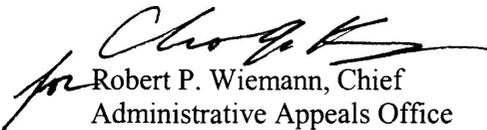
PETITION: Immigrant Petition for Alien Worker as Outstanding Professor or Researcher Pursuant to  
Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 (AAO) on appeal. The appeal will be dismissed.

According to Part 5 of the petition, the petitioner is a “U.S. Government Biomedical Research” entity. Under gross annual income and net annual income, the petitioner indicated “U.S. Government Agency.” The petitioner 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 in the United States as a staff scientist. The director determined that the petitioner is not an eligible petitioner for the classification sought.

On appeal, the Director of the petitioner’s Division of International Service, [REDACTED] asserts that the petitioner is both an institution of higher learning and a private employer and, thus, an eligible petitioner. For the reasons discussed below, we concur with the director that the petitioner, as a government entity, is not eligible to petition for an alien worker under the classification sought.

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.

(Emphasis added.)

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.)

As the petitioner is a government agency, the director determined that it was statutorily ineligible to file the instant petition and denied the petition accordingly. On appeal, ██████████ notes that the regulations do not define either the phrase "institution of higher learning" or "private employer." ██████████ asserts that the petitioner, while not a degree-granting institution, is an institution of higher learning because it has "a tenure and tenure-track system similar to that of U.S. universities" and provides mentoring to postdoctoral trainees, medical residents and fellows. The petitioner submits an e-mail message from ██████████ Assistant Director of the petitioner's Office of Intramural Research, discussing the office's training programs and copies of regulations and proposed rules.

As noted by ██████████ the regulation at 8 C.F.R. § 204.5(i)(1) provides that "[a]ny United States employer" may file a petition seeking to classify an alien as an outstanding professor or researcher pursuant to section 203(b)(1)(B) of the Act. The statute, however, requires that the alien be seeking to work for an institution of higher education or a private employer. The regulation requires a job offer<sup>1</sup> from an institution of higher learning or a private employer. In the legislative history,

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<sup>1</sup> 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

Congress stated that an “invitation for employment by a university or private employer must accompany a petition for admission.” *Family Unity And Employment Opportunity Immigration Act Of 1990 House Report*, H.R. Rep. No. 101-723, 59-60 (September 19, 1990). Thus, it is clear that the petition must be filed by an institution of higher education or a private employer.

It is rudimentary that interpretation of the statutory language begins with the terms of the statute itself, and if those terms, on their face, constitute a plain expression of congressional intent, they must be given effect. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1994). Where Congress’s intent is not plainly expressed, we then need to determine a reasonable interpretation of the language and fill any gap left, either implicitly or explicitly, by Congress. *Id.* at 843-44. The rules of statutory construction dictate that we take into account the design of the statute as a whole. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Moreover, the paramount index of congressional intent is the plain meaning of the words used in the statute taken as a whole. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). The legislative purpose is presumed to be expressed by the ordinary meaning of the words used. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984).

While section 203(b)(1)(B) of the Act may not define “institution of higher education,” Congress has defined this phrase in its laws pertaining to education. Specifically, 20 U.S.C. § 1001(a) defines “Institution of higher education,” in pertinent part, as follows:

[A]n educational institution in any State that--

- (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
- (2) is legally authorized within such State to provide a program of education beyond secondary education;

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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.) 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.

(3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;

(4) is a public or other nonprofit institution; and

(5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

Subparagraph (b) provides that the following entities are also included:

(1) any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that meets the provision of paragraphs (1), (2), (4), and (5) of subsection (a) of this section; and

(2) a public or nonprofit private educational institution in any State that, in lieu of the requirement in subsection (a)(1) of this section, admits as regular students persons who are beyond the age of compulsory school attendance in the State in which the institution is located.

This definition provides a reasonable basis for us to interpret congressional intent in using the phrase "institution of higher education" in section 203(b)(1)(B) of the Act. None of the materials submitted establish that the petitioner is an education institution that admits students and provides education that can be credited towards a baccalaureate degree or that it is a "school" that provides training to "students." Paid postdoctoral associates, residents and fellows are employees who have obtained their degrees, not "students." The record also does not show that the petitioner is legally authorized by the State of Maryland to provide a post-secondary educational program. Further, the record lacks evidence that the petitioner is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary of Education for the granting of preaccreditation status. Finally, we are not persuaded that a tenure-based employment system renders an employer that does not otherwise meet the above definition of an institution of higher education. Our interpretation that the phrase "institution of higher education" contemplates an accredited or preaccredited institution that admits students is consistent with the legislative history of section 203(b)(1)(B) of the Act which provides: "An invitation for employment by *a university* or

private employer must accompany a petition for admission.” H.R. Rep. No. 101-723 at 60. The petitioner has not established that it is an institution of higher education.

Next, we examine whether the petitioner, a government agency, might be a “private employer.” We must presume that the use of the word “private” in the statute is not superfluous and, thus, that it has some meaning. *See Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209 (1997); *Bailey v. U.S.*, 516 U.S. 137, 145 (1995). Black’s Law Dictionary 1213 (7<sup>th</sup> ed. 1999) defines “private” as “[r]elating or belonging to an individual, *as opposed to the public or the government.*” (Emphasis added.) The petitioner is a government agency and, thus, cannot be considered a “private employer.” This interpretation does not preclude government agencies from filing petitions in behalf of researchers in other classifications.

On appeal, [REDACTED] references the commentary to a *proposed* rule. Specifically, *Employment-Based Immigrants*, 60 Fed. Reg. 29771, 29775 (June 6, 1995) states that government agencies “should” be able to file petitions under this classification and proposes to “*amend* the regulation to include government agencies on the list of United States employers.” (Emphasis added.) The fact that it was deemed necessary to propose an amendment to the regulation to allow state, local, or Federal government agencies to petition under this classification reinforces the position that the current regulation does not do so. The proposed version of 8 C.F.R. § 204.5(i)(3)(iii)(C) would allow for a job offer from “a private employer *or* a state, local or Federal Government agency.” (Emphasis added.) The use of the disjunctive “or” as opposed to a word such as “including” reveals that legacy Immigration and Naturalization Service (INS), now Citizenship and Immigration Services (CIS), did not believe that the phrase “private employer” includes government agencies. We reiterate that this proposed amendment to add government agencies to the list of eligible employers was not implemented as a final rule. Accordingly, the petitioning entity is not an eligible petitioner in accordance with 8 C.F.R. § 204.5(i)(3)(iii).

Finally, [REDACTED] asserts that other Service Centers have approved petitions in this classification filed by the petitioner. 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 (Commr. 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 other petitions in this classification filed by the petitioner, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 at \*3 (E.D. La.), *aff’d*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001).

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.