



U.S. Citizenship
and Immigration
Services

Interoffice Memorandum

June 6, 2006

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS

FROM: Michael Aytes /s/
Acting Director for Domestic Operations
U.S. of Citizenship and Immigration Services
Department of Homeland Security

Re: Guidance on the Requirement of a “Permanent Offer of Employment” for Outstanding Professors and Researchers

Revisions to *Adjudicator’s Field Manual (AFM)* Chapter 22.2(c)(2)(B)
(AFM Update AD06-00)

I. Purpose

This memorandum provides guidance on applying the definition of “permanent employment” as set forth in 8 C.F.R. § 204.5(i)(2) when adjudicating first preference (EB-1) petitions filed on behalf of outstanding researchers.

II. Background

Section 203(b)(1)(B)(iii)(I)-(III) of the Immigration and Nationality Act (“INA”) defines employment for outstanding professors and researchers as:

- (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 “Outstanding Professors and Researchers” category was added to the first preference (EB-1) classification, and thus exempted from the labor certification process, via the 1990 Immigration and Nationality Act (IMMACT ‘90), Pub. L. 101-649. Congress recognized that such employees provide direct contributions to the United States and that U.S. workers alone could not meet legitimate employment needs. As a result, Congress created an expedited process for obtaining permanent residence for certain qualifying aliens. Such aliens include professors and researchers holding tenured, tenure-track, or other comparable research positions.

The applicable regulations require an offer of employment as initial evidence in support of a first preference petition filed on behalf of an outstanding professor or researcher. See 8 C.F.R. § 204.5(i)(3)(iii). The regulations provide that the offer of employment be in the form of a letter from the petitioning employer (i.e., U.S. university or institution of higher learning or a department, division, or institute of a private employer) stating that the employment is a tenured or tenure-track teaching position or a “permanent” research position in the alien’s academic field. See 8 C.F.R. § 204.5(i)(3)(iii)(A)-(C). The word “permanent”, in reference to a research position, is defined as:

“either tenured, tenure-track, or for an indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination.”

8 C.F.R. § 204.5(i)(2).

A recent review of modern business practices reveals that most employment agreements, when entered into between the employer and potential employee, provide that a tenure-track teaching position or comparable research position is terminable “at will,” even though both the employer and the employee have the expectation that the employee will continue in the employment for an indefinite or unlimited duration. “Good cause for termination” clauses often are not included in such agreements because they raise numerous legal and business issues for employers. Moreover, in most occupations, such guarantees are impracticable regardless of whether the job is being offered to a U.S. or foreign worker. By contrast, employment contracts for most tenured teaching positions still contain language reflecting that such positions are subject to termination only for good cause.

In determining whether a petitioning employer has established that a research position is permanent, some adjudicators have focused solely on whether the language of an actual employment contract (if submitted) or the offer of employment contains a “good cause for termination” provision. As evidence of a “good cause for termination” provision is not mandated under 8 CFR 204.5(i)(3), such evidence is not the only way by which a petitioning employer may demonstrate that an employee in a research position will have “an expectation of continued employment.”

Some adjudicators also have inadvertently applied the definition of “permanent” – a definition that only effects research positions – to the assessment of whether a non-research position is tenured or tenure-track.

III. Field Guidance

A. “Permanent” for Research Positions

This guidance clarifies that adjudicators should not deny a petition where the employer is seeking an outstanding researcher solely because the actual employment contract or offer of employment does not contain a “good cause for termination” clause. The petitioning employer, however, must still establish that the offer of employment is intended to be of an indefinite or unlimited duration and that the nature of the position is such that the employee will ordinarily have an expectation of continued employment.

For example, many research positions are funded by grant money received on a yearly basis. Researchers, therefore, are employed pursuant to employment contracts that are valid in one year increments. If the petitioning employer demonstrates, however, the intent to continue to seek funding and a reasonable expectation that funding will continue (such as demonstrated prior renewals for extended long-term research projects) such employment can be considered “permanent” within the meaning of 8 C.F.R. § 204.5(i)(2). Adjudicators should also consider the circumstances surrounding the job offer as well as the benefits attached to the position. A position that appears to be limited to a specific term, such as in the example above, can meet the regulatory test if the position normally continues beyond the term (i.e., if the funding grants are normally renewed).

B. Tenure or Tenure-Track Positions

The determination as to whether a position qualifies as a tenured or a tenure-track position is not linked to the regulatory requirement that the position be “permanent” as defined in 8 C.F.R. 204.5(i)(2). 8 C.F.R. 204.5(i)(2) applies only to “research positions.” Adjudicators do not need to evaluate whether the employment contract for a tenured or tenure-track position has a “good cause for termination” clause, and should not deny a petition seeking an outstanding professor for a tenured or tenure-track position on that basis alone. Adjudicators, however, should continue to evaluate whether the overall nature of the position is tenured or tenure-track. Note, USCIS will not equate tenured or tenured-track positions with those that are temporary, adjunct, limited duration fellowships or similar positions, where the employee has no reasonable expectation of long-term employment with the university.

IV. Contact

Questions regarding this memorandum should be directed through channels to Alexandra Haskell in the Business and Trade Branch of Service Center Operations.

V. AFM Update

Accordingly, the *AFM* is revised as follows:

1. Section 22.2(c)(2)(B) in Chapter 22 of the Adjudicator’s Field Manual is amended to read as follows:

22.2 Employment-based Petitions (Forms I-140)

(c)

(2) Outstanding Researchers and Professors]

8 C.F.R. § 204.5(i)(3)(iii) requires an offer of employment as initial evidence in support of a first preference petition filed on behalf of an outstanding professor or researcher. The offer of employment may be in the form of a letter from the petitioning employer (i.e., U.S. university or institution of higher learning or a department, division, or institute of a private employer) stating that the employment is a tenured or tenure-track teaching position or a “permanent” research position in the alien’s academic field. See 8 C.F.R. § 204.5(i)(3)(iii)(A)-(C). The word “Permanent”, in reference to a research position, is defined as:

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“Permanent” for Research Positions

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that are valid in one year increments. If the petitioning employer demonstrates, however, the intent to continue to seek funding and a reasonable expectation that funding will continue (such as demonstrated prior renewals for extended long-term research projects) such employment can be considered “permanent” within the meaning of 8 C.F.R. § 204.5(i)(2). Adjudicators should also consider the circumstances surrounding the job offer as well as the benefits attached to the position. A position that appears to be limited to a specific term, such as in the example above, can meet the regulatory test if the position normally continues beyond the term (i.e., if the funding grants are normally renewed).

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- ☞ 2. The AFM Transmittal Memoranda button is revised by adding a new entry, in numerical order, to read:

AD06-00
[INSERT
SIGNATURE
DATE OF THIS
MEMO]

Chapter 22.2

This memorandum revises Chapter 22 of the *Adjudicator’s Field Manual (AFM)* by amending section 22.2(c)(2)(B) addressing the requirement for a “permanent offer of employment” for Outstanding Professors and Researchers.