identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

B3

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 23 2010

LIN 08 007 52329

IN RE: Petitioner:
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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

for Perry Rhew
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.

The petitioner is an 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). The petitioner seeks to employ the beneficiary in the United States as a postdoctoral research fellow. 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 asserts that despite the explicit language limiting the term of postdoctoral appointments and the petitioner's own classification of these positions as "temporary" in its faculty handbook, they constitute permanent positions as defined in a June 6, 2006 U.S. Citizenship and Immigration Services (USCIS) memorandum. For the reasons discussed below, while the memorandum may provide useful factors to consider for contracts that are annually renewable indefinitely, it does not suggest or imply that these factors can overcome employment terms that are fundamentally temporary. Any other interpretation would result in the untenable conclusion that the memorandum directly contradicts the pertinent statute, legislative history, regulations and commentary issued with the final regulation. Thus, we uphold the director's decision.

Beyond the decision of the director, we further find that the petitioner has not demonstrated that the beneficiary had attained the outstanding level of achievement required for classification as an outstanding researcher. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.

Permanent Job Offer

The legislative history unequivocally states that the beneficiary "must be offered a tenured or tenure-track teaching position, or comparible [*sic*] position as a researcher." H.R. Rep. No. 101-723, 59 (Sept. 19, 1990).

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.

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.

In promulgating the final regulation, the Immigration and Naturalization Services (INS), now USCIS, 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 comparable positions. (Emphasis added.) 56 Fed. Reg. 60897, 60899 (Nov. 29, 1991).

As stated above, the petitioner submits the memorandum *Guidance on the Requirement of a "Permanent Offer of Employment" for Outstanding Professors and Researchers,* AFM Update AD06-00, Michael Aytes, Acting Director for Domestic Operations (USCIS), June 6, 2006. In pertinent part, the memorandum states that USCIS should not deny a petition where the job offer lacks a "good cause for termination" clause provided "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." The memorandum continues:

> 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.

The memorandum then explains that in such situations, the positions should be considered permanent where the petitioner demonstrates an intent to continue to seek funding and a reasonable expectation that funding will continue. The memorandum concludes that a position "that appears to be limited to a specific term, such as in the example above, can meet the regulatory test if the positions normally continues beyond the term (i.e., if the funding grants are normally renewed)."

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit).

Where the petitioner proposes an interpretation of guidance in a memorandum that directly contradicts the plain and unambiguous language in a regulation, we cannot adopt that interpretation. Thus, we cannot read Mr. Aytes' memorandum as stating that the offered position, including renewals, need not be indefinite with a reasonable expectation of continued employment.

Thus, while the potential for future funding may be a reasonable consideration for annually renewable positions that are not limited to the number of renewals, positions that, by their very terms, are limited to one or two annual renewals are inherently temporary. In this situation, the potential for continued funding is irrelevant.

On Part 6 of the petition, the petitioner indicated that the proposed employment was a permanent position. The petitioner submitted an August 7, 2007 letter from [redacted] and Head for the petitioner's Department of Microbiology and Molecular Genetics, advising the petitioner that his postdoctoral research fellow appointment had been continued. The petitioner also submitted a letter from [redacted] of Immigration for the petitioning institution, confirming that [redacted] has hiring authority for his area. In addition, the petitioner submitted a joint letter from [redacted] and the beneficiary's supervisor, [redacted], asserting that funding for the beneficiary's research was approved for three years and that they anticipated employing the beneficiary after the expiration of three years. Thus, [redacted] and [redacted] conclude that the beneficiary's position "can be regarded as permanent."

On February 11, 2009, the director requested the portion of the petitioner's faculty handbook that relates to the beneficiary's position. In response, the petitioner submitted the requested evidence. Section 1.5.4 is entitled "Temporary Faculty Appointments and Titles." Under this section, subsection 1.5.4.6.3 relates to "Post-Doctoral Fellows." These positions are described as follows:

> Individuals who hold an earned doctorate and *temporarily* affiliate with the University to pursue additional scholarly work may be appointed as post-doctoral fellows. Persons holding this title are normally compensated from funds made available through research grants or contracts. Post-doctoral fellows are not normally assigned to teach regularly scheduled classes although they may provide occasional instruction in subjects and techniques in which they have specialized expertise. *Appointments are to be made for a term of one year or less. Reappointment for a total period of not more than three years may be made.*

(Emphasis added.)

In a new letter, asserts that the beneficiary's position "is of an indefinite and unlimited duration as long as funding is available" and that he anticipates funding to remain available. [redacted] provides a similar letter.

The director concluded that the petitioner's faculty handbook clearly classifies postdoctoral research fellows as inherently temporary positions and denied the petition.

On appeal, counsel notes the June 6 memorandum quoted above and concludes that the letters from [redacted] and [redacted] confirm that the beneficiary's position is permanent as defined in the regulations based on the anticipated continued funding for the position.

In this situation, postdoctoral research fellow positions are plainly and unambiguously described as temporary in the petitioner's faculty handbook. They fall under the heading of "Temporary Faculty and Appointments" and they are limited to three years, including renewals. While [redacted] and [redacted] have expressed their interest in keeping the beneficiary, they have not demonstrated that the petitioner has formally waived the limit for postdoctoral research fellows clearly stated in the petitioner's own faculty handbook such that the beneficiary may be renewed in this position indefinitely. For the reasons discussed above, in a case where the position is so unequivocally temporary, the issue of future funding for the project is irrelevant.

Our findings are consistent with Congressional intent in limiting this classification to aliens with job offers for positions comparable to tenure or tenure track positions. 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' 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).

Had Congress intended this classification to apply to an internationally recognized researcher with any type of job offer, it could have said so. Instead, Congress stated that the research position must be comparable to a tenure or tenure-track position. Section 203(b)(1)(B)(iii)(II) of the Act. Tenure and tenure-track positions are not limited to one or two annual renewals. Significantly, we note that the petitioner's faculty handbook lists several research positions, research assistant professor, research associate professor and research professor, that are listed under section 1.5.3 and, thus, do not fall under the "Temporary Faculty Appointments and Titles" provisions of section 1.5.4, under which postdoctoral research fellows fall (subsection 1.5.4.6.3).

In light of the above, we uphold the director's finding that the beneficiary's position is inherently temporary.

International Recognition

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. 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. *Employment-Based Immigrants,* 56 Fed. Reg. 30703, 30705 (proposed July 5, 1991) (enacted 56 Fed. Reg. 60897 (Nov. 29, 1991)). The criteria follow.

> *Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field.*

The petitioner submitted confirmation of the beneficiary's tuition exemptions for 1999 through 2002 and a letter from [redacted] of the Scholarship Granting Department of the Japan Student Services Organization (JASSO) confirming that the beneficiary received JASSO scholarships from 1999 through 2002.

It is significant that the *proposed* regulation relating to this classification would have required evidence of a major *international* award. The final rule removed the requirement that the award be "international," but left the word "major." The commentary states: "The word "international" has been removed in order to accommodate the *possibility* that an alien might be recognized internationally as outstanding for having received a major award that is not international." (Emphasis added.) 56 Fed. Reg. 60897-01, 60899 (Nov. 29, 1991.)

Thus, the standard for this criterion is very high. The rule recognizes only the "possibility" that a *major* award that is not international would qualify. Significantly, even lesser international awards cannot serve to meet this criterion given the continued use of the word "major" in the final rule. *Cf.* 8 C.F.R. § 204.5(h)(3)(i) (allowing for "lesser" nationally or internationally recognized awards for a separate classification than the one sought in this matter).

Academic study is not a field of endeavor, but training for a future field of endeavor. As such, academic scholarships and student awards cannot be considered prizes or awards in the beneficiary's field of endeavor. Moreover, competition for scholarships is limited to other students. Experienced experts in the field are not seeking scholarships. Similarly, experienced experts do not compete for fellowships and competitive postdoctoral appointments. Thus, they do not suggest that a beneficiary is internationally recognized.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members.

The petitioner submitted evidence that the beneficiary is a member of the American Chemical Society (ACS) and the American Society for Photobiology. The petitioner failed to submit evidence of the membership requirements for these associations.

As the record does not reflect that these organizations require outstanding achievements of their general membership, the petitioner has not established that the beneficiary meets this criterion.

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.

The petitioner submitted a self-serving list of articles that cite the beneficiary's work. 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'r. 1998) (citing *Matter of Treasure Craft of* California, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). Assuming that these articles do cite the beneficiary's work, such articles are primarily about the author's own work, not the beneficiary's work. As such, they cannot be considered published material about the beneficiary's work.

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.

As stated above, the regulatory criteria are to be used in evaluating whether a professor or researcher is deemed outstanding. 56 Fed. Reg. at 30705. Thus, the evidence submitted to meet a given criterion must be indicative of or consistent with international recognition.

The record reflects that the beneficiary has refereed articles for *Photochemistry and Photobiology.* The record reflects that [redacted], the beneficiary's supervisor at the University of Washington, made the request. Being requested to review an article by one's own supervisor is not evidence of 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. Without evidence that sets the beneficiary apart from others in his field, such as evidence that he has reviewed manuscripts for a journal that credits a small, elite group of referees; 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.

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."

As stated above, 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). Any Ph.D. thesis, postdoctoral or other research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. 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.

Furthermore, the regulations include a separate criterion for scholarly articles. 8 C.F.R. § 204.5(i)(3)(i)(F). Thus, the mere authorship of scholarly articles cannot serve as presumptive evidence to meet this criterion. To hold otherwise would render the regulatory requirement that a beneficiary meet at least two criteria meaningless.

The beneficiary received his Ph.D. in 2002 from Osaka University where he studied under the direction of [redacted]. The beneficiary worked as a postdoctoral researcher at Washington State University under the direction of [redacted]. Finally, the beneficiary has been working as a postdoctoral research fellow at the petitioning institution under the direction of Dr. [redacted] The beneficiary submitted letters from these three individuals.

[redacted] asserts that the beneficiary joined [redacted] photoactive yellow protein (PYP) group at Osaka University, focusing on the chromophore of PYP. [redacted] explains that the beneficiary used Raman spectroscopy to study PYP and chemically synthesized isotopically-labeled chromophores, which enabled the team to separate the overlapped complex signals and to make a complete assignment of vibrational spectra. [redacted] further asserts that the beneficiary "showed a correlation of protein dynamics and chromophore movement." In addition, according to [redacted], the beneficiary prepared mutant PYPs that allowed the team to observe the recovery process under physiological conditions. [redacted] concludes with his belief that the beneficiary "will become a scientist of note in the future in the United States." [redacted] does not suggest that the beneficiary is already internationally recognized as outstanding based on his past contribution.

[redacted] asserts that the beneficiary studied the visual pigments from rods and cones at the University of Washington. [redacted] concludes that the beneficiary's "strong background in chemistry" allowed him to provide "important new insights into how visual pigments function, especially those from the cones." [redacted] does not identify those insights. While [redacted] states that the beneficiary's published articles "have attracted a great deal of attention from people in this field of study" he does not provide any specific examples of how the beneficiary's work is impacting the field.

[redacted] asserts that the beneficiary has made the following three discoveries:

> (i) the assignment of the resonance Raman spectrum of a widely studies photoreceptor protein, which provides an essential and solid basis for interpreting spectroscopic data into the mechanisms that operate during the function of the protein; (i[i]) the unexpected discovery of the importance of multiple structurally different forms of the protein during its function; and (iii) the role of individual amino acids in the signaling process of receptor proteins, using protein mutants.

[redacted] does not explain how these discoveries have impacted the field. Rather, he concludes that the beneficiary is providing "new and important insights into the mechanism by which light activates a receptor protein" and discusses the importance of this area of research.

[redacted] also states that the beneficiary possesses skills that are rare in the United States. The issue of whether similarly-trained workers are available in the United States, however, is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 (Comm'r. 1998).

The opinions of experts in the field are not without weight and have been considered above. USCIS 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'r. 1988). However, USCIS 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; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS 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'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The letters considered above primarily contain bare assertions of widespread recognition and vague claims of contributions without specifically identifying contributions and providing specific examples of how those contributions have influenced the field. The petitioner did not submit letters from independent references who affirm their own reliance on the beneficiary's work or who were even simply familiar with his work through his reputation. The petitioner also failed to submit

corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

While the beneficiary's research is no doubt of value, 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 Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. The record does not establish that the beneficiary's work has been recognized internationally as outstanding. Thus, the petitioner has not established that the beneficiary meets this criterion.

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 the beneficiary has authored several articles and presented his work at conferences. The Department of Labor's Occupational Outlook Handbook, 2008-2009 (accessed at www.bls.gov/oco on February 12, 2009 and incorporated into the record of proceedings), provides information about the nature of employment as a postsecondary teacher (professor) and the requirements for such a position. *See* www.bls.gov/oco/ocos066.htm. The handbook expressly states that faculty members are pressured to perform research and publish their work and that the professor's research record is a consideration for tenure. Moreover, the doctoral programs training students for faculty positions require a dissertation, or written report on original research. *Id.* This information reveals that original published research, whether arising from research at a university or private employer, does not set the researcher apart from faculty in that researcher's field.

As stated above, the petitioner submitted a self-serving list of citations. 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. at 165 (citing *Matter of Treasure Craft of California,* 14 I&N Dec. at 190). Even if we accepted this list of citations and concluded that the beneficiary meets this criterion, he only meets one criterion. As discussed above, an alien must meet at least two of the regulatory criteria to be eligible for the benefit sought.

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 the level of an alien who is internationally recognized as an outstanding researcher or professor. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

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.