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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

B3

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 06 2010

IN RE: Petitioner: [redacted]
Beneficiary:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 a company that develops stem cell therapies. 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 Chief of Scientific Development and Chief Executive Officer. The director determined that the petitioner had not established that it employed at least three persons full-time in research positions, in addition to the beneficiary, at the time of filing the petition.

On appeal, counsel submits a brief and further evidence. For the reasons discussed below, we uphold the director's decision.

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)(1) provides: "Any United States employer desiring and intending to employ a professor or researcher who is outstanding in an academic field under section 203(b)(1)(B) of the Act may file an I-140 visa petition for such classification."

The regulation at 8 C.F.R. § 204.5(i)(3)(iii) provides that such 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.)

This petition was filed on March 12, 2009 to classify the beneficiary as an outstanding researcher in immunology and stem cell research.

Section 203(b)(1)(B)(iii)(III) of the Act, 8 U.S.C. § 1153(b)(1)(B)(iii)(III), states that an alien may qualify as for the classification sought based on an offer of employment from a private research department, division, or institute, only "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 requirement of three full-time research employees is also set forth in 8 C.F.R. § 204.5(i)(3)(C)(iii). The petitioner contends that it has met this requirement, with the President of the petitioning company ([redacted]) qualifying as one of the full-time research employees, the Chief Operating Officer ([redacted]) qualifying as the second, and the alien beneficiary (Chief of Scientific Development and Chief Executive Officer) qualifying as the third. The alien beneficiary is currently employed in a nonimmigrant classification.

First, the petitioner has not established that the Chief Operating Officer, [redacted], is employed by the company in a full-time research position. It is noted that the Merriam-Webster Dictionary 595 (1974) defines research as a "careful or diligent search" or the "studious and critical inquiry and examination aimed at the discovery and interpretation of new knowledge." The petitioner initially submitted a January 5, 2009 letter from [redacted] stating that [redacted] "currently has 4 full-time employees and one part time employee, 3 of them are dedicated to scientific research." In response to the director's request for evidence, the petitioner submitted an unsigned 2008 U.S. Corporation Income Tax Return for [redacted], Form W-2 Wage and Tax Statements for 2008

for the company's five employees, a "[redacted] Organizational Chart," and a [redacted] payroll time sheet reflecting the dates of hire for the company's five employees. The submitted payroll evidence does not indicate the number of hours [redacted] worked for the company for any specific periods from his date of hire (January 1, 2007) to the petition's March 12, 2009 filing date.[1] The petitioner also submitted a list of ten of [redacted] peer reviewed research publications for 2008 which identifies only [redacted] the alien beneficiary, and several scientists other than [redacted] as the research authors. The petitioner's response also included an unpublished manuscript submitted by [redacted] in September 2009 for consideration for publication in [redacted] The manuscript lists twelve authors (including the alien beneficiary and [redacted], none of whom are [redacted] The manuscript does include an acknowledgment from the authors thanking [redacted] "for performing research leading to compilation of this manuscript," but the amount of time he devoted and the dates of his research work are unknown.

The petitioner also submitted a September 14, 2009 letter from [redacted] stating:

> Given the size of our internal infrastructure, our operations are dedicated 100% to research and development. Accordingly, [redacted] as Chief Operating Officer, has been functioning full-time as a researcher.
>
> Specific tasks performed by [redacted] include:
>
> a) Working alongside [redacted] and [redacted] in designing experiments and interpreting outcomes, especially in the area of autoimmunity;
>
> b) Researching and identifying scientists and ideas in our space that may serve as collaborators or licensing opportunities, respectively;
>
> c) Coordinating internal research endeavors and collaborations with external scientific groups.
>
> Chris has participated in several stem cell conferences including:
>
> a) [redacted]
>
> b)
>
> c)
>
> Additionally, [redacted] was critical in establishing and managing our research collaboration with [redacted] from [redacted] and [redacted] from the [redacted] performed significant research into the [redacted] which became one of [redacted] collaborators.

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[1] According to [redacted]'s Form W-2 Wage and Tax Statement, he received only $50,000 in 2008. This amount is far less than half of the 2008 salary amounts received by [redacted] three other executives who all earned in excess of $115,000 that year.

In support of [redacted] statements, the petitioner submitted press releases from January 2007 and January 2008 quoting [redacted]. In the January 2007 press release, [redacted] discusses the business arrangement with the [redacted], but there is no evidence showing that [redacted] was the inventor or researcher who created the stem cell derived therapies being licensed. In the January 2008 press release, [redacted] comments on [redacted] identification of a new source of T regulatory cells for treatment of autoimmunity, but there is no evidence indicating that he authored [redacted] patent application or performed the underlying research to develop the methodologies. The petitioner also submitted a September 17, 2009 e-mail from [redacted], "host and chairman of the [redacted] stating that [redacted] and the alien beneficiary represented [redacted] at the meeting. While [redacted] e-mail indicates that [redacted] was present at the meeting, nothing in the e-mail indicates that [redacted] presented his own original research findings at the meeting.

The petitioner submitted a September 16, 2009 letter from [redacted] Professor of Medicine, [redacted], stating:

> I have collaborated with [redacted] for over 2 years, a collaboration which has resulted in 3 shared publications (*abstracts below the letter*) and 2 poster presentations at international conferences. [redacted] in his position as Chief Operating Office [*sic*] works full time at conducting research for [redacted]. I have interacted with him at the [redacted] meeting in 2008, as well as on numerous occasions during formulation of experiments, analysis of data, and establishment of the partnership between my laboratory and [redacted]. Because of [redacted] work, and the talents of [the beneficiary] and [redacted], the company was able to publish more than 13 papers in 2009 alone, including a recent one in the prestigious journal [redacted] I am very proud to work with the [redacted] team and have enjoyed [redacted] strategic and scientific leadership in our numerous research endeavors.

In support of [redacted] statements, the petitioner submitted the aforementioned three abstracts from 2008-09 which identify only [redacted], the alien beneficiary, and several scientists other than [redacted] as the research authors. With regard to the "more than 13 papers" [redacted] published in 2009, there is no evidence showing that the [redacted] coauthored any of those research publications. In fact, the record is devoid of evidence indicating that [redacted] has authored any research findings published by [redacted] Moreover, [redacted] occasional attendance at scientific meetings, his identification of licensing opportunities for [redacted] intellectual property technologies created by others, and his management of business arrangements with other laboratories do not establish that his role as Chief Operating Officer equates to a full-time research position.

The preceding letters of support from [redacted] do not specifically identify the autoimmunity experiments formulated and designed by [redacted], the experimental outcomes he interpreted, the scientific data he analyzed, and the dates of his work. We note that a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of*

Katigbak, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). In this matter, that means that the petitioner must demonstrate that Chief Operating Officer [redacted] had been working full-time in research activities for [redacted] as of the petition's March 12, 2009 filing date. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak,* 14 I&N Dec. at 49; *see also Matter of Izummi,* 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that its Chief Operating Officer's activities which post-date the filing of the petition will subsequently be deemed full-time research. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey,* 541 F.3d 257, 261 (4th Cir. 2008).

The director determined that the petitioner had not established that it employed at least three persons full-time in research positions, in addition to the beneficiary, at the time of filing the petition. The director also stated that:

> the three full time researchers identified by the petitioner also maintain significant managerial positions . . . . Given the general duties for positions such as Chief Operations Officer, President and Chief Executive Officer, it appears the three identified researchers are most likely not engaged in . . . research on a full time basis.

On appeal, counsel states:

> The volume and nature of the research produced by the three [redacted] researchers demonstrates that they are clearly engaged in full time research despite the fact that they maintain secondary executive responsibilities, and in fact this model in the norm for scientific companies in their early states of development.

The petitioner's appellate submission includes letters from senior executives at [redacted] explaining that biotechnology companies in their early stages often operate with full-time scientific researchers simultaneously holding executive positions. The petitioner also submits a list of [redacted] Publications 2007 – Present" identifying approximately twenty publications which pre-date the filing of the petition and which identify [redacted] and the alien beneficiary as authors. Chief Operating Officer [redacted] is not identified among the authors for any of these published research findings. We agree with counsel that the submitted evidence (such as published findings from 2007 and 2008 identifying [redacted] and the alien beneficiary as authors) is adequate to demonstrate that those two executives have been engaged in full-time research for [redacted]. However, the record lacks comparable primary evidence showing that Chief Operating Officer [redacted] had been working full-time in research activities for [redacted] as of the petition's filing date.

The petitioner's appellate submission includes a November 22, 2009 letter from [redacted] stating: [redacted] has spent

approximately 30 hours per week researching details of experiments that are proposed, an additional 15 hours per week researching prior experiments of others in reference to current projects, and five hours per week managing ongoing research projects." [redacted] letter does not specify the dates of [redacted] work, identify the exact nature of his contribution to the proposed experiments, or indicate the original findings he discovered in his research.

Regarding the self-serving statements in the letters from individuals who work for the petitioning company and its immediate collaborators, depending on the specificity, detail, and credibility of a letter, U.S. Citizenship and Immigration Services (USCIS) may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). Moreover, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.[2]

Rather than submitting primary evidence demonstrating that [redacted] was engaged in full-time research for [redacted] as of the petition's filing date (such as his authorship of published scientific findings and pre-existing payroll statements documenting his full-time hours), the petitioner relies upon self-serving letters and other documents that post-date the filing of the petition. The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. Where a record does not exist, the petitioner must submit an original written statement on letterhead from the relevant authority indicating the reason the record does not exist and whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii). In this case, the petitioner has not established that primary evidence of [redacted] full-time employment in a research position at [redacted] does not exist or cannot be obtained. Therefore, the self-serving documentation which post-dates the filing of the petition is not sufficient to meet the petitioner's burden of proof. Thus, the petitioner has not shown that its Chief Operating Officer was employed "full-time in research activities" as required under section 203(b)(1)(B)(iii)(III) of the Act. Accordingly, the petitioner has established that it only employed the beneficiary and one other researcher in full-time research activities at the time of filing and, thus, is not a qualifying employer.

Second, even if we were to conclude that Chief Operating Officer [redacted] was employed full-time in research activities as of the petition's filing date, which we do not, the inclusion of the alien beneficiary as the third research employee is problematic. On appeal, counsel argues that the statute and regulations permit the petitioner to file an I-140 petition on behalf of the alien beneficiary, notwithstanding the fact that he is one of the three qualifying researchers. Neither the statute nor the legislative history clearly indicates whether the alien beneficiary can himself be the third full-time

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[2] *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States,* 745 F. Supp. 9, 15 (D.C. Dist. 1990).

research employee for purposes of a private entity's eligibility to file a visa petition under § 203(b)(1)(B). Similarly, the issue is not addressed in the legislative history set forth at H. Rep. 101-723 (Sept. 19, 1990), which indicates only that a private employer is eligible to file this petition "if there are at least three persons employed full-time in research." Finally, the issue did not arise during the rulemaking process. *See* 56 Fed. Reg. 30,703 (July 5, 1991) (proposed rule); 56 Fed. Reg. 60,897 (Nov. 29, 1991) (final rule).

That said, it is worth noting that section 203(b)(1)(B)(iii)(III) of the Act requires that "the alien seeks to enter the United States" to work for "a department, division, or institute of a private employer" that "employs at least 3 persons full-time in research activities." The phrases "seeks to enter" and "employs at least 3 persons" are both in the present tense. If an alien researcher is currently outside the United States, and intends to enter the United States with an immigrant visa, then the prospective employer must already employ at least three full-time researchers in the relevant department, division, or institute. In such a case, the three researchers obviously do not include the alien. Thus, the statutory construction demonstrates that the alien seeks to become the fourth researcher in a company that already employs three ***other*** researchers.[3] In instances where the alien is already in the United States as a nonimmigrant, and the alien has joined ***two*** other researchers to become the ***third*** researcher, then the employer does not satisfy the statutory construction.

There is no regulatory or statutory justification for the arbitrary assumption that a company too small to petition for a worker who is still overseas can, nevertheless, petition for that same worker if the worker is already in the United States as a nonimmigrant. Therefore, we find that the position held by the alien beneficiary shall not be counted as one of the three persons involved full-time in research activities. The AAO concludes that, even if the alien beneficiary is lawfully employed in a nonimmigrant classification, the petitioner may not count the alien beneficiary toward the requirement of "3 persons [employed] full-time in research activities." The apparent purpose of 203(b)(1)(B)(iii)(III) is to limit this immigrant visa classification to well-established research institutes. If the employment of a nonimmigrant alien, which is by definition temporary, can be counted toward this requirement then it would appear that hiring three nonimmigrant aliens could make all three of them eligible. This result would, with little effort, render the three employees requirement meaningless.[4]

Beyond the decision of the director, the regulation at 8 C.F.R. § 204.5(i)(3)(iii) provides that a petition under this visa classification must be accompanied by "[a]n *offer* of employment from a prospective United States employer. . . . in the form of a letter . . . *offering* the alien a permanent research position in the alien's academic field." (Emphasis added.) Black's Law Dictionary 1113 (8th ed. 2004) 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

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[3] There is no evidence showing that [redacted] Inc. had employed a full-time Chief of Scientific Development and Chief Executive Officer prior to the alien beneficiary's January 1, 2007 hiring date.

[4] Granted, for at least some nonimmigrant classifications, the position itself need not be temporary, but the alien must be coming temporarily to the United States.

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, 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 from the petitioner addressed to USCIS *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's initial evidence included a January 5, 2009 letter of support from Mr. Riordan to USCIS, but his letter does not constitute a job offer from the petitioner to the alien beneficiary. The petitioner has not submitted the primary required initial evidence, the original job offer predating the filing date of the petition. A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). Confirmations after the fact are not evidence of eligibility as of the date of filing. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. Moreover, the nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence. In this instance, the petitioner has not complied with the regulation at 8 C.F.R. § 103.2(b)(2) regarding the submission of secondary evidence. Specifically, the petitioner has not demonstrated that the original job offer to the beneficiary does not exist or is unavailable. While we do not question the credibility of those who have confirmed the beneficiary's employment, counsel has not sufficiently explained why we should accept attestations about the terms and conditions in a document in lieu of the document itself. Without the initial job offer, we cannot consider the petitioner's explanations about the terms and conditions set forth in that job offer.

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.