

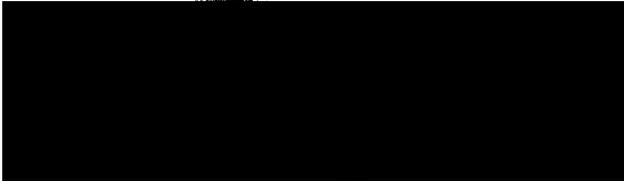


U.S. Citizenship
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FILE: [REDACTED]
LIN 04 049 50011

Office: NEBRASKA SERVICE CENTER

Date: AUG 18 2005

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.

Mari Johnson

S Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a postsecondary educational 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 research 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 submits a brief and additional evidence.

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)(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 submitted a cover letter from [REDACTED] addressed to the director asserting that the petitioner "wishes to continue to employ [the beneficiary] as a Research Associate in Chemistry." On February 26, 2004, the director requested evidence that the petitioner had offered the beneficiary a permanent job. Specifically, the director requested a contract between the petitioner and beneficiary, official guidelines reflecting that the beneficiary's position is a permanent position at the petitioning university, or documentation reflecting that an exception has been made for the beneficiary to make the beneficiary's job permanent as defined in the regulations.

In response, the petitioner submitted a new letter from [REDACTED] affirming that the beneficiary has been working full-time and a letter addressed to the director from [REDACTED] Department Chairman of the Department of Chemistry at the petitioning university, affirming that the beneficiary's position is a permanent position with "no fixed term." [REDACTED] acknowledges that, as with tenure positions, the beneficiary's position is contingent on the availability of funds.

The director concluded that [REDACTED] letter was insufficient because it was addressed to the director and acknowledged that the beneficiary's position was contingent on available funding. The director also noted the limited salary offered to the beneficiary according to the original petition.

On appeal, counsel asserts that the beneficiary's position has been funded for the past 15 years and that the beneficiary's salary is not a valid consideration. The petitioner submits a September 2, 2004 letter from Dr. Rinaldi to the beneficiary confirming "our job offer to you for the permanent full-time position of Research Associate." The letter also confirms "the expectation of [the beneficiary's] continued employment contingent on continued availability of funding, as with all permanent positions with the University."

The record now contains a job offer issued to the beneficiary; however, it is dated after the petition was filed and cannot establish the beneficiary's eligibility as of that date. We do acknowledge that the petitioner is asserting that the beneficiary was working in a permanent position at the time of filing. The petitioner, however, failed to submit the contract for that position, as requested.

While the petitioner failed to submit the requested contract and university official policy confirming that the position of research associate is a permanent position as defined in the relevant regulations, as opposed to the university's definition, the record did not contain any inconsistencies regarding the nature of job offer at the time the director issued his decision. Our review of the petitioner's website,¹ however, raises additional concerns. Rule [REDACTED] of the petitioner's Administrative Code reflects that the rank of instructor "is composed of full-time non-tenure track faculty." While "auxiliary faculty" includes "research appointments" under the same rule, auxiliary faculty appears to be a subset of the instructor rank, given the broad definition of that rank quoted above. Rule [REDACTED] provides that instructors "and those not on indefinite tenure shall receive annual notices of reappointment if their continued service is desired." The next subparagraph of that rule provides that instructors "and fixed term faculty shall be subject to annual appointment."

These rules have now been added to the record of proceedings. Therefore, this matter will be remanded for the director to provide the petitioner an opportunity to respond to these rules, which appear inconsistent with the

¹ We accessed www.uakron.edu/ogc/rules on August 8, 2005, where we were able to search and download the petitioner's administrative rules.

representations in the letters quoted above. We note that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.