

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B3

FILE: [REDACTED]
LIN 03 257 50091

Office: NEBRASKA SERVICE CENTER

Date: NOV 15 2005

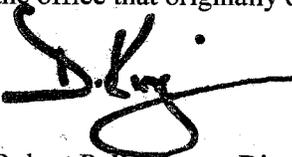
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[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.


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 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 research scientist. 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, the petitioner submits a new letter addressed to the director and an earlier letter relating to the beneficiary's promotion from postdoctoral fellow to research scientist.

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)(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 failure in the regulations to require a job offer "addressed to the beneficiary" does not imply that a letter to the director can be considered a job offer. Such language would be redundant as an offer can only be made to an offeree.

Finally, 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 letter from Dr. [REDACTED] Chairman of the Department of Molecular Genetics, Biochemistry and Microbiology, addressed to Citizenship and Immigration Services (CIS), asserting that the beneficiary had been promoted from a postdoctoral fellow to research associate to research scientist. The only terms of the beneficiary's position that Dr. [REDACTED] is that it is full-time. This document does not constitute a job offer from the petitioner to the beneficiary. On April 12, 2005, the director requested evidence that the petitioner had extended a permanent job offer to the beneficiary.

In response, the petitioner submitted a May 3, 2005 letter co-signed by Dr. [REDACTED] and Dr. [REDACTED] and addressed to the beneficiary. The letter indicates that it is "a formal confirmation of your continued appointment as a Research Scientist, a position in the unclassified civil service." The letter further states that an unclassified position "serves at the pleasure of the Board of Trustees and as an at will employee both you and the University are free to end your employment if they find it necessary. This appointment is open ended, but necessarily it is contingent upon continued performance and upon availability of outside funding." Finally, the letter notes the availability of funding through 2009.

The director concluded that the petitioner had not submitted the initial evidence required by the regulations, the original job offer letter. In addition, relying on the definition of "at will" in Black's Law Dictionary, the director concluded that "at will" employment could not meet the definition of permanent quoted above.

On appeal, the petitioner submitted a letter from [REDACTED] Dean of the petitioning university, asserting that the research scientist position "is a permanent position in that it is of indefinite duration in which [the beneficiary] has an expectation of continued employment unless there is good cause for termination." [REDACTED] does not attempt to explain the "at will" language used in the letter addressed to the beneficiary.

In addition, the petitioner provides an April 4, 2003 letter from Dr. [REDACTED] addressed to [REDACTED] requesting a waiver of the recruitment process for the promotion of the beneficiary from postdoctoral fellow to research scientist. The letter provides that the request is being made to allow the beneficiary to be listed as a principle investigator on grant proposals. The petitioner also submitted evidence that the National Institutes of Health (NIH) requires grant applicants to establish that "individuals' visas will allow them to remain in this country long enough for them to be productive on the research project." Nothing in the information from NIH indicates that principle investigators must be permanent employees who can only be terminated for cause.

While the dean of a university is a credible authority regarding the terms and conditions of a particular position at that university, [REDACTED] fails to reconcile his statements with other evidence of record. As noted by the director, the May 3, 2005 letter unambiguously states that the beneficiary's position is unclassified, meaning "at-will," and that either the university or the beneficiary may end the employment "if they find it necessary."¹ As quoted by the director, Black's Law Dictionary 545 (7th ed. 1999) defines "employment at will" as "Employment that is usu. undertaken without a contract and that may be terminated at any time, by either the employer or the employee, *without cause*." (Emphasis added.) Dean Sacher does not address the use of this language in the letter addressed to the beneficiary or reference university regulations defining "at will" differently than as defined in Black's Law Dictionary or reflecting that "unclassified" positions can only be terminated for cause. Thus, the petitioner has not overcome the director's valid concerns on appeal.

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.

¹ The petitioner's website, <http://webcentral.uc.edu/fa/content/letterofappoint.cfm>, goes further, requiring that appointment letters for nonclassified positions state that "both [the employee] and the University remain free to end [the employee's] employment with the University for any reason or *for no reason at all*." (Emphasis added.)