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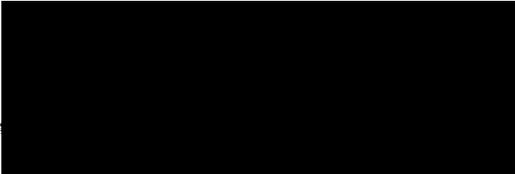


FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: NOV 28 2005
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:



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. While the appeal does not succeed on its merits, we withdraw the director's decision and remand the matter for the sole purpose of affording the petitioner an opportunity to respond to derogatory information publicly available on the petitioner's own website accessed by this office.

The petitioner is a university. 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). According to the petition, 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, counsel submits a brief.

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.

(Emphasis added.) Black's Law Dictionary 1111 (7th ed. 1999) 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." ALM's online law dictionary, available at www.law.com, defines offer as "a specific proposal to 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, we find that 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 addressed to Citizenship and Immigration Services (CIS) *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 as a "research scientist" was a permanent position. The petitioner submitted a letter from Dr. [REDACTED], Director of the petitioner's Human Cancer Genetics Program and Chairman of its Department of Molecular Virology, Immunology and Medical Genetics, addressed to CIS, asserting that he supports the beneficiary's petition for permanent residence. This document does not constitute a job offer from the petitioner to the beneficiary. On May 18, 2005, the director requested evidence that the petitioner had extended a permanent job offer to the beneficiary.

In response, the petitioner submitted a letter from [REDACTED], Administrative Manager of the petitioner's Human Cancer Genetics Program, addressed "To Whom It May Concern" confirming that the beneficiary is working for the petitioner as a Research Assistant Professor and asserting that the petitioner has offered the beneficiary "permanent employment in this position."

The director noted that the petitioner's response did not include the actual job offer and concluded that the record did not establish either that the petitioner had offered the beneficiary the position of Research Assistant Professor as of the date of filing or whether the position offered to the beneficiary at the time of filing was permanent.

On appeal, counsel quotes the second half of the regulatory definition of "permanent," omitting the requirement that it be "for a term of unlimited or indefinite duration." Counsel further asserts that the filing of the petition and the submission of a letter in support of the petition evidences the petitioner's intent and expectation of the beneficiary's continued employment with the petitioning institution. The petitioner submits a new letter from Ms. Delffs, affirming that the individual who signed the petition has authority to do so and oversees the beneficiary's "employment matters." Ms. Delffs asserts that the research scientist position held by the beneficiary as of the date of filing was "a regular, full-time position within the University." She continues:

Since, like most private employers, [the petitioner] is an "at-will" employer, we do not use the term "permanent" but instead refer to employees who are not temporary as "regular." It has always been the case, and still is, that [the beneficiary's] position with the University, as are such regular positions, not temporary ones, with an expectation of continued employment [sic].

[The beneficiary] was offered originally the position of Research Assistant Professor, which is classified also as a regular full-time position. However, she was not able to assume this position until her H-1 petition had been approved and until the University approved this rank internally.

At the time of the Request for Evidence, both of these issues had been resolved and [the beneficiary] had been promoted to [the] Research Assistant Professor position. We confirmed this officially in our letter dated June 24, 2005 and re-confirm the offer and anticipate continued employment by [the beneficiary].

Despite the director's specific request for the job offer letter addressed to the beneficiary and the observation in the director's denial that the petitioner has failed to submit such a letter, the petitioner fails to supply this required initial evidence on appeal. Counsel's assertion that the petition itself and a letter of support demonstrate an intent to employ the beneficiary permanently is not persuasive. As quoted above, the regulation at 8 C.F.R. § 204.5(i)(3)(iii) requires a job offer letter offering the beneficiary a permanent job, subsequently defined in the regulations as one with a term of unlimited or indefinite duration. Confirmation of employment that uses the word "permanent" without providing the actual terms of the employment is insufficient. Moreover, Ms. Delffs definition of the word "permanent" does not appear to be consistent with the regulatory definition as her letter on appeal concedes that the beneficiary's employment is "at-will." "Employment at will" is defined 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." Black's Law Dictionary 545 (7th ed. 2001).

For the above reasons, the appeal does not succeed on its merits. The claim that the position is "permanent," as defined in the regulation quoted above, however, is also contradicted by the petitioner's own policies as reflected on its website. The petitioner should be aware of its own publicly available policies. Nevertheless, the petitioner has not been afforded an opportunity to respond to our concerns regarding its policies, which we have now made part of the record. Thus, we withdraw the director's decision and remand the matter to the director

for the sole purpose of affording the petitioner an opportunity to respond to the following information obtained from its website. The director should enclose copies of the information, summarized as follows:

1. The searchable database for job classifications available on the petitioner's website indicates that the "TGIC" code for research scientists is "U." The "Definitions of Codes Used in Listing of [the petitioner's] Job Classifications," also available on the site, provides that the "TGIC" code "U" represents an "unclassified position."
2. Rule 4.20(I) of the petitioner's Appointments Policy provides: "Regular, unclassified appointments are at will." "Applicant Resources," at hr.osu.edu/emp/application.htm, provides that "Unclassified positions are not subject to the provisions of section 124.34 of the Ohio Revised Code, which means that employment is at-will *and may be ended at any time either by you or the university.*" (Emphasis added.)
3. "Letters of Offer for Unclassified Staff, Senior Administrative and Professional," which can be downloaded from the petitioner's website, provides:

Language in letters of offer may create a contract. Because of this, letters should not include the following:

1. References to permanent employment, termination for just cause, probationary periods, specific expectations of performance, or salary increases.
2. Specific causes for termination or dismissal.

This language strongly suggests that the relevant issue is not whether the research scientist position is a "regular" position, but whether the position is "classified," as unclassified employment may be terminated without cause. As quoted above, the definition of "permanent" set forth in the regulation at 8 C.F.R. § 204.5(i)(2) requires that the employment may only be terminated for cause. Regardless of whether the beneficiary was employed as a Research Assistant Professor as of the date of filing, the relevant issue is whether the petitioner had offered her that position as of the date of filing. The record contains no evidence that it had done so or that the Research Assistant Professor position is a "classified" position.

In light of the above, the matter is remanded to the director for the sole purpose of advising the petitioner of the derogatory evidence publicly available on its own website and affording the petitioner an opportunity to respond pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i). We note, however, that any attempt to explain or reconcile inconsistencies in the record, which now includes the petitioner's own policies as reflected on its website, 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 (BIA 1988).

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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 that, *regardless of outcome*, is to be certified to the Administrative Appeals Office for review.