

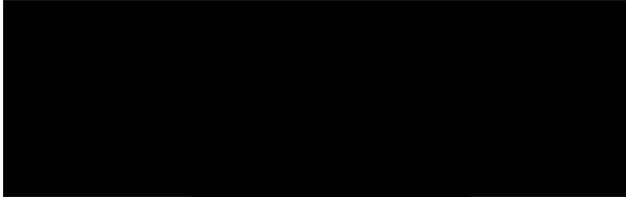
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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 03 2006
LIN 06 007 54097

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.

Robert P. Wiemann, 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 on appeal. The appeal will be dismissed.

The petitioner is a hospital and research institute. 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, the petitioner submits a statement and evidence that the beneficiary was reappointed after the date of filing. For the reasons discussed below, we uphold the director's decision. Further, we find that the petitioner has not established that the beneficiary is recognized internationally as outstanding in his academic field, as required for classification as an outstanding researcher.

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." The online law dictionary by American Lawyer Media (ALM), 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, 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 was a permanent position. The original list of exhibits listed an employment offer letter, but such letter was not included. On December 1, 2005, the director requested evidence that the petitioner had extended a permanent job offer to the beneficiary.

In response, the petitioner submitted a March 1, 2005 letter offering the beneficiary an appointment as a research associate "effective March 1, 2005, through February 28, 2006." The petitioner also submitted a July 12, 2005 letter addressed to the beneficiary advising of an increase in salary.

The director concluded that the position had a finite end date and, thus, did not meet the definition of permanent. On appeal, the petitioner asserts that it has "a policy to renew every employee's appointment annually, for the purpose of updating the benefits provided to all employees." The petitioner submits evidence that the beneficiary was reappointed on January 6, 2006, after the date of filing. The petitioner also received a raise on the same date.

In promulgating the final regulation, the Immigration and Naturalization Service, now CIS, 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" as comparable. (Emphasis added.) 56 Fed. Reg. 60867, 60899 (November 29, 1991).

The petitioner provides no evidence that renewal of one-year term positions is automatic or expected unless notice of termination is provided. The record does not support the petitioner's assertion that the fixed term appointments merely allow for a review of benefits. The beneficiary's first raise occurred in July 2005, between his initial appointment and his first reappointment. While the renewal in 2006 may begin to demonstrate a pattern consistent with an expectation of indefinite employment, this first renewal took place after the date of filing. The petitioner must demonstrate that the beneficiary enjoyed a reasonable expectation of continued employment as of the date of filing. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Finally, the petitioner did not submit evidence that research associates at the petitioning institute are ordinarily renewed indefinitely such that the beneficiary might have a reasonable expectation of being renewed himself. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In light of the above, the petitioner has not overcome the director's basis for denial.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is recognized internationally as outstanding in his academic field. An application or petition that fails

to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 petitioner 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. 56 Fed. Reg. 30703, 30705 (July 5, 1991). The criteria follow.

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

In the initial cover letter, the petitioner asserted that the beneficiary’s postdoctoral fellowship and promotion to research associate in less than the typical four years constitute “recognized awards for excellence.” We cannot agree. Competition for postdoctoral appointments is limited to other recent graduates. Experienced experts in the field are not seeking postdoctoral appointments. Moreover, a job offer, even a competitive one, cannot be credibly characterized as a prize or award for excellence. Thus, the beneficiary’s employment history cannot serve to meet this criterion.

The beneficiary received (1) “the first order prize of Unilevel from [redacted] and [redacted] in December 2001, (2) the first order prize [redacted] in the same month and (3) “the first order prize from [the [redacted] in July 2001.

The beneficiary graduated from the [redacted] in 2001. The first and third prizes listed above appear to be local Shanghai awards. The record contains no evidence regarding the significance of the [redacted] such as the pool of competitors and the number of awards issued.

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 (November 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). The record contains no evidence that the Peng-Yingang award is a *major* national award.

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 International Society for Interferon and Cytokine Research (ISICR) and the American Society for Cell Biology (ASCB). The petitioner failed to submit evidence of the membership requirements for these associations. It is noted that the beneficiary was first elected as a postdoctoral member of ASCB and that the letter indicates that his membership would be converted to regular membership after four years, suggesting that ASCB exercises little review over its regular members.

The record does not reflect that the above organizations require outstanding achievements of their general membership. Thus, 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 citation indices establishing that the beneficiary has been cited. Articles which cite the beneficiary’s work are primarily about the author’s own work, not the beneficiary. As such, they cannot be considered published material about the beneficiary.

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.

The petitioner submitted a letter from the beneficiary’s supervisor, [REDACTED], asserting that the beneficiary “has served as an expert reviewer of many manuscripts that have been submitted to prestigious journals, such as [REDACTED] and *Cancer Cell*.” The petitioner has not established whether the above journals directly solicited the beneficiary’s input or whether [REDACTED] was solicited and then assigned the duty to the beneficiary. We note that [REDACTED]

is a member of the National Academy of Sciences. Being requested to review an article by one's own supervisor is not indicative of or consistent with international recognition.

Regardless, 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 an unusually large number of articles, 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."

discusses the beneficiary's work with transcription factor connected to cancer and inflammatory diseases. According to was previously believed to be inactive until phosphorylated by a developmental pathway or cancer signal. The beneficiary "made the remarkable discovery that the supposedly inactive, UNphosphorylated form is, contrary to previous opinion, actually a highly active transcription factor in its own right, with a spectrum of functions quite distinct from those of the phosphorylated form that is generated in response to signals." expresses his hope that the beneficiary's follow-up to this discovery "will contribute new understanding that will eventually pay off in better treatments for patients afflicted by cancer or inflammatory diseases."

The petitioner also submitted a letter from with Cancer Research, UK, who asserts that he has cooperated with for more than 20 years. asserts that the beneficiary has contributed to "the realization of the importance of in human cancer, its potential role in the control of cell growth, differentiation and development in reproductive tissues and importance in defining the immune response to the [interferons] and other cytokines." Former colleagues from's laboratory provide similar information.

As of the date of filing, the beneficiary had authored two articles that address the role of unphosphorylated and and Transcriptional Regulation in

February 2005. The record contains no evidence that the 2003 article has been cited. The 2005 article, published only three months prior to the date of filing, had been cited a single time.

To be considered an original scientific contribution indicative of international recognition, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the impact of the petitioner's work. The record lacks reference letters from independent researchers who have applied the beneficiary's work. Moreover, his most recent results had just been published as of the date of filing and, thus, had not been widely and frequently cited. Thus, the evidence relating to the beneficiary's work or results is not indicative of international recognition as of the date of filing, the date as of which the petitioner must demonstrate the beneficiary's eligibility. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

[REDACTED], a member of the associate staff at the petitioning institute, discusses the beneficiary's Ph.D. research at the [REDACTED]. While currently at the petitioning institute, [REDACTED] explains that he met the beneficiary during his oral presentation at a conference in 2000. [REDACTED] provides:

[The beneficiary's] oral presentation provides new insight in to the abnormal function of Acyl-coenzyme A: cholesterol acyltransferase (ACAT)[, an] enzyme [that] causes hypercholesterolemia and atherosclerosis. His studies showed that the ACAT expresses in most tissues and is critical for cholesterol homeostasis and involved in atherosclerotic plaque formation. In macrophages, the accumulation of cytosolic droplets of cholesterol esters results in the formation of "foam cells," a hallmark of early atherosclerotic lesions and in macrophages. The role ACAT in cardiovascular pathogenesis has sparked strong interest in pharmaceutical companies to develop inhibitors of ACAT as possible therapeutic agents for hypercholesterolemia and atherosclerosis.

The record, however, contains no letters from pharmaceutical companies affirming their application of the beneficiary's ACAT research. We acknowledge that the work has garnered some citations, 12 total, eight of which appear to be from independent research teams. Eight independent citations, however, are not indicative of or consistent with international recognition for original contributions to the field.

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 contributions are indicative of or consistent with international recognition.

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 11 published articles. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition are the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This report reinforces our position that publication of scholarly articles is not automatically evidence of international recognition; we must consider the research community's reaction to those articles.

Two of the petitioner's articles have been moderately cited. Thus, we are persuaded that the beneficiary meets this criterion. We will not presume, however, that meeting this criterion demonstrates eligibility under another criterion. Such a presumption would render meaningless the requirement that an alien meet two separate criteria. For the reasons discussed above, the evidence falls far short of establishing that the beneficiary meets a second criterion.

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 an international reputation 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.