

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

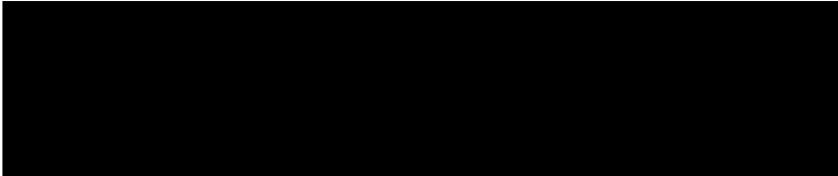
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

B3



FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: MAY 21 2010
SRC 08 015 57835

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:

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, Texas 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.

According to the petitioner's cover letter, the petitioner is a state agency. 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 a senior environmental scientist. The director determined that the petitioner had not established that the beneficiary had attained the outstanding level of achievement required for classification as an outstanding researcher or had the necessary three years of experience. Further, the director found that the petitioner had not established that it employed three full-time researchers and had achieved documented accomplishments in the beneficiary's academic field. Finally, the director noted that the petitioner had not submitted any of the required initial evidence to establish its ability to pay the proffered wage.

On appeal, counsel asserts that the director erred in denying the petition without first issuing a request for additional evidence. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) provides that if the initial evidence does not demonstrate eligibility, U.S. Citizenship and Immigration Services (USCIS) in its discretion may deny the petition for ineligibility *or* request any missing evidence. As the director determined that the initial evidence did not demonstrate eligibility, the director did not err in denying the petition without first issuing a request for additional evidence. Moreover, the most efficient remedy for any alleged error in failing to request additional evidence would be to consider any evidence that might have been submitted in response to such a request on appeal. In the matter before us, however, the petitioner submits no additional evidence relating to the director's concerns.

We will consider counsel's assertions relating to the beneficiary's eligibility below. For the reasons discussed below, we uphold the director's findings through a careful two-step approach that first counts the evidence and then evaluates the merits of that evidence.¹ Beyond the director's decision, we further find that the petitioner, a state agency rather than a university, institution of higher education or a private employer, is not an eligible employer qualified to file a petition under the classification sought. The petitioner's statutory ineligibility to file a petition under the classification sought is yet another reason why remanding the matter to the director for a request for evidence would serve no purpose.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

¹ The specifics of and legal basis for this approach will be explained at length under Part II(A) of this 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.

I. QUALIFYING EXPERIENCE

The regulation at 8 C.F.R. § 204.5(i)(3) states that a petition for an outstanding professor or researcher must be accompanied by:

(ii) Evidence that the alien has at least three years of experience in teaching and/or research in the academic field. Experience in teaching or research while working on an advanced degree will only be acceptable if the alien has acquired the degree, and if the teaching duties were such that he or she had full responsibility for the class taught or if the research conducted toward the degree has been recognized within the academic field as outstanding. Evidence of teaching and/or research experience shall be in the form of letter(s) from current or former employer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien.

This petition was filed on August 17, 2007 to classify the beneficiary as an outstanding researcher in the field of aquatic biology. Therefore, the petitioner must establish that the beneficiary had at least three years of teaching or research experience in the field as of that date, and that the beneficiary's work has been recognized internationally within the field as outstanding. The director concluded that the record lacked evidence of the beneficiary's three years of qualifying experience. On appeal, counsel asserts that the petitioner submitted the beneficiary's curriculum vitae and that additional evidence should have been requested if necessary. The petitioner, however, submits no new evidence documenting the beneficiary's past employment.

The regulation at 8 C.F.R. § 204.5(g)(1) provides that evidence of qualifying experience "shall" be in the form of letters from current or former employers. While we acknowledge that the beneficiary received his Ph.D. in 2000 and submitted articles authored between that time and the filing of the petition in 2007 as well as other evidence suggesting prior employment, the petitioner did not submit the initial required evidence in this matter, letters from the beneficiary's employers verifying his three years of experience.

II. INTERNATIONAL RECOGNITION

A. Law

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 the following six criteria, of which the beneficiary must submit evidence qualifying under at least two.

(A) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;

(B) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;

(C) 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;

(D) 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;

(E) Evidence of the alien's original scientific or scholarly research contributions to the academic field; or

(F) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

On appeal, counsel asserts that the director erred in evaluating the significance of the evidence submitted under the various criteria and implies that the mere submission of evidence relating to a given criterion must be accepted as meeting that criterion.

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under a similar classification set forth at Section 203(b)(1)(A) of the Act. *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. March 4, 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's procedure for evaluating evidence submitted to meet a given evidentiary criterion. With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.*

The court stated that the AAO's approach rested on an improper understanding of the regulations.² Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at *6 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at *3.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then, if qualifying under two³ criteria, considered in the context of a final merits determination. While involving a different classification than the one at issue in this matter, the similarity of the two classifications makes the court's reasoning persuasive to the classification sought in this matter. In reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her

² Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulation.

³ The classification at issue in *Kazarian*, section 203(b)(1)(A) of the Act, requires qualifying evidence under three criteria whereas the classification at issue in this matter, section 203(b)(1)(B) of the Act, requires qualifying evidence under only two criteria.

conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

B. Analysis

ii. Evidentiary Criteria

On appeal, counsel does not challenge the director's conclusion that the record does not contain any evidence of major prizes or awards for outstanding achievement in the academic field pursuant to 8 C.F.R. § 204.5(i)(3)(i)(A). We note that while prior counsel did not assert that the beneficiary meets this criterion, the record contains a letter from the Technical Counsel for Scientific Investigation at the National Autonomous University of Mexico referencing the beneficiary's acceptance into the "Program of Bonuses." The petitioner also submitted foreign language certificates without accompanying translations. The regulation at 8 C.F.R. § 103.2(b)(3) requires the submission of complete certified English language translations for all foreign language documents. Thus, we will not consider the foreign language certificates. Finally, the petitioner submitted research grants supporting the beneficiary's research.

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 (Nov. 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). We are not persuaded that bonuses from one's employer constitute major awards.

Regarding the beneficiary's research grants, research grants simply fund a scientist's work. Every successful scientist engaged in research, of which there are hundreds of thousands, receives funding from somewhere. Obviously the past achievements of the principal investigator are a factor in grant proposals. The funding institution has to be assured that the investigator is capable of performing the proposed research. Nevertheless, a research grant is principally designed to fund future research, and not to honor or recognize past achievement.

In light of the above, the petitioner has not submitted evidence of major prizes or awards pursuant to 8 C.F.R. § 204.5(i)(3)(i)(A).

As evidence that the beneficiary has participated, either individually or on a panel, as the judge of the work of others in the same or an allied academic field pursuant to 8 C.F.R. § 204.5(i)(3)(i)(D), the petitioner submitted evidence that the beneficiary served on the thesis committee for a Master of Science student at Florida International University. The beneficiary also refereed an article for *Ecological Applications*. This evidence qualifies under the plain language of the criterion set forth at 8 C.F.R. § 204.5(i)(3)(D). Pursuant to the reasoning in *Kazarian*, 2010 WL 725317 at *5, however, the nature of these duties may be and will be considered below in our final merits determination.

As evidence relating to the beneficiary's original scientific or scholarly research contributions to the academic field, the petitioner submitted four reference letters, all from the beneficiary's immediate circle of coauthors and collaborators, and the beneficiary's articles. As noted by counsel, the plain language of the regulation at 8 C.F.R. § 204.5(i)(3)(i)(E) does not require that the beneficiary's contributions themselves be internationally recognized as outstanding. That said, the plain language of the regulation does not simply require original research, but an original "research contribution." Had the regulation contemplated merely the submission of original research, it would have said so, and not have included the extra word "contribution." Moreover, the plain language of the regulation requires that the contribution be "to the academic field" rather than an individual laboratory or institution. We simply note that the regulations include a separate criterion for scholarly articles at 8 C.F.R. § 204.5(i)(3)(i)(F). If the regulations are to be interpreted with any logic, it must be presumed that the regulation views contributions as a separate evidentiary requirement from scholarly articles.

██████████ a wetland ecologist at Smith College and one of the beneficiary's coauthors, discusses the importance of the beneficiary's work with above-ground and below-ground vegetation dynamics on tree islands. ██████████ asserts that the data the beneficiary collected "has been useful to our understanding of the biogeochemical role of tree islands on the landscape" and that ██████████ relied on this data in his own work. ██████████ use of the data in his own work does not demonstrate the beneficiary's contribution to the field as a whole. ██████████ speculates that this data "may contribute to a complete paradigm shift for scientists and policy makers in how the Everglades is restored and managed in the future." Speculation as to a future contribution cannot establish that the beneficiary has already contributed to the academic field as a whole.

██████████, a professor at Florida International University, indicates that he and the beneficiary were in graduate school together at Louisiana State University. ██████████ asserts broadly that the beneficiary "contributes daily, as a professional ecologist, to the management and restoration of the Florida Everglades." ██████████ then discusses the importance of these wetlands, which is not contested. ██████████ notes that the beneficiary has published his work. As stated above, however, the publication of scholarly articles is a separate criterion under 8 C.F.R. § 204.5(i)(3)(i)(F). ██████████ does not provide examples of specific contributions or explain how those contributions have impacted the academic field rather than simply the work of the beneficiary's employer.

██████████, a member of the beneficiary's Ph.D. advisory committee, asserts that the beneficiary has "contributed enormously to the understanding of how the mangrove community has changed in response to hydrologic alterations, and such changes in vegetation have adversely

affected its natural processes." [REDACTED] does not, however, explain how this work has impacted the academic field of ecology.

[REDACTED] at the petitioning agency, asserts that the beneficiary "continues to make significant scientific contributions; especially in the field of mangrove resilience, wetland peat accretion, and tree island community dynamics." More specifically, [REDACTED] states that the beneficiary is "looking at how water management and natural disturbances have impacted the ecological function and biodiversity of tree islands and mangroves." [REDACTED] explains that the beneficiary "has demonstrated how the plant community structures in these two ecosystems have changed in response to hydrologic alterations, and he has analytically examined the ecological processes needed to account for such deviations." While [REDACTED] characterizes the value of the beneficiary's contributions as "significant," he does not explain how the beneficiary's work has contributed to the academic field.

Finally we acknowledge that the beneficiary has authored several articles and book chapters. The record, however, lacks citations or other evidence demonstrating that this original research is considered a contribution to the academic field. Even if we considered the original nature of the beneficiary's research to qualify it under the criterion at 8 C.F.R. § 204.5(i)(3)(i)(E), and we do not, whether or not the contributions are indicative of the beneficiary's international recognition in the field is a valid consideration under our final merits determination.

As stated above, the petitioner submitted several articles authored by the beneficiary. Thus, the beneficiary has submitted evidence that qualifies under 8 C.F.R. § 204.5(i)(3)(F). Pursuant to the reasoning in *Kazarian*, 2010 WL 725317 at *5, however, the field's response to these articles may be and will be considered below in our final merits determination.

In light of the above, the petitioner has submitted evidence that qualifies under at least two criteria, 8 C.F.R. §§ 204.5(i)(3)(i)(D) and (F). The next step is a final merits determination that considers whether the evidence is consistent with the statutory standard in this matter, international recognition as outstanding. Section 203(b)(1)(B)(i).

ii. Final Merits Determination

It is important to note at the outset 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. *Employment-Based Immigrants*, 56 Fed. Reg. 30703, 30705 (proposed July 5, 1991) (enacted 56 Fed. Reg. 60897 (Nov. 29, 1991)).

As stated above, the beneficiary served on the thesis committee for a Master of Science student at Florida International University. The major professor for this student was [REDACTED], one of

the beneficiary's coauthors and collaborators as well as the beneficiary's former fellow student colleague. The beneficiary also refereed a single article for *Ecological Applications*.

The fact that the beneficiary served as a thesis committee member for one of his coauthor's students is a relevant consideration as to whether the evidence is indicative of the beneficiary's recognition beyond his own circle of collaborators. *See Kazarian, 2010 WL 725317 at *5*. We find that this service as a "judge" reflects no recognition of the beneficiary beyond his collaborators.

In addition, 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 manuscripts for a journal that credits a small, elite group of referees, 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's judging experience is indicative of or consistent with international recognition.

Regarding the beneficiary's original research, as stated above, it does not appear to rise to the level of a contribution to the academic field as a whole. Demonstrating that the beneficiary's work was "original" in that it did not merely duplicate prior research is not useful in setting the beneficiary apart in the academic community through eminence and distinction based on international recognition. 56 Fed. Reg. at 30705. Research work that is unoriginal would be unlikely to secure the beneficiary a master's degree, let alone classification as an outstanding researcher. 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."

Finally, the Department of Labor's Occupational Outlook Handbook, 2008-2009 (accessed at www.bls.gov/oco on January 28, 2010 and incorporated into the record of proceedings), provides information about the nature of employment as a postsecondary teacher (professor) and the requirements for such a position. *See* www.bls.gov/oco/ocos066.htm. The handbook expressly states that faculty members are pressured to perform research and publish their work and that the professor's research record is a consideration for tenure. Moreover, the doctoral programs training students for faculty positions require a dissertation, or written report on original research. *Id.* This information reveals that original published research, whether arising from research at a university or private employer, does not set the researcher apart from faculty in that researcher's field.

The record contains no evidence that the beneficiary's articles or book chapters have been cited or other comparable evidence that demonstrates the beneficiary's publication record is consistent with international recognition.

In light of the above, our final merits determination reveals that the beneficiary's qualifying evidence, judging the work of his coauthor's master's degree student, participating in the widespread peer review process, and publishing articles and book chapters that have not garnered any citations or other response in the academic field, do not set the beneficiary apart in the academic community through eminence and distinction based on international recognition. 56 Fed. Reg. at 30705. Indeed, the

record lacks evidence that members of the academic field outside of the beneficiary's immediate circle of colleagues are even aware of his work.

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 petitioner submitted evidence that qualifies for consideration under the regulation at 8 C.F.R. § 204.5(i)(3)(i). Our final merits evaluation of that qualifying evidence, however, reveals that the record stops far short of elevating the beneficiary to the level of an alien who is internationally recognized as an outstanding researcher or professor. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

III. QUALIFYING EMPLOYER

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.)

The director concluded that the record lacks evidence that the petitioner employs at least three full-time researchers and that it has achieved documented accomplishments in the beneficiary's academic field.

On appeal, counsel asserts that the director used an incorrect standard for the type of accomplishments the petitioner must demonstrate but submits no new evidence documenting any achievements of documented accomplishments by the petitioning agency. As quoted above, the regulation at 8 C.F.R. § 204.5(i)(3)(iii)(C) states that the petitioner must "demonstrate" its achievement of documented accomplishments. Thus, the petitioner has not overcome the director's concerns.

Counsel further asserts that the employment of three full-time researchers can be inferred from the petitioner's employment of 1,174 individuals total. We reiterate that the regulation at 8 C.F.R. § 204.5(i)(3)(iii)(C) states that the petitioner must "demonstrate" that it employs at least three full-time researchers. Thus, it is the petitioner's burden to establish this element of eligibility; USCIS is not required to infer the number of researchers from the total number of employees. As such, the petitioner has not overcome this concern.

As quoted above, the regulation at 8 C.F.R. § 204.5(i)(3)(iii) requires a job offer from an institution of higher education or a private employer. In the legislative history, Congress stated:

The alien must be offered a tenured or tenure-track teaching position, or comparable position as a researcher. . . .

Researchers for private employers are also eligible for admission within this category if there are at least three persons employed full-time in research.

The history concludes that an "invitation for employment by a university or private employer must accompany a petition for admission." *Family Unity And Employment Opportunity Immigration Act Of 1990 House Report*, H.R. Rep. No. 101-723, 59-60 (Sept. 19, 1990). Thus, Congress' repeated use of the word private makes clear that the petition must be filed by an institution of higher education or a private employer.⁴

It is rudimentary that interpretation of the statutory language begins with the terms of the statute itself, and if those terms, on their face, constitute a plain expression of congressional intent, they must be given effect. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1994). Where Congress' intent is not plainly expressed, we then need to determine a reasonable interpretation of the language and fill any gap left, either implicitly or explicitly, by Congress. *Id.* at 843-44. The rules of statutory construction dictate that we take into account the design of the statute as a whole. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Moreover, the paramount index of congressional intent is the plain meaning of the words used in the statute taken as a whole. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). The legislative purpose is presumed to be expressed by the ordinary meaning of the words used. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984).

We must presume that the use of the word "private" in the statute is not superfluous and, thus, that it has some meaning. See *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209 (1997); *Bailey v. U.S.*, 516 U.S. 137, 145 (1995). Black's Law Dictionary 1213 (8th ed. 2004) defines "private" as "[r]elating or belonging to an individual, as opposed to the public or the government." (Emphasis added.) Similarly, Webster's II New College Dictionary 900 (3rd ed. 2005) defines private as "belonging to a particular person or persons, as opposed to the public or the government" and "of, relating to, or

⁴ The fact that the classification sought is limited to private employers is acknowledged by the private bar. See 9 Bender's Immigration Bulletin 703 (June 1, 2004), arguing that private research institutions should qualify for H1-B cap exempt status and noting that section 203(b)(1)(B) of the Act enables "private employers" to petition for eligible full-time researchers.

derived from *nongovernment* sources." In addition, the online Cambridge Advanced Learner's Dictionary available at <http://dictionary.cambridge.org/define.asp?key=62983&dict=CALD&topic=business-general-words> defines private as "controlled or paid for by a person or company *and not by the government.*" We are unaware of any plain interpretation of "private" that includes state agencies. Moreover, we are persuaded that this interpretation is not inconsistent with Congressional intent in retaining outstanding researchers. Significantly, Congress expressed its interest in limiting this classification to individuals who had secured an offer of permanent employment. Many permanent government jobs are not available to individuals who are not yet lawful permanent residents.

The petitioner in this matter is a state agency. While there may be some private entities that are intertwined with federal public agencies, such as Fannie Mae and the Smithsonian, that situation is not before us. Similarly, there is no evidence that the petitioner is actually a local 501(c)(3) charitable organization that merely receives a state budget. Such facts, should they arise in a future case, will be duly considered. Ultimately, the record contains no evidence that the petitioner is a quasi-private entity or other considerations that might warrant a more thorough review of the petitioner's qualifications to file petitions under the classification sought in this matter. On this ground alone, the petition is not approvable.

Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The petitioner did not initially address this issue. Thus, the director concluded that the petitioner had not established its ability to pay the proffered wage. On appeal, counsel notes that the petitioner indicated that it employs over 100 individuals and listed a budget of over \$1,400,000,000 on the Form I-140 petition. Counsel does not assert, and the record does not contain, however, a statement from a financial officer at the petitioning agency as required under 8 C.F.R. § 204.5(g)(2).

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.