

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

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

PUBLIC COPY



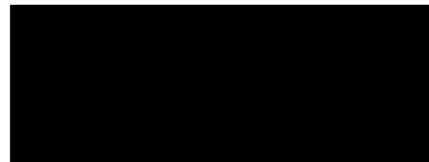
B3

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: **MAR 01 2011**

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 \$630. 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, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

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). The petitioner seeks to employ the beneficiary permanently in the United States as a senior 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 documentation.

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* 1189 (9th ed. 2009) 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" and defines "offeree" as "[o]ne to whom an offer is made." In addition, *Black's Law Dictionary* defines "offeror" as "[o]ne who makes an offer." *Id* at 1190.

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 USCIS 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.

Initially, the petitioner submitted a June 26, 2008 letter addressed to USCIS relating to the beneficiary's previous nonimmigrant visa petition. The letter, from [REDACTED] of the petitioner's

states that the petitioner is offering the beneficiary "temporary employment as [redacted] and that the petitioner would employ the beneficiary from October 1, 2008 through September 30, 2011.

In response to the director's request for additional evidence, the petitioner submitted letters dated June 8, 2009, December 9, 2009 and June 17, 2010 from officials at the petitioning university reappointing the petitioner as a senior research associate. While all of these reappointment letters reference a specific term, they all reference the potential for renewal. The petitioner also submitted relevant pages from its faculty handbook advising: "In general, the maximum period for [a senior research associate appointment] is five years, although in appropriate cases this may be extended." Thus, it does not appear that the petitioner's policies bar the reappointment of a senior research associate in that position beyond five years.

Finally, [redacted] professor at the petitioning university, affirms that the petitioner's position is considered permanent and that his presence is an important part of the university's process of renewing grants from the U.S. military.

In promulgating the final regulation, the Immigration and Naturalization Service, now USCIS, 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. 60897, 60899 (Nov. 29, 1991).

Given that the petitioner may renew term appointments indefinitely, that the petitioner had already renewed the beneficiary's term twice as of the date of filing, and given the petitioner's submission of a letter affirming that the petitioner expected funding to continue, we are satisfied that the petitioner had offered the beneficiary a "permanent" position as defined at 8 C.F.R. § 204.5(i)(2) as of the date of filing the petition. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In light of the above, we withdraw the director's determination that the petitioner had not offered the beneficiary a qualifying job as of the date of filing. Therefore, this matter will be remanded for consideration of whether the petitioner has established that the beneficiary enjoys international recognition as outstanding and whether he has the necessary three years of experience.

Experience

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

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.

(Emphasis added.) The petitioner filed the petition on June 14, 2010 to classify the beneficiary as an outstanding researcher in the field of mechanical and aerospace engineering. Therefore, the petitioner must establish that the beneficiary had at least three years of teaching and/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.

Initially, counsel stated that the beneficiary has approximately ten years of post-baccalaureate experience. The beneficiary, however, only received his Ph.D. two years before the petitioner filed the petition. The beneficiary gained his previous experience while pursuing his advanced degrees. Thus, in order for USCIS to consider this experience, the petitioner must demonstrate that the beneficiary had full responsibility for any classes taught or that the international community has recognized his research while pursuing his degree as outstanding. 8 C.F.R. § 204.5(i)(3)(ii) (quoted above).

In light of the above, the director shall determine whether the beneficiary had full responsibility for any classes taught and/or whether the beneficiary's research conducted toward his degree has been recognized within the academic field as outstanding.

International Recognition

In addition, 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.

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*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of 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 U.S. Citizenship and Immigration Services (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.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations.¹ 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 1122 (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 1119-20.

¹ Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) (comparable to 8 C.F.R. § 204.5(i)(3)(i)(D)) and 8 C.F.R. § 204.5(h)(3)(vi) (comparable to 8 C.F.R. § 204.5(i)(3)(i)(F)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination.² 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 evaluating the evidence submitted under the criteria at 8 C.F.R. § 204.5(i)(3)(i) the director shall take into account the following:

1. The director shall determine whether a student award for academic standing and an award limited to current students studying Global Navigation Satellite Systems are "major prizes or awards" pursuant to 8 C.F.R. § 204.5(i)(3)(i)(A).
2. The director shall determine whether employment at a laboratory constitutes membership in associations, let alone associations that require outstanding achievements of their members pursuant to 8 C.F.R. § 204.5(i)(3)(i)(B). The director shall note that the regulation at 8 C.F.R. § 204.5(i)(3)(i) does not permit the submission of "comparable" evidence. *Compare* 8 C.F.R. § 204.5(h)(4).
3. Accepting that the beneficiary's peer review constitutes judging the work of others pursuant to 8 C.F.R. § 204.5(i)(3)(i)(D), the director must determine, as part of a final merits determination, whether a request from a colleague to review manuscripts as part of the widespread peer review process is indicative of or consistent with international recognition as outstanding.
4. The director shall determine whether the beneficiary's original research constitutes a contribution *to the field* of mechanical and aerospace engineering as a whole pursuant to 8 C.F.R. § 204.5(i)(3)(i)(E).
5. Accepting that the beneficiary has authored published articles, the director must determine, as part of a final merits determination, whether the beneficiary's publication record is indicative of or consistent with international recognition as outstanding.

The director must take into account 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)).

² 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.

In reviewing the evidence under the final merits determination, the director must take into account the nature of the beneficiary's judging experience as a relevant consideration as to whether the evidence is indicative of the beneficiary's recognition beyond his own circle of collaborators. *See Kazarian*, 596 F. 3d at 1122.

Also in the final merits determination, the director shall take into account information from the Department of Labor's Occupational Outlook Handbook (OOH), (accessed at www.bls.gov/oco on February 24, 2011 and incorporated into the record of proceedings). The OOH 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.* Furthermore, the beneficiary's citation history is a relevant consideration as to whether the evidence is indicative of the beneficiary's recognition beyond his own circle of collaborators. *See Kazarian*, 596 F. 3d at 1122.

Finally, we note that the petitioner must establish the beneficiary's eligibility as of the priority date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971); *see also* *Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Comm'r. 1998) citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition."

If the director finds that the petition is not approvable, the director must issue a new denial notice, containing specific findings that will afford the petitioner the opportunity to address the director's ground(s) for denial. 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; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not sustain the appeal. Because the petition is not approvable, the petition is remanded to the director for issuance of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.