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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**

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[REDACTED]

DATE: **JAN 03 2012**

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as Outstanding Professor or Researcher Pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:

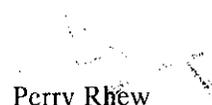
[REDACTED]

INSTRUCTIONS:

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 appeal will be dismissed.

The petitioner is an art museum. 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 an Associate Curator of Asian Art. The director determined that the petitioner had not established that the beneficiary's job duties constitute a research position in his academic field. The director also found that the petitioner had not established that it employed at least three other persons full-time in research positions as of the petition's filing date.

On appeal, counsel states:

In the instant petition, the Petitioner has submitted relevant, probative, and credible evidence that should have led the director to believe that the claim is "more likely than not" or "probably" true, and the applicant or petitioner has satisfied the standard of proof that the position of Curator is a "comparable position to conduct research" thereby satisfying section 203(b)(1)(B) of the INA [Immigration and Nationality Act].

The AAO acknowledges that the standard of proof is preponderance of the evidence, as noted by counsel on appeal. The preponderance of the evidence standard, however, does not relieve the petitioner from satisfying the basic evidentiary requirements required by the statute and regulations. Therefore, if the statute and regulations require specific evidence, the petitioner is required to submit that evidence. See section 203(b)(1)(B)(iii)(III) of the Act and 8 C.F.R. § 204.5(i)(3)(iii)(C).

Counsel refers to several unpublished decisions by the AAO in the classification sought. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. Further, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all U.S. Citizenship and Immigration Services (USCIS) employees in the administration of the Act, unpublished decisions are not similarly binding.

In this matter, the documentation submitted by the petitioner fails to demonstrate by a preponderance of the evidence that the beneficiary's duties equate to a permanent research position in his academic field and that the petitioner employs at least three persons full-time in research positions. Further, the documentation submitted by the petitioner does not establish that the [REDACTED] is a "private employer." See section 203(b)(1)(B)(iii)(III) of the Act and 8 C.F.R. § 204.5(i)(3)(iii)(C). Moreover, the petitioner failed to submit evidence of the actual job offer extended by the petitioner to the beneficiary as required by the regulation at 8 C.F.R. § 204.5(i)(3)(iii).

For the reasons discussed below, the AAO will uphold the director's 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.

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 first issue to be determined is whether or not the beneficiary's job duties constitute a research position in his academic field. The petitioner submitted a February 10, 2010 letter from [REDACTED] Deputy Director, [REDACTED] stating:

[The beneficiary] has been employed [REDACTED] to present.

[The beneficiary] has been responsible for the [REDACTED]. He has had responsibility for research into, development of, and interpretation of objects in the collection through exhibition and study. His duties have included the following:

- Conducting specialized research on works of art from China, Japan, Southeast Asia and Korea;
- Assisting in planning and implementing exhibitions in the museum's special exhibition spaces and galleries of Asian art;
- In concert with Assistant Director, meeting with donors to develop community around collecting interests and to raise funds for acquisitions;
- Participating in seeking out and developing acquisition proposals for works of art to grow the museum's collection of Asian art;
- Assisting with the direction of research of on-call research assistants;
- Seeking out contact with colleagues to deepen the exposure of the museum's Asian collection within the art museum industry;
- Working with curatorial colleagues to improve operations of the division; and
- Assuming other responsibilities as assigned.

Based on [REDACTED] description of the beneficiary's specific duties, only two out of eight of them appear to encompass research. Accordingly, based on the information in the record, the petitioner has not established that the beneficiary will be employed full-time in research activities.

The second issue to be determined is whether or not the petitioner employs at least three other persons full-time in research activities. The petitioner submitted a February 10, 2010 letter from [REDACTED] stating:

[REDACTED] employs 9 individuals in full-time research positions in the job title of "Curator." Every Curator serves the following purpose:

"To assume responsibility for the research, cataloguing, installation and publication of the collection through publications and exhibitions both internal and outside the institution."

In sum, [REDACTED]'s Curators have responsibility for research of objects in the collection and duties associated with publication of those research efforts.

The record does not include documentary evidence to support [REDACTED] claims. For instance, the petitioner failed to submit employment records or job descriptions for the SLAM's other curators demonstrating that they work "full-time in research activities." See section 203(b)(1)(B)(iii)(III) of the Act. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Furthermore, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

[REDACTED] letter was accompanied by an excerpt from the U.S. Department of Labor's *Occupational Outlook Handbook* containing the following information on Curators:

Curators administer museums, zoos, aquariums, botanical gardens, nature centers, and historic sites. The head curator of the museum is usually called the *museum director*. Curators direct the acquisition, storage, and exhibition of collections, including negotiating and authorizing the purchase, sale, exchange, or loan of collections. They are also responsible for authenticating, evaluating, and categorizing the specimens in a collection. Curators often oversee and help conduct the institution's research projects and related educational programs. Today, an increasing part of a curator's duties involves fundraising and promotion, which may include the writing and reviewing of grant proposals, journal articles, and publicity materials, as well as attendance at meetings, conventions, and civic events.

Most curators specialize in a particular field, such as botany, art, paleontology, or history. Those working in large institutions may be highly specialized. A large natural history museum, for example, would employ separate curators for its collections of birds, fishes, insects, and mammals. Some curators maintain their collections, others do research, and others perform administrative tasks. In small institutions with only one or a few curators, one curator may be responsible for a number of tasks, from maintaining collections to directing the affairs of the museum.

The AAO does not dispute that museums employ curators who oversee and help conduct research projects. The issue to be determined in this matter, however, is whether or not the [REDACTED] employs at least 3 persons *full-time in research activities*" (emphasis added) as required by the plain language of section 203(b)(1)(B)(iii)(III) of the Act. Although the [REDACTED] may employ multiple curators whose general duties involve some degree of research work, the petitioner has not submitted documentary evidence demonstrating that those positions constitute "full-time" research positions. Accordingly, based on the evidence in the record, the petitioner has not established that it employs at least three persons full-time in research positions.

The third issue to be determined is whether or not the [REDACTED] is a "private employer." See section 203(b)(1)(B)(iii)(III) of the Act and 8 C.F.R. § 204.5(i)(3)(iii)(C). 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.<sup>1</sup>

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).

The AAO 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* 1315 (9<sup>th</sup> ed. 2009) 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 (3<sup>rd</sup> ed. 2005) defines private as "belonging to a particular person or persons, as opposed to the public or the government." In addition, the online Cambridge Advanced Learner's Dictionary available at [http://dictionary.cambridge.org/dictionary/learner-english/private\\_1](http://dictionary.cambridge.org/dictionary/learner-english/private_1) defines "private" as "controlled by or paid for by a person or company and not by the government."

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<sup>1</sup> 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.

The petitioner submitted an audited financial report for the [REDACTED] entitled [REDACTED] [REDACTED]s and [REDACTED] stating:

[REDACTED]  
[REDACTED] are included with these financial statements.

\* \* \*

The Subdistrict meets the criterion for formatting its financial statements *as a government*. The Subdistrict activity represents activity of the primary government on the financial statements.

The Foundation is reported in a separate column to emphasize that it is *legally separate from the Subdistrict . . . .*

\* \* \*

[REDACTED] was established by an act of the [REDACTED] [REDACTED] and is supported by tax revenue from the [REDACTED]  
[REDACTED]

(Emphasis added.)

According to the [REDACTED] "Statement of Cash Flows for the Year Ended December 31, 2008," all payments to employees (\$14,005,392) such as the beneficiary are made by the "Museum Subdistrict." Based on the preceding financial documentation, the AAO cannot conclude that the [REDACTED] is a "private employer," or that the beneficiary or any of museum's other curators are employed by the Foundation. The documentation submitted by the petitioner shows that petitioner is a public entity – a "political subdivision of the [REDACTED]" supported by taxes levied by the [REDACTED].<sup>2</sup> The AAO is unaware of any plain interpretation of "private" that includes a state "Subdistrict" or a "political subdivision" of a state. Thus, the documentation submitted by the petitioner fails to establish that the [REDACTED] is a "private

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<sup>2</sup> "In 1909 the Museum became a *public entity* supported by a City tax, and eliminated all admission fees. In 1971, voters in St. Louis City and County approved the creation of the [REDACTED] [REDACTED] a political subdivision of the State of Missouri, and [REDACTED] [REDACTED] and County of St. Louis.' City and County tax-collecting agencies collect the property tax imposed by [REDACTED] and remit the proceeds to the District, which redistributes them to the five subdistricts . . . ." (Emphasis added.) See [http://www.\[REDACTED\]/aboutus/foundation.php](http://www.[REDACTED]/aboutus/foundation.php), accessed on December 12, 2011, copy incorporated into the record of proceeding.

employer” as required by section 203(b)(1)(B)(iii)(III) of the Act and the regulation at 8 C.F.R. § 204.5(i)(3)(iii)(C).

The fourth and final issue to be determined in this matter is whether or not the record includes evidence of the actual job offer “in the form of a letter from . . . a private employer offering the alien a permanent research position in the alien's academic field” as required by the plain language of the regulation at 8 C.F.R. § 204.5(i)(3)(iii)(C). *Black's Law Dictionary* 1189 (9<sup>th</sup> 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. The online law dictionary by American Lawyer Media (ALM), available at <http://www.law.com/jsp/law/dictionary.jsp>, 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.”

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. The petitioner submitted a February 10, 2010 letter from [REDACTED] addressed to the Director, Nebraska Service Center, USCIS, stating:

This letter confirms that, upon approval of the I-140 immigrant visa petition and I-485 application for adjustment of status, that the [REDACTED] will employ [the beneficiary] in the permanent research position of [REDACTED]

[The petitioner's] employment will be for an indefinite or unlimited duration in which he will ordinarily have an expectation of continued employment unless there is good cause for termination.

The preceding document does not constitute a job offer from the petitioner to the beneficiary. The petitioner has not submitted the primary required initial evidence of the job offer or complied with the regulation at 8 C.F.R. § 103.2(b)(2) regarding the submission of secondary evidence.

Specifically, the petitioner has not demonstrated that the original job offer does not exist or is unavailable. While the AAO does not question the credibility of those who have confirmed the beneficiary's employment, counsel has not sufficiently explained why the AAO should accept attestations about the terms and conditions in a document in lieu of the document itself. Without the initial job offer, the AAO cannot consider the petitioner's explanations about the terms and conditions set forth in that job offer.

As the petitioner is statutorily ineligible under section 203(b)(1)(B)(iii)(III) of the Act as a public employer, the AAO finds no reason to make any further determination regarding whether or not the beneficiary meets at least two of the regulatory criteria set forth at 8 C.F.R. §§ 204.5(i)(3)(i), and whether or not he stands apart in the academic community through eminence and distinction based on international recognition.

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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.