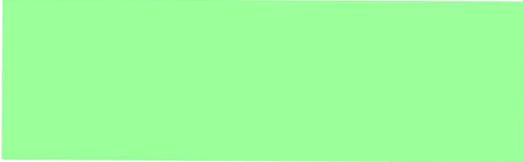


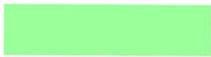


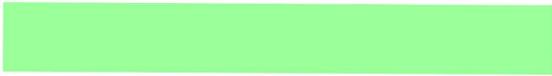
**U.S. Citizenship
and Immigration
Services**

(b)(6)



Date: **MAR 26 2013** Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

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. Please note that all documents have been returned to the office that originally decided your case. Please also note that any further inquiry 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,

Ron Rosenberg
Acting 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 AAO will withdraw the director's decision; however, because the petition is not approvable at this time,¹ it is remanded for further action and consideration.

The petitioner is a university. It seeks to classify the beneficiary as an outstanding professor or 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 an assistant professor. The director determined the petitioner had not established that it had offered the beneficiary a permanent job as of the date of filing.

The petitioner submits a brief and additional documentary evidence in support of the appeal.

THE LAW

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

¹ The director denied the petition on the basis of a single issue.

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 United States Citizenship and Immigration Services (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.

DISCUSSION

The director denied the petition, finding the petitioner failed to establish that it had offered the beneficiary a permanent job. On Part 6 of the petition, the petitioner indicated that the proposed employment was a permanent position.

Initially, the petitioner submitted a support letter dated October 25, 2012 addressed to USCIS, referring to a June 28, 2010 job letter relating to the beneficiary's previous nonimmigrant visa petition. The job letter, from [redacted] Chair of the petitioner's Department of Biomedical Engineering, states that the petitioner "requires the temporary services of [the beneficiary] to work as an Assistant Professor in the Department of Biomedical Engineering." The letter states the petitioner is offering the beneficiary employment "on a full-time basis for a three-year period. He will be compensated at the rate of \$74,000 per year."

In response to the director's request for additional evidence (RFE) dated November 16, 2012, the petitioner submitted a letter dated November 27, 2012 from officials at the petitioning university addressed to USCIS stating "This letter explains the nature of the terms of the employment and confirms the position is a tenure track position." The letter further states:

[The petitioner] requires the full-time services of [the beneficiary] to work as an Assistant Professor of Biomedical Engineering in the School of Engineering . . . conducting research in biomechanics and rehabilitation engineering ; developing the curriculum for and teaching 4 courses annually in biomedical engineering at the undergraduate and graduate level; and performing administrative duties . .

On appeal, the petitioner now submits the original job offer, dated May 17, 2010.² The original job offer states as follows:

The initial appointment is understood to be probationary as defined in the faculty handbook, which is distinct from appointments that carry continuous tenure . . . The decision on tenure for a faculty member at [the petitioning institution] is normally considered in the sixth year of the seven-year probationary period. However, the faculty member can initiate tenure application at any time during the probationary period. . .

The petitioner also submitted relevant pages from its faculty handbook advising: "An appointment probationary for tenure is an appointment to a Faculty for a term of one or two years, and is subject to renewal up to a maximum of seven years of service . . . unless a new letter of appointment is issued prior to such terminal date." Thus, it does not appear that the petitioner's policies bar the

² Although the petitioner asserts it submitted the original job offer in response to the director's RFE, the record does not support the petitioner's assertion.

reappointment of an Assistant Professor in that position beyond seven years. The original job offer letter does not include any terms implying that the job is other than permanent.

Given that the petitioner may renew term appointments indefinitely we find that the original job letter, when read in conjunction with the affirmations from the petitioner that the job is permanent, overcomes the director's basis for denial. 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.

International Recognition

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.³ 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.

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.⁴ 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:

³ 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)).

⁴ 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.

1. 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 the beneficiary's review of manuscripts as part of the widespread peer review process is indicative of or consistent with international recognition as outstanding.
2. The director shall determine whether the beneficiary's original research constitutes a contribution to the field of biomedical engineering as a whole pursuant to 8 C.F.R. § 204.5(i)(3)(i)(E).
3. 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)).

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."

(b)(6)

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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.