U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

JAN 0 9 2007

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
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IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a 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). According to Part 6 of the petition, the petitioner seeks to employ the beneficiary in the United States as a senior scientist. 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 letters from the petitioner. For the reasons discussed below, we uphold the director's finding that the petitioner has not submitted the required initial evidence in this matter. Moreover, as will be discussed in more detail below, we withdraw the director's finding that the beneficiary qualifies as "outstanding" as this finding is unsupported by the record. Specifically, some of counsel's assertions are not supported by any evidence at all and the remaining evidence is not consistent with international recognition in the field.

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (B) Outstanding Professors and Researchers. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien is recognized internationally as outstanding in a specific academic area,
> > >
> > > (ii) the alien has at least 3 years of experience in teaching or research in the academic area, and
> > >
> > > (iii) the alien seeks to enter the United States --
> > >
> > > > (I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,
> > > >
> > > > (II) for a comparable position with a university or institution of higher education to conduct research in the area, or
> > > >
> > > > (III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if

> the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

The regulation at 8 C.F.R. § 204.5(i)(3)(iii) provides that a petition must be accompanied by:

> An *offer* of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:
>
> (A) A United States university or institution of higher learning *offering* the alien a tenured or tenure-track teaching position in the alien's academic field;
>
> (B) A United States university or institution of higher learning *offering* the alien a permanent research position in the alien's academic field; or
>
> (C) A department, division, or institute of a private employer *offering* the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

(Emphasis added.) Black's Law Dictionary 1111 (7th ed. 1999) defines "offer" as "the act or an instance of presenting something for acceptance" or "a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract." Black's Law Dictionary does not define "offeror" or "offeree." The online law dictionary by American Lawyer Media (ALM), available at www.law.com, defines offer as "a specific proposal to enter into an agreement with another. An offer is essential to the formation of an enforceable contract. An offer and acceptance of the offer creates the contract." Significantly, the same dictionary defines offeree as "a person or entity *to whom an offer to enter into a contract is made* by another (the offeror)," and offeror as "a person or entity who makes a specific proposal *to another (the offeree)* to enter into a contract." (Emphasis added.)

In light of the above, we concur with the director that the ordinary meaning of an "offer" requires that it be made to the offeree, not a third party. As such, regulatory language requiring that the offer be made "to the beneficiary" would simply be redundant. Thus, a letter addressed to Citizenship and Immigration Services (CIS) *affirming* the beneficiary's employment is not a job *offer* within the ordinary meaning of that phrase.

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

> *Permanent,* in reference to a research position, means either tenured, tenure track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination.

On Part 6 of the petition, the petitioner indicated that the proposed employment was a permanent position. Counsel asserted in his initial brief that the petitioner was offering the beneficiary permanent employment as a research associate. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner submitted two letters from faculty at the petitioning university addressed to CIS. Dr. [redacted] asserts that he recruited the beneficiary to work in his laboratory as a senior researcher. Dr. [redacted], however, asserts that the beneficiary has been working as a postdoctoral fellow for Dr [redacted] These letters are inconsistent and neither constitutes a job offer from the petitioner to the beneficiary. On March 27, 2006, the director requested "a copy of the offer by [the petitioner] to [the beneficiary] of a permanent research position."

In response, the petitioner submitted two letters from Dr. [redacted] to the director, both dated June 5, 2006. In the first letter, Dr. [redacted] confirms that the terms of the beneficiary's position are those stated in Part 6 of the petition. In the second letter, Dr. [redacted] purports to confirm the offer of the position of senior scientist, a permanent research position "as defined in Title 8, Code of Federal Regulations."

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). The letters submitted in response to the director's request both postdate the filing of the petition.

The director acknowledged receiving the two letters from Dr [redacted] but denied the petition "for lack of required initial evidence."

On appeal, the petitioner submits a letter from [redacted] Manager of Employment and Employee Relations for the petitioning university, asserting that "the responsibility for offering positions lies with the hiring departments or divisions, and is not carried out in any central unit." Thus, Ms. [redacted] asserts that anyone holding a research position would not have an offer letter "from the Office of Human Resources." She does not, however, assert that offer letters in general are unavailable or do not exist. The petitioner also submits a new letter from Dr [redacted] While the new letter is addressed to the beneficiary, it postdates the filing of the petition and purports to confirm "the continuing offer of employment to you of the position of Senior Scientist."

As discussed above, the regulation at 8 C.F.R. § 204.5(i)(3)(iii) provides that the offer from the petitioner to the beneficiary is required initial evidence. Moreover, the director specifically and unambiguously requested this evidence.

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now purports to submit it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

We concur with the director that the petitioner had not submitted the required initial evidence, the job offer issued by any official representing the petitioner to the beneficiary that predates the filing of the petition. The regulation at 8 C.F.R. § 103.2(b)(2) provides that the "non-existence or other unavailability of required evidence creates a presumption of ineligibility." Secondary evidence is only permissible once the petitioner establishes that primary evidence is either unavailable or does not exist. Affidavits are only permissible once the petitioner establishes that secondary evidence is either unavailable or does not exist. *Id.* The petitioner has not established that the hiring departments and divisions referenced by Ms. do not issue job offer letters and that the petitioner, a major university, does not enter into written contracts with its employees. Thus, the petitioner has not established that neither primary nor secondary evidence of the job offer predating the filing of the petition exists.

Moreover, the two June 5, 2006 letters from Dr. cannot resolve the discrepancies between his initial letter and that of Dr , who characterizes the beneficiary as a postdoctoral fellow. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In light of the above, we uphold the portion of the director's decision finding that the petitioner had failed to submit the initial required evidence, a qualifying job offer. An application or petition, however, that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). For the reasons discussed below, we must withdraw the director's finding that the beneficiary qualifies as an outstanding researcher as this finding is not supported by the record.

The regulation at 8 C.F.R. § 204.5(i)(3)(i) states that a petition for an outstanding professor or researcher must be accompanied by "[e]vidence that the professor or researcher is recognized

internationally as outstanding in the academic field specified in the petition." The regulation lists six criteria, of which the beneficiary must satisfy at least two. It is important to note here that the controlling purpose of the regulation is to establish international recognition, and any evidence submitted to meet these criteria must therefore be to some extent indicative of international recognition. More specifically, outstanding professors and researchers should stand apart in the academic community through eminence and distinction based on international recognition. The regulation at issue provides criteria to be used in evaluating whether a professor or researcher is deemed outstanding. 56 Fed. Reg. 30703, 30705 (July 5, 1991). Counsel asserts that the beneficiary satisfies all six criteria, discussed separately below.

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

Initially, counsel asserted:

> During the course of his studies and research, [the beneficiary] has thrice received stipend awards as he pursued his advance degrees and conducted research at Tatung University, National Cheng Kung University, and National Yang-Ming University in Taiwan, ROC.

As stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534; *Matter of Laureano,* 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506. The petitioner submitted the beneficiary's curriculum vitae that lists a poster presentation award, a student stipend and three postdoctoral stipends. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)).

Primary evidence of an award consists of a copy of the award itself. Secondary evidence of an award might include contemporaneous news coverage of the award. As stated above, the petitioner must establish that neither primary nor secondary evidence exists in order to rely on affidavits. 8 C.F.R. § 103.2(b)(2). The petitioner did not submit the beneficiary's poster presentation award or the "stipend" letters.

Moreover, it is significant that the *proposed* regulation relating to this classification would have required evidence of a major *international* award. The final rule removed the requirement that the award be "international," but left the word "major." The commentary states: "The word "international" has been removed in order to accommodate the *possibility* that an alien might be recognized internationally as outstanding for having received a major award that is not international." (Emphasis added.) 56 Fed. Reg. 60897-01, 60899 (November 29, 1991.)

Thus, the standard for this criterion is very high. The rule recognizes only the "possibility" that a *major* award that is not international would qualify. Significantly, even lesser international awards cannot serve to meet this criterion given the continued use of the word "major" in the final rule. *Cf.* 8 C.F.R. § 204.5(h)(3)(i) (allowing for "lesser" nationally or internationally recognized awards for a separate classification than the one sought in this matter).

The student and postdoctoral stipends appear, by their titles, to be limited to students and those just beginning their careers. The petitioner has not established that the beneficiary competed with the most experienced and renowned members of the field for these "stipends" or that the most elite members of the field aspire to win such stipends. Thus, these stipends are simply not evidence of international recognition in the field. Rather, they represent high academic and entry-level career achievements in comparison with the beneficiary's fellow students and postdoctoral researchers.

Finally, the petitioner has not established the significance of the beneficiary's poster presentation award, for which he presumably competed only against other poster presenters at that conference. The petitioner has not even established that poster presentations themselves compare with oral presentations and invited talks.

In summary, the petitioner submitted no evidence to meet this criterion and even the assertions made by counsel and the beneficiary do not support a claim to meet this criterion.

> *Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members.*

The petitioner submitted the beneficiary's membership certificate for the Phi Tau Phi Scholastic Honor Society of "The Republic of Dhina [sic]." The petitioner failed to submit evidence of the membership requirements for this honor society.

Moreover, the National Yang-Ming University, where the beneficiary obtained his Ph.D., elected the beneficiary to Phi Tau Phi membership. Student honor societies generally recognize student achievement, not achievements in the field. Moreover, the petitioner has not explained how this membership reflects the beneficiary's recognition beyond the National Yang-Ming University.

In light of the above, the petitioner has not submitted established that the beneficiary meets this criterion.

> *Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation.*

Counsel relies on articles citing to the beneficiary's work as evidence to meet this criterion. Articles which cite the beneficiary's work are primarily about the author's own work, not the beneficiary. As

such, they cannot be considered published material about the beneficiary's work. Rather, we will consider the citations below as they relate to the significance of the beneficiary's own published articles, although in this matter the minimal number of citations documented is not persuasive evidence of international recognition.

Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field.

The record reflects that the beneficiary has refereed abstracts for conferences in 2003 and 2004. We cannot ignore that scientific conferences are peer reviewed and rely on many scientists to review submitted abstracts. This statement is not conjecture; the beneficiary is listed as one of approximately 400 peer reviewers for each conference. Thus, peer review is routine in the field; not every peer reviewer enjoys international recognition. Without evidence that sets the beneficiary apart from others in his field, such as evidence that he has reviewed an unusually large number of articles, received independent requests from a substantial number of journals, or served in an editorial position for a distinguished journal, we cannot conclude that the beneficiary meets this criterion.

Evidence of the alien's original scientific or scholarly research contributions to the academic field.

Obviously, the petitioner cannot satisfy this criterion simply by listing the beneficiary's past projects and demonstrating that the beneficiary's work was "original" in that it did not merely duplicate prior research. Research work that is unoriginal would be unlikely to secure the beneficiary a master's degree, let alone classification as an outstanding researcher. Because the goal of the regulatory criteria is to demonstrate that the beneficiary has won international recognition as an outstanding researcher, it stands to reason that the beneficiary's research contributions have won comparable recognition. To argue that all original research is, by definition, "outstanding" is to weaken that adjective beyond any useful meaning, and to presume that most research is "unoriginal." To be considered a contribution consistent with international recognition, the statutory standard in this matter, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the impact of the beneficiary's work.

Counsel asserts that the beneficiary is developing technology to improve the diagnosis and treatment of Multiple Sclerosis, strokes and Alzheimer's Disease. As stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. at 534; *Matter of Laureano,* 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez,* 17 I&N Dec. at 506.

The petitioner submitted two reference letters, both from the beneficiary's colleagues at the petitioning university. The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful claim of sustained national or international acclaim. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron*

International, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of international recognition and vague claims of contributions are less persuasive than letters that specifically identify contributions and provide specific examples of how those contributions have influenced the field. In addition, letters from independent references who were previously aware of the beneficiary through his reputation and who have applied his work are far more persuasive than letters from independent references who were not previously aware of the beneficiary and are merely responding to a solicitation to review the beneficiary's curriculum vitae and work and provide an opinion based solely on this review. Ultimately, evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. An individual with international recognition should be able to produce unsolicited materials reflecting that acclaim.

Dr. indicates that he met the beneficiary at a conference, kept in contact with him and ultimately offered him a position at the petitioning university. Dr. indicates that he and the beneficiary "developed an intuitively simple model for the interpretation of nerve injury of the brain and spinal cord." asserts that their model "has now been applied in patients to shed lights [sic] on the underlying mechanism of human diseases such as Alzheimer's disease, Schizophrenia, and multiple sclerosis." concludes that the model is easily applicable in most hospitals in the United States and Europe and that its impact "will soon be realized."

Dr. asserts that the beneficiary has performed "ground-breaking work in imaging that has [the] potential to alter the field of imaging of the central nervous system." Dr. s further asserts that the beneficiary has investigated the toxic conditions to myelin using animal models and has demonstrated a new neuroimaging technique to non-invasively identify different pathologies such as Multiple Sclerosis. Finally, the beneficiary has demonstrated the influence of chemical fixation in postmortem neuroimaging, which provides new insights into how best to interpret postmortem MRI scans.

The record does not contain any letters from hospital executives or other representatives confirming their use of the beneficiary's model. The record also lacks letters from independent renowned members of the field explaining the beneficiary's impact in the field. While the record does contain a small number of citations to the beneficiary's work, no one article by the beneficiary has been cited more than four times. The petitioner has not established that this number of citations is consistent with a contribution that has garnered international recognition in the field.

While the beneficiary's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. The record does not establish that the beneficiary's work represented a groundbreaking advance in neurology.

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

The petitioner submitted evidence that the beneficiary has authored seven published articles and 12 conference abstracts. The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its *Report and Recommendations*, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition are the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career." This report reinforces our position that publication of scholarly articles is not automatically evidence of international recognition; we must consider the research community's reaction to those articles.

The petitioner also submitted evidence that another research team at the petitioning university acknowledged the beneficiary's contributions to their work in a published article. This acknowledgement does not demonstrate the beneficiary's recognition beyond the petitioning university. The petitioner also submitted evidence that four of the beneficiary's articles have been cited, but none of these articles has been cited more than four times by independent research teams. The petitioner has not established that four citations for an article in his field are indicative of or consistent with international recognition, the statutory standard in this matter.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

The petitioner has shown that the beneficiary is a talented and prolific researcher, who has won the respect of his collaborators, employers, and mentors, while securing some degree of international exposure for his work. The record, however, stops short of elevating the beneficiary to an international reputation as an outstanding researcher or professor. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner.

Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.