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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: LIN 03 268 50129 Office: NEBRASKA SERVICE CENTER Date: AUG 11 2005

IN RE: Petitioner:
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:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and 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). 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 defined in the pertinent regulations.

On appeal, counsel asserts that the director's decision is inconsistent with previous decisions. We note that we adjudicate petitions on a case-by-case basis. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). In addition, counsel's appellate brief adds to the inconsistencies that were already apparent in the record of proceedings.

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.

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 June 19, 2003 letter fro[redacted] professor at the petitioning institution, to Citizenship and Immigration Services (CIS). In his letter, [redacted] asserts that the beneficiary "has been employed as a Senior Research Associate Scientist since January 2003. We continue to make an offer of full-time employment to [the beneficiary] to serve as a Senior Research Associate Scientist." On October 1, 2004, the director requested "the actual offer of employment made by [the petitioner] to [the beneficiary]."

The petitioner's response does not include the original offer of employment from the petitioner to the beneficiary. Rather, the petitioner submitted the beneficiary's August 5, 2003 notification of a change in the terms and conditions of his appointment. The notification does not include an appointment ending date, although a space for such a date is on the form. The petitioner also submitted letters from a human resources administrative assistant with the petitioner's Department of Biological Chemistry and a payroll supervisor affirming that the beneficiary "is" a permanent employee. While favorable on their face, these documents are inconsistent with the other letter submitted in response to the request for additional evidence and counsel's own assertions on appeal.

The petitioner also submitted a new letter from [redacted] ated October 11, 2004. This letter, jointly signed by the beneficiary, is once again addressed to CIS and purports to clarify the June 19, 2003 letter. The letter affirms that the petitioner and the beneficiary "agree that the position is for a term of indefinite or unlimited duration and that [the beneficiary] ordinarily has an expectation of continued employment." The letter reiterates that the job has "no specific ending date and will continue to be open for the indefinite future." The letter then cites a provision from the "Faculty/Staff Handbook" regarding termination for cause. The letter concludes, however, with the following statement: "As a 12-month appointee, [the beneficiary] will accrue vacation." In a second letter [redacted] attests to his own authority to hire the beneficiary.

On appeal, counsel's assertions raise even more concerns and contradictions. Specifically, in addition to asserting that the regulations do not require an offer addressed to the beneficiary, counsel states:

> [The director] continually contends that the petitioner has failed to produce what [the director] requested, namely a copy of the actual offer of employment made to the beneficiary. Employment-based immigrant petitions are by definition based on prospective positions, since the alien is unable to lawfully accept permanent employment in the U.S. until he or she is a permanent resident. An actual letter of employment issued for the alien's current (temporary) employment is not relevant to the petition. What is relevant is that the alien has been offered a permanent research position in his field as evidence in a letter from the petitioner. The June 19 letter meets these regulatory criteria.

Counsel further asserts that the 12-month appointment is not disqualifying because it represents a typical university structure whereby universities "make appointments and issue wage increases on a yearly basis." Counsel's implication that it would require a change in appointment policy to hire the petitioner beyond a 12-month appointment conflicts with counsel's other assertion, quoted above, that the petitioner has made the beneficiary an offer of employment more permanent than the current 12-month appointment counsel characterizes as "temporary."

The fact that the beneficiary is currently employed in a term position is not in and of itself disqualifying.[1] A beneficiary need not already be working in a permanent capacity; the petitioner could submit a conditional job offer for a permanent job contingent on the beneficiary's adjustment to lawful permanent resident status. We emphasize that the record does not contain such an offer. First, we concur with the director that the ordinary meaning of an "offer" requires that it be made to the offeree, not a third party. Regulatory language requiring that the offer be made "to the beneficiary" would simply be redundant. Thus, a letter addressed to CIS is not a job offer. Of more concern, the June 19, 2003 letter specifically states that the job offered is the same position and title as the job currently held by the beneficiary, a senior research associate scientist, a position that Dr. [redacted] subsequently characterizes as a 12-month appointment and counsel concedes is temporary. The petitioner has not demonstrated that the position of senior research associate scientist can include both term appointments and indefinite employment. It remains that the petitioner has not demonstrated that absent an act by the petitioner, such as a letter of termination or non-reappointment, a senior associate research scientist would continue in that position past 12 months.

Ultimately, either the beneficiary's current job is permanent, as claimed by some of the letters discussed above, or it is temporary, as implied by [redacted] and conceded by counsel. If the current job is permanent and the job on which the petition is based, the original job offer letter is relevant. If the current job is temporary, a job offer letter preceding the date of filing[2] for a permanent, and thus different, position is required.

Finally, 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.

[1] While a nonimmigrant's authorization to work is temporary, counsel provides no legal authority for the implication that a nonimmigrant cannot accept a job that does not specify a termination date.
[2] *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak;* 14 I&N Dec. 45, 49 (Comm. 1971).

582, 591-92 (BIA 1988). The petitioner has not resolved the inconsistencies regarding the terms of the beneficiary's current job and whether the job offered is merely a reappointment to the same job.

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.