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U.S. Citizenship and Immigration Services

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FILE: LIN 04 002 51145 Office: NEBRASKA SERVICE CENTER Date: AUG 18 2005

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.

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 nonprofit research institute. 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 the petition, the petitioner seeks to employ the beneficiary in the United States as a 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, the petitioner submits additional evidence. We uphold the director's decision for the reasons discussed below.

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 position of research associate was permanent. The petitioner submitted a January 21, 2000 letter from [redacted] the beneficiary offering the beneficiary an appointment as a Research Fellow "for the year beginning January 20, 2000 through January 19, 2001." The petitioner also submitted evidence that the beneficiary was reappointed to this position on January 20, 2001, March 20, 2002 and March 20, 2003. On November 30, 2004, the director requested a copy of the letter offering the beneficiary a position as a research associate, the job listed on the petition. In response, the petitioner submitted a May 14, 2003 letter offering the beneficiary an appointment as a research associate "effective June 1, 2003 through May 31, 2004." The petitioner was reappointed to this position on June 1, 2004 for another twelve months.

The petitioner also provided a letter from [redacted] staff member of the petitioning institute, asserting that the research associate position is "permanent" and that it is "the policy of [the petitioner] to award annual contracts to all it's [sic] staff members that are renewable on a yearly basis based on mutual agreement of both parties."

The director concluded that as of the date of filing, the petitioner had only offered the beneficiary a temporary research fellowship.

On appeal, counsel asserts that the director both conceded that the position of research associate is permanent and found that the petitioner had not offered the beneficiary an indefinite position. Counsel asserts that the "manifest weight of the evidence presented by [the petitioner] plainly establishes that the position of Research Associate is for an indefinite or unlimited duration and that [the beneficiary] has an expectation of continued employment." In the alternative, counsel asserts that the actual renewal of contracts gives the employees an expectation of continued employment. Counsel concludes:

> The [director's] rationale, if widely applied, would require all employers to grant lifetime appointments to outstanding researchers and other professional staff. As the [director] well knows, such a requirement is wholly unsupported by the statute and regulations.

The petitioner submits a letter from [redacted] hief of Staff and Vice President of the petitioner's Board of Governors, who explains that the beneficiary, along with 1,400 other professionals, is working on a one-year

renewable appointment. He explains that renewal is based on an annual professional review "and carries with it a reasonable expectation of continued employment, unless there is good cause for termination." He continues that all faculty and leadership at the petitioning foundation are subject to the same process, which is not intended to "appear to represent a limited or insecure employment relationship."

In addition, the petitioner submits a letter from Dr. [redacted] Director of Research for the petitioner. Dr. [redacted] asserts that the research associate position "is the first level faculty position at the Cleveland Clinic equivalent to a Tenure Track Research Assistant Professor at most universities."

The petitioner filed the petition on October 2, 2003. While the director focused on the beneficiary's twelve-month appointment as a research fellow as of April 1, 2003, the response to the director's request for additional documentation reflects that the beneficiary was then promoted to a research associate on May 14, 2003, prior to the petition's date of filing. As such, we can consider the research associate job offer. Counsel is not persuasive, however, that the research associate job is permanent as defined in the relevant regulation, quoted above. First, the director's decision is not inconsistent. The director acknowledges that the research position itself is continuing but concludes the beneficiary's appointment to that position is not. We concur.

The petitioner's policy of issuing term contracts to all of its employees does not require the director to waive the permanent job offer requirement set forth in both the statute and the regulations as quoted above. The regulations do not require tenure or a "lifetime" appointment as counsel implies. Rather, it requires a position that is either tenure-track or can only be terminated for cause. If the petitioner does not offer tenure, and the insistence that the petitioner only issues annual contracts suggests it does not, we cannot conclude that the beneficiary's position is "tenure-track." While Dr. [redacted] implies that the petitioner will only fail to renew the beneficiary's contract for cause, the original offer of employment for the research associate position does not indicate that non-reappointment can only be for cause. Rather, the May 14, 2003 letter includes a specific termination date. The reappointment letters reveal that the annual reviews are not merely performance evaluations where the employee presumes reappointment unless otherwise advised.

Regarding counsel's alternative assertion, while the beneficiary may have had an expectation of continued employment based on previous reappointments, the use of the word "and" in the regulation at 8 C.F.R. § 204(i)(2) indicates that such an expectation is required *in addition to* an offer for a job with a term of indefinite or unlimited duration. The May 14, 2003 job offer is unambiguously for a one-year term subject to renewal. The petitioner did not provide the beneficiary's contract indicating that renewal is automatic unless there is cause to terminate the employment relationship.

In light of the above, the petitioner has not established that the job offer was for a position with indefinite or unlimited duration. The lack of a permanent job offer from the petitioner to the beneficiary is sufficient grounds for denial.

Finally, we do not contest the petitioner's prestige and distinguished reputation or its sincerity in wishing to employ the beneficiary. As an adjudicatory body, however, we are bound by the statute and the regulations. Whether or not the statute and regulations are conducive to the petitioner's personnel policies is not a consideration for us. We note that this decision is without prejudice to a new petition filed under a different

classification that does not require a permanent job offer as defined in the regulation set forth at 8 C.F.R. § 204.5(i)(2).

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.