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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **OCT 27 2009**
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The petitioner filed an appeal, which the director deemed to be untimely. The director considered the late appeal as a motion to reopen and affirmed the denial of the petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the sciences. The director determined that the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability. More specifically, the director found that the petitioner had failed to demonstrate receipt of a major, internationally recognized award, or that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). The director also determined that the petitioner had not submitted clear evidence that he would continue to work in his area of expertise in the United States.

On appeal, the petitioner argues that the director had no legal basis to treat his appeal as a motion to reopen. In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal with the proper fee within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding. *See* 8 C.F.R. § 103.5(a)(1)(ii). In this instance, the director denied the petition on August 8, 2008. The petitioner attempted to file his initial appeal on September 12, 2008, 35 days after the director issued the decision denying the petition. However, the appeal was not accepted by the service center because it had not been properly filed with an acceptable form of payment.¹ Appeals filed without the proper fee do not retain a filing date. *See* 8 C.F.R. § 103.2(a)(7). The record includes notices from the Nebraska Service Center dated September 12, 2008 and September 19, 2008 indicating that the Form I-290B, Notice of Appeal or Motion, was returned to the petitioner because his appeal did not include a correct form of payment. The Nebraska Service Center received the petitioner's resubmitted Form I-290B with the proper \$585.00 filing fee on December 4, 2008. As the Form I-290B submitted by the petitioner on September 12, 2008 did not retain a filing date, the actual filing date for his Form I-290B is December 4, 2008, 83 days after the director's decision was served by mail. Accordingly, the director's treatment of the late appeal as a motion to reopen was in compliance with the regulations.

The petitioner further argues that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3) and that he is coming to the United States to continue to work in his area of expertise.

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

¹ Even if the initial appeal had had been submitted with a proper form of payment, the appeal would have been deemed untimely.

(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):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition, filed on December 27, 2006, seeks to classify the petitioner as an alien with extraordinary ability as an inventor and a biologist. The petitioner earned his Master's degree in Biology from the Heinrich Heine University of Dusseldorf in Germany in September 2007. On appeal, the petitioner states that he is now a Ph.D. student at the University of Cologne.

The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, internationally recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. A petitioner, however, cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three criteria at 8 C.F.R. § 204.5(h)(3). In determining whether the petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of or consistent with sustained national or international acclaim. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R.

§ 204.5(h)(2). The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).²

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The petitioner submitted a certificate from BKK Krupp Thyssen & Partner, a health insurance provider, stating that he received a "Special Prize" in the "Youth scientists 2000 Regional Competition in Duesseldorf." Pursuant to 8 C.F.R. § 103.2(b)(3), any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation that the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. The English language translation accompanying this prize certificate was not certified by the translator as required by the regulation. Nevertheless, this prize reflects regional recognition rather than a nationally or internationally recognized prize for excellence in the field of endeavor. Further, with regard to an award won by the petitioner in a regional youth competition, we do not find that such an award indicates that he "is one of that small percentage who has risen to the very top of the field of endeavor." See 8 C.F.R. § 204.5(h)(2). There is no indication that the petitioner faced competition from throughout his field, rather than competitors limited to his approximate age group in the field. The petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, not for individuals progressing toward the top at some unspecified future time.

The petitioner submitted a certificate from the European Academy of Natural Sciences, Hanover, Germany stating that his research work entitled "Novel Fusion Proteins Against Different Kinds of Leukemias and Solid Tumors" won first place in the international competition at the Euromedica Hanover 2005 International Congress and Trade Fair. The record does not include information from the presenting organization indicating the significance of this award or its evaluation criteria. Further, there is no documentary evidence demonstrating that the award is recognized beyond the presenting organization and therefore commensurate with a nationally or internationally recognized prize or award for excellence in the field.

The petitioner submitted a certificate and a bronze medal from the "IENA 2003 International Exhibition 'Ideas-Inventions-Innovations'" in Nuremberg, Germany. The certificate states that the petitioner was awarded a bronze medal for outstanding achievements with regard to his invention entitled "Cytoskeleton – Binding Fusion Proteins for Inhibition of Tumor Growth." In response to the director's request for evidence, the petitioner submitted a May 13, 2008 letter from [REDACTED] IENA Project Management, stating:

The IENA in Nuremberg is the most important international trade show for "Ideas-Inventions-Innovations" in Germany for the last 60 years now.

² The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

An international expert jury awards particularly inventive performances with medals, certificates and prizes. These awards are highly regarded throughout the branch.

Valuation of inventions according to the following criteria:

- Inventive level and technical progress
- Economic usability
- Practical relevance/value
- Design and presentation

The self-serving nature of [REDACTED] comment regarding the reputation of the IENA is not sufficient to demonstrate that the petitioner's bronze medal equates to a nationally or internationally recognized award for excellence in the biomedical field. [REDACTED] letter does not provide information regarding the number or percentage of IENA 2003 exhibitors who earned some type of recognition. We cannot conclude that selection for an honor that is annually conferred upon a substantial number and percentage of exhibitors is indicative of national or international recognition in the biomedical field. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for "that small percentage of individuals who have risen to the very top of their field of endeavor." Further, there is no documentary evidence demonstrating that the petitioner's award is recognized beyond the presenting organization and therefore commensurate with a nationally or internationally recognized prize or award. The plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that petitioner's awards be nationally or internationally *recognized* in the field of endeavor and it is his burden to establish every element of this criterion. In this case, there is no evidence demonstrating that the petitioner's award had a significant level of recognition beyond the context of the IENA exhibition where it was presented.

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

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

In order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The petitioner submitted evidence of his membership in the German Inventors Society and Young Inventors International. The record, however, does not include evidence (such as membership bylaws) showing the admission requirements for these organizations. The petitioner also asserts that he is a member of the German Society for Highly Gifted Children, but there is no evidence to

support his claim. Simply 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)). In this case, there is no evidence showing that the preceding organizations require outstanding achievements of their members, as judged by recognized national or international experts in the petitioner's field or an allied one. Accordingly, the petitioner has not established that he meets this criterion.

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.³

The petitioner submitted a February 19, 2000 article about him in *Wochen-Zeitung* and a May 2001 article about him in *Bild der Wissenschaft*. The English language translations accompanying these articles were not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3). Further, there is no evidence (such as circulation statistics) showing that *Wochen-Zeitung* and *Bild der Wissenschaft* qualify as professional or major trade publications or other major media.

The petitioner submitted a brief article about him (approximately twelve sentences) in the March 25, 1999 issue of *Stern* entitled "Youth Assistance in Researching Alzheimer." The English language translation accompanying this article was not certified by the translator as required by the regulation at 8 C.F.R. § 103.2(b)(3). In response to the director's request for evidence, the petitioner submitted distribution information showing that *Stern* qualifies as a form of major media. In addressing the 1999 article in *Stern*, the director's decision stated that "a single major media article published about the petitioner" was not "indicative of sustained acclaim" in his field. We concur with the director's finding. In the seven years preceding the petition's filing date, there is no further evidence showing that the petitioner has been the subject of published material in major media. Accordingly, the petitioner has not demonstrated that his national or international acclaim as an inventor or a biologist has been sustained. **See section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3).** The preceding evidence is not consistent with sustained national or international acclaim as of the date of filing of this petition and, thus, is insufficient to meet this criterion without

³ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

additional evidence under this criterion or other criteria documenting the petitioner's more recent acclaim in his field.

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

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

The petitioner submitted documentation from the German Patent and Trademark Office reflecting that he was granted patents for several of his inventions. In response to the director's request for evidence, the petitioner submitted four international patent applications and documentation indicating that he filed a patent application with the United States Patent and Trademark Office, but there is no evidence of the applications' approval. Nevertheless, the grant of a patent demonstrates only that an invention is original. This office has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 n. 7, (Commr. 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* In this case, there is no evidence showing that the petitioner has licensed or successfully marketed his inventions. In his response to the director's request for evidence, the petitioner discusses only the potential of his inventions stating: "My inventions have a really very big commercial potential. Only in the U.S.A., I will be able to realize these my [*sic*] plans and to commercialize my inventions." Thus, the impact of the petitioner's inventions in his field is not documented in the record. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Rather than submitting evidence demonstrating that his inventions have already had a significant impact in the medical field, the petitioner instead comments on his future aspirations for their commercialization. Accordingly, the petitioner has not established that his inventions equate to original scientific contributions of major significance in the field.

Aside from evidence of his German patents and international patent applications, the petitioner submitted four letters of recommendation in support of the petition.

The petitioner's professor at Heinrich Heine University of Dusseldorf, [REDACTED] states:

[The petitioner] joined my group and began research work on guppies receiving his "Dipl. Biol" from the University of Dusseldorf in summer 2007 with a study on "Behavioral changes of female guppies . . . during the reproductive cycle." In his diploma thesis [the petitioner] has shown that he is a meticulous and tenacious researcher. The results he obtained are valuable contribution enriching our ideas about behavioral mechanisms to compensate drawbacks of viviparism.

We note that the petitioner earned his Master of Biology degree subsequent to the petition's filing date. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO is not required to consider

subsequent developments in the petitioner's career in this proceeding. Nevertheless, there is no evidence showing that the petitioner's master's thesis research pertaining to the behavior of female guppies during the reproductive cycle equates to a scientific contribution of major significance in the field of biology. While the petitioner's research is no doubt of some 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 master's thesis or biological research, in order to be accepted for graduation, publication, presentation, or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge has inherently made a contribution of major significance in the field.

██████████ of Medicine, Universitätsklinikum Carl Gustav Carus, Technical University of Dresden, states that the petitioner's antibody-binding fusion proteins "might be of clinical use in the future" and may have "possible use as new biocompatible materials." Dr. ██████████ further states that the petitioner's work "might open . . . new possibilities to treat systemic lupus erythematosus and immune complex diseases" and that the petitioner has "the potential to make important contributions to biomedical sciences." Similarly, ██████████ a Swiss physician, states that the petitioner's work "may lead to novel class of protein therapies against various kinds of solid tumors and leukemia." The comments from ██████████ and ██████████ are not sufficient to demonstrate that the petitioner has made original scientific contributions that have already significantly influenced or impacted his field. As previously discussed, a petitioner cannot file a petition under this classification based on the expectation of future eligibility. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971).

On motion, the petitioner submitted evidence of two additional patent applications he filed with the United States Patent and Trademark Office in November and December of 2007. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Accordingly, the AAO is not required to consider the 2007 patent applications in this proceeding. The petitioner also submitted an excerpt from the book *Essentials of Patents* by ██████████ and ██████████

In addressing the petitioner's evidence and arguments pertaining to this regulatory criterion, the director's January 7, 2009 decision stated:

In the denial decision, the USCIS acknowledged that the petitioner's patents represented original work in the field, but found that the record did not demonstrate that any of the patents have had major significance in the field. The petitioner now questions the "legal basis" for requiring his work to have already had major significance in the field. However, the regulations clearly state that any original contributions must be "of major significance in the field." While the petitioner and the authors of several witness letters contend that the petitioner's work "might" be of use, the speculation that something may have a significant impact at an unspecified future date is not sufficient to demonstrate that the petitioner's work meets this criterion.

The petitioner also contends that the mere granting of the patent applications is demonstrative of a significant contribution. However, the excerpt from *Essentials of Patents* indicates that the subject matter for a patent "must be (1) novel, (2) useful, and (3) not obvious to one skilled in the art." This corroborates that patents are demonstrative of original work in the field; however, there is nothing to suggest that patents are only granted for inventions that have major significance in the field. Many patents have little, if any, impact on the field. The record lacks evidence that the petitioner's own patents have had any significant impact on the field of endeavor.

We concur with the director's findings. On appeal, the petitioner submits a letter of support from [REDACTED] of Technological Development, Integrated DNA Technologies, Inc., stating:

My conclusion of extraordinary abilities of [the petitioner] is based on the following:

1. Number of patents and patent applications obtained by [the petitioner] by the age of 27 (five plus one published U.S. Patent application . . .), and
2. He is a sole inventor in all of them.

* * *

During my career in both USSR and U.S. in either academic or industrial settings I haven't met a person with such a remarkable invention record.

[REDACTED] letter does not provide specific examples of how the petitioner's work is already influencing the field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the documentation submitted indicates that the petitioner has earned the admiration of those offering letters of support and that he is a talented biologist with potential, the evidence of record does not establish that he has already made original scientific contributions of major significance in his field. For example, the petitioner's evidence does not establish that his research and inventions have had a substantial national or international impact in the biomedical field, nor does it show that the field has significantly changed as a result of his work.

In this case, the letters of support submitted by the petitioner are not sufficient to demonstrate that he meets this criterion. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of

an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance that one would expect of a biologist or an inventor who has sustained national or international acclaim. Without evidence showing that the petitioner's work has been unusually influential, highly acclaimed throughout his field, or has otherwise risen to the level of contributions of major significance, we cannot conclude that he meets this criterion.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

The petitioner submitted documentation indicating that he has authored patent applications and a master's thesis. There is no evidence showing that this work was in professional or major trade publications or some other form of major media. Further, we note that authoring scholarly articles is inherent to scientific research.⁴ As a biological scientist must demonstrate published research prior to even obtaining a permanent job in his field, published research alone cannot serve to set the petitioner apart from others in his field. While we acknowledge that we must avoid requiring acclaim within a given criterion, it is not a circular approach to require some evidence of the community's reaction to the petitioner's published work in a field where publication is expected of those merely completing training in the field. *Kazarian v. USCIS*, __ F. 3d __, 2009 WL 2836453, *6 (9th Cir. 2009). For this reason, we will evaluate a citation history or other evidence of the impact of the petitioner's articles when determining their significance to the field. For example, numerous independent citations for an article authored by the petitioner would provide solid evidence that other scientists have been influenced by his work and are familiar with it. On the other hand, few or no citations of an article authored by the petitioner may indicate that his work has gone largely unnoticed by his field. On motion, the petitioner submitted a United States Patent Application filed by [REDACTED] that cites to one of the petitioner's German patents. This single citation is not sufficient to demonstrate that the petitioner's work has attracted a level of interest in his field consistent with sustained national or international acclaim.

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

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

At issue for this criterion are the position the petitioner was selected to fill and the reputation of the entity that selected him. In other words, the position must be of such significance that the alien's selection to fill the position, in and of itself, is indicative of or consistent with national or international acclaim.

⁴ For "Biological Scientists," the Department of Labor's Occupational Outlook Handbook, 2008-2009 (accessed at <http://www.bls.gov/oco/>), states that a "solid record of published research is essential in obtaining a permanent position involving basic research." See <http://data.bls.gov/cgi-bin/print.pl/oco/ocos047.htm>, accessed on October 8, 2009, copy incorporated into the record of proceeding. This information reinforces USCIS' position that publication of scholarly articles is not automatically evidence of sustained national or international acclaim; we must consider the research community's reaction to those articles.

In a December 9, 2009 letter accompanying the petition, the petitioner asserts that his listing in the Young Inventors International "Hall of Fame" demonstrates that he performed in a leading or critical role for the organization. The record, however, does not include evidence demonstrating that Young Inventors International has a distinguished reputation. Further, there is no evidence showing that the petitioner's role for this organization was leading or critical. For example, the record does not include a letter of support originating from Young Inventors International discussing the nature of the petitioner's role and his importance to the organization's operations. The documentation submitted by the petitioner does not establish that he was responsible for the success or standing of this organization to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim. Accordingly, the petitioner has not established that he meets this criterion.

In this case, we concur with the director's finding that the petitioner has failed to demonstrate his receipt of a major internationally recognized award, or that he meets at least three of the criteria that must be satisfied to establish the national or international acclaim necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 204.5(h)(3). The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2).

On appeal, the petitioner states that the "totality of facts, of awards, patents, [and] press reports" are comparable evidence of his extraordinary ability. The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten criteria "do not readily apply to the beneficiary's occupation." The regulatory language precludes the consideration of comparable evidence in this case, as there is no evidence that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). Where an alien is simply unable to meet three of the regulatory criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. Nevertheless, there is no evidence showing that the documentation the petitioner requests reevaluation of as comparable evidence constitutes achievements and recognition consistent with sustained national or international acclaim at the very top of his field.

The director also found that the petitioner had not submitted clear evidence that he would continue to work in his area of expertise in the United States. The regulation at 8 C.F.R. § 204.5(h)(5) requires "clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States." In addressing the petitioner's claims regarding his continuation of work in the United States, the director's August 8, 2008 decision stated:

The initial record indicated that the petitioner is not currently in the United States, and that, at the time of filing, he was a graduate student in Germany. The petitioner did [not] clearly indicate his plans in the United States. The petitioner simply indicated a desire "to realize and

commercialise [*sic*] my inventions in the USA, either in a U.S. company, or in cooperation with U.S. companies, or through licensing or via joint ventures with business partners I will be able to find in the USA." The petitioner did not detail any specific plan to accomplish the commercialization of his invention, and thus did not adequately demonstrate that he would be coming to the United States to continue working in his field of endeavor.

Therefore, the petitioner was requested to provide evidence that he would be coming to the United States to continue work in the area of expertise. The petitioner was advised that such evidence could include letters from prospective employers, evidence of prearranged commitments such as contracts, or a statement detailing plans on how he intends to continue his work in the United States.

In response, the petitioner states the following:

I plan to found a company based on my intellectual property including filed U.S. patent applications, international and German patent applications, and issued German patents. . . . The planed [*sic*] company will also offer consulting services for non-standard solutions of problems in life sciences. The U.S. Government, as well as investors, industrial and academic partners can be interested in these my services.

I plan to start this company primarily based on consulting services as well as on two projects, new sensor systems and new lubricants. Later, additional departments for other projects are planed [*sic*] to be established.

This statement provides a general desire to found a company, which may be involved in development or inventions and/or consulting. However, the petitioner has not provided a business plan or otherwise clarified the specifics of how he intends to start this business. There is nothing to suggest that he has already attracted business partners or investors, and no other evidence to demonstrate the petitioner's ability to start his own business from scratch. It is also not clear whether the petitioner would be primarily involved in the administrative duties of a business, or whether he would still be performing work in the field of biology. The information provided is not sufficiently detailed, and as such is not "clear evidence" that the petitioner is coming to the U.S. to continue work in his area of expertise.

We concur with the director's findings. The petitioner's claims regarding starting a company do not equate to "clear evidence" that he would continue to work in his area of expertise in the United States. For example, while the petitioner claims that he intends to found a company in the United States based on his intellectual property and that this company will then develop and market his inventions, he does not specify the U.S. Government agencies, investors, or industrial and academic partners that are interested in utilizing his services, licensing his patents, or forming a partnership with him. The petitioner's motion and appeal were unaccompanied by clear evidence to overcome the director's findings. Accordingly, we concur with the director's determination that the petitioner has not submitted clear evidence that he will continue to work in his area of expertise in the United States.

Review of the record does not establish that the petitioner has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international level. Further, the petitioner has not submitted clear evidence demonstrating that he will continue to work in his area of expertise in the United States. Therefore, the petitioner has not established eligibility pursuant to sections 203(b)(1)(A)(i) and (ii) of the Act and the petition may not be approved.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.