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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

**PUBLIC COPY**

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 12 2011

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case 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,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO dismissed the petitioner's appeal. The matter is now before the AAO on motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner seeks classification as an "alien of extraordinary ability" in the sciences, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined that the petitioner had not established the requisite extraordinary ability through extensive documentation and sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On motion, counsel argues that the petitioner meets the categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(i), (v), and (vi). For the reasons discussed below, we affirm our prior decision.

## I. 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):
>
> > (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* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.* and 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that an alien demonstrate his or her sustained acclaim and the recognition of his or her achievements in the field. Such acclaim and achievements must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through meeting at least three of the following ten categories of evidence:

> (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
>
> (ii) 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;
>
> (iii) 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;
>
> (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;
>
> (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
>
> (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
>
> (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
>
> (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
>
> (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

> (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *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.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while 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. 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 1119-1120.

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. In reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. *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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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[1] 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) and 8 C.F.R. § 204.5(h)(3)(vi).

## II. Analysis

### *A. Evidentiary Criteria*

This petition, filed on February 19, 2008, seeks to classify the petitioner as an alien with extraordinary ability as a research physicist. The petitioner has submitted evidence pertaining to the following categories of evidence at 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.*

In finding that the petitioner's evidence did not satisfy this criterion, the AAO's appellate decision stated:

> The petitioner claims to meet this criterion based on his receipt of [redacted] The petitioner submitted a copy of a December 20, 2002 letter from [redacted] advising him that the application submitted on his behalf had been approved and that he would be awarded [redacted] to conduct research in Japan under the leadership of your host researcher for a period of 24 consecutive months."
>
> In response to the director's request for evidence (RFE) dated December 2, 2008, the petitioner provided a document from the website of the JSPS describing the organization's history and purpose:
>
> > The [JSPS] . . . is an independent administrative institution, established by way of a national law for the purpose of contributing to the advancement of science in all fields of the natural and social sciences and the humanities. [redacted] plays a pivotal role in the administration of a wide spectrum of Japan's scientific and academic programs. While working within the broad framework of government policies established to promote scientific advancement, [redacted] carries out its programs in a manner flexible to the needs of the participating scientists.
> >
> > [redacted] was founded in 1932 as a non-profit foundation through an endowment granted by [redacted] became a quasi-governmental organization in 1967 under the auspices of [redacted]. Over this 70-year period, [redacted] has worked continuously to develop and implement a far-reaching array of domestic and international scientific programs.

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[2] On motion, the petitioner does not claim to meet or submit evidence relating to the categories of evidence not discussed in this decision.

The petitioner also provided copies of pages from a 2008-2009 brochure from [redacted] In a section entitled [redacted] stated:

> [redacted] administers the [redacted] aimed at forging milestone advances in highly creative, cutting-edge research across the spectrum of the humanities, social sciences and natural sciences. [redacted] serve to foster and secure a top world-class caliber of Japanese researchers, whereas our international exchange programs place strong emphasis on collaborations with partner countries that work to build research hubs of the highest world order.

Page 19 of the brochure indicates that the "JSPS carries out programs to invite researchers for other countries to Japan" and that the programs "are open to all eligible researchers irrespective of their nationally or specialization." Page 28 of the brochure indicates that the program for [redacted] "allows researchers affiliated with Japanese universities or research institutes to invite promising young researchers from overseas to Japan to participate in collaborative research activities at their institutions for 1-2 years. The fellowship includes a travel grant and monthly stipend." At the request of the director, the petitioner also provided information regarding the selection process for applicants for the fellowship program, which he indicated was taken from the [redacted] website. According to the petitioner, selection is done by committee comprised of 47 members and approximately 1,700 examiners and involves a document review followed by a panel review. The document review is based on a grading system of 1 to 5, with 5 being "superlative," and "tak[es] into account research achievements, the research plan, estimated research capacity, and future potential of the research."

In denying the petition, the director stated:

> [T]he evidence submitted fails to establish that this fellowship satisfies this criterion. Most notably, the petition has failed to provide specific evidence to establish the actual eligibility requirements to compete for the [redacted]. In any instance, the evidence submitted indicates the program was established to assist promising and highly qualified young foreign researches [sic] wishing to conduct research in Japan. It is readily apparent that this award is designed for young postdoctoral researchers. The Service finds that this award is limited in scope as more established and experienced researchers do not compete for such awards.

On appeal, counsel states that "nothing in the [redacted] criteria for Post-Doctoral Fellowship relates to age or youth." Referencing the [redacted] counsel further states that applicants for the year 2010 "must have received their doctorate within the past six years" and that, based on a Canadian study, "all students from a doctorate program graduating from a Canadian university in 2004-2005, the average age was 36 years." Counsel thus opines that "a [redacted] might be given to a scientist six years after their PhD is awarded might be well into their 40s." The petitioner submits a February 26, 2009 letter

from [redacted] in which he states, [redacted] offers a fellowship program for foreign post-doc researchers who have received a doctorate degree within the past 6 years."

We note that while the [redacted] does not specify an age limit in its selection process, its brochure provides, at page 28, that [redacted] "allows researchers affiliated with Japanese universities or research institutes to invite promising young researchers from overseas to Japan to participate in collaborative research activities." [Emphasis added.]

"Young" in this context therefore limits those who are eligible to apply for the [redacted] to those who have obtained a doctorate degree within the six years prior to applying for the fellowship. Thus it excludes from consideration other experienced experts in the field. Honors limited by their terms to a specified group are not an indication that the recipient "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's receipt of the [redacted] offers no meaningful comparison between him and more experienced professionals in the field who have long since completed their educational training. Thus, they cannot establish that the petitioner is one of the very few at the top of his field.

Furthermore, the petitioner has not established that [redacted] for [redacted] is a nationally or internationally recognized award for excellence in the petitioner's field of endeavor. That the fellowship is sponsored in part by the Japanese government or that it selects from an international pool is not sufficient, by itself, to establish that the award is recognized as an award of excellence, either nationally or internationally. The plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the 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 showing that the [redacted] commanded a significant level of recognition beyond the context of the process in which it was awarded.

On motion, counsel repeats his earlier arguments made on appeal that "nothing in the [redacted] criteria for [redacted] explicitly is tied down to age or youth; instead it relates only to a scientist's progression and period of time after the receipt of a doctorate in their field of expertise. One must have received their doctorate within the past six years." We do not contest counsel's statements regarding this issue. It remains, however, that those who were eligible to apply for the [redacted] were limited to those who had obtained a doctorate degree within the six-year period preceding their application for the fellowship. Thus, as noted in the AAO's appellate decision, the fellowship excluded from consideration experienced scientists in the field who had long since received their doctorates beyond imposed the six-year limitation.

Counsel states that the March 3, 2009 from [redacted] was not considered or addressed by the AAO in its appellate decision. We

note that the petitioner's appellate decision included two letters from [redacted] dated February 26, 2009 and March 3, 2009. The AAO's appellate decision specifically quoted [redacted] February 26, 2009 letter, which states:

> [redacted] budget for the 2008 fiscal year totals 240.6 billion yen. . . . [W]e are the leading funding agency in Japan.
>
> [redacted] offers a fellowship program for foreign post-doc researchers who have received a doctorate degree within the past 6 years. We do not consider whether they have a full-time position in their home country at the point of application. The applicants have to submit a proposal of their research. The selection is based on the applicant's academic record and the expected impact of the research proposal. [The petitioner] was one of successful fellows selected for the FY2003 fellowship. The selection is highly competitive, e.g., the ratio of successful applicants for that time was 16.8%. He had conducted his research from April 2003 to March 2005 at the National Institute of Advanced Industrial Science and Technology (AIST) in Japan. His research subject was "[redacted]

We cannot ignore [redacted] comment that "selection is based on the applicant's *academic record* and the *expected impact of the research proposal*" [emphasis added] rather than demonstrated excellence in the field of endeavor.

In his subsequent March 3, 2009 letter [redacted] states:

> The [redacted] is an internationally recognized award. It is not based on age and clearly, [redacted] has granted this award to recipients who have excelled in their respective fields. In the scientific fields, experience is important, but longevity in a field does not qualify a person for this award. Past recipients actually include those who are already assistant professors in major universities. [redacted] does not discourage candidates who are at a certain age. The only limit in timing is that the candidate must have received their doctorate in their field within the past six years. This is not a question of their age at all.
>
> Further, it is not uncommon that one receives their doctorate in their field well into their 30s. It is incorrect to assume that this award prefers those who are younger. In this case, [the petitioner] received the [redacted] based on a convincing record of his academic and research achievements, and the project proposal he had submitted in the field of spintronics. Our selection of him in 2003 was based on the excellence and recognition he had already achieved internationally at that time. His award of a [redacted] confirms his achievements in the field.

The petitioner's appellate submission also included a February 25, 2009 letter from [redacted]

> [The petitioner] received an award from [redacted] to carry out research in the area of spintronics in our institute. [redacted] which was originally established in 1932 as a non-profit foundation through an endowment granted by Emperor Showa, has become an independent Japanese organization with an annual grant of several hundred billion yen and is highly esteemed world wide. The [redacted] award to carry out research is given only to a very small fraction of the scientists worldwide, and [the petitioner] was selected because of his outstanding academic credentials and the research proposal that he submitted.

According to his submitted curriculum vitae, the petitioner began working at [redacted] in July 2002. As discussed in the AAO's appellate decision, the petitioner initially submitted a copy of a December 20, 2002 letter from the [redacted] addressed to him stating:

> I am pleased to inform you that [redacted] has decided to approve the application of Director [redacted] and to award you a fellowship under the [redacted]" to conduct research in Japan under the under the leadership of your host researcher for a period of 24 consecutive months.

The 2008-2009 [redacted] brochure submitted in response to the director's request for evidence states that a total of "1,818 fellows" received [redacted] in FY2007.

The petitioner's motion includes information about [redacted] According to the submitted documentation, the Fields Medal is awarded every four years to a candidate under age forty "to recognize outstanding mathematic achievement for existing work." The John Bates Clark medal is awarded biennially to an American economist under the age of forty who is judged to have made "the most significant contribution to economic thought and knowledge." The AAO agrees with counsel that these two medals restricted to scholars under age forty equate to internationally recognized awards for excellence in mathematics and economics. However, unlike the petitioner's [redacted], which is awarded to hundreds of researchers on an annual basis, the Fields Medal is awarded to only a single recipient every four years and the John Bates Clark medal is awarded to only a single recipient every two years. Moreover, in contrast to the petitioner's [redacted] the preceding medals recognize "achievement for existing work" and "the most significant contribution" in their respective fields. The petitioner's [redacted] however, is based on the "expected impact of the research proposal" rather than proven excellence in the field of endeavor.

The petitioner's [redacted] constitutes his selection to participate in advanced research training under the guidance of an experienced researcher rather than his receipt of a nationally or internationally recognized prize or award for excellence in the field. Selection for this subordinate research position is based on the applicant's academic record and the "expected impact" of his research proposal and is not indicative of past excellence in the field of endeavor. The petitioner's two-year [redacted] reflects a temporary training opportunity at [redacted]

designed to facilitate collaborative research activities, not a nationally or internationally recognized prize or award in the field of endeavor. In this instance, the [redacted] approved the application submitted by Director [redacted] and funded the petitioner's postdoctoral appointment at that institution. Every successful scientist engaged in research, of which there are hundreds of thousands, receives funding from somewhere. Obviously, the academic qualifications of the petitioner were a factor in the funding of his [redacted]. The [redacted] has to be assured that the hundreds of researchers who receive its annual funding are capable of performing the proposed research. Nevertheless, the petitioner's [redacted] was principally designed to fund his future participation in collaborative research activities at [redacted], and not to recognize his past excellence in the research field. Moreover, as noted in the AAO's appellate decision, the plain language of the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the 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 showing that the petitioner's [redacted] had a significant level of recognition beyond the context of the process in which it was awarded. Finally, even if the petitioner were to establish that his [redacted] equates to a nationally or internationally recognized prize or award for excellence in the field, which he has not, the statute requires the submission of "extensive documentation." Section 203(b)(1)(A)(i) of the Act; 8 U.S.C. § 1153(b)(1)(A)(i). Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires the alien's receipt of "nationally or internationally recognized *prizes* or *awards*" in the plural. [Emphasis added.] One such award does not meet the plain language requirements of this criterion.

In light of the above, we reaffirm our appellate finding that the petitioner does not meet 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.*

On motion, counsel does not challenge the AAO's determination that the petitioner has not established that he meets this criterion and we reaffirm our appellate findings.

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

The petitioner submitted documentation indicating that, with co-inventors, he has applied for two patents, one internationally and one in the United States, for an invention entitled [redacted] Although counsel initially alleged that the international patent had been approved, in response to the RFE, he acknowledged that both patents are still pending. Even if the petitioner were to establish that his devices received a patent, 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 instance, there is no documentary evidence of specific examples where these devices have been licensed, commercialized, or successfully marketed in the data storage industry as of the petition's filing date. Thus, the impact of the petitioner's invention is not documented in the record. Accordingly, the petitioner has not established that the preceding invention equates to an original scientific contribution of major significance in the field.

In finding that the petitioner's evidence did not satisfy this criterion, the AAO's appellate decision stated:

> The petitioner . . . submitted several letters of reference commenting on the significance of his work in spintronics.
>
> * * *
>
> While the petitioner'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. 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 to the field as a whole. The petitioner's field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in 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 it is clear from the petitioner's references that he has been involved in novel research and is one of the pioneers in spintronics, they do not indicate that the petitioner's advances in this area constitute a contribution of major significance to his field.
>
> * * *
>
> The ten regulatory criteria at 8 C.F.R. § 204.5(h)(3) reflect the statutory demand for "extensive documentation" in section 203(b)(1)(A)(i) of the Act. Opinions from witnesses whom the petitioner has selected do not represent extensive documentation. Independent evidence that already existed prior to the preparation of the visa petition package carries greater weight than new materials prepared especially for submission with the petition. The petitioner's references indicate that his work has been significant. However, the regulation requires the petitioner to establish that his work has been of major significance to his field of endeavor.

On motion, the petitioner submits additional reference letters discussing his research contributions. [redacted] and [redacted] states:

> In 2005, [the petitioner] discovered a novel effect called the spin-torque diode effect, which was published in *Nature* magazine. The contents and discovery behind a *Nature* publication typically constitute a major scientific breakthrough. The *Nature* scientific board reviews all major discoveries among all science fields, including physics, chemistry, biology etc., and chooses only the most important ones for a given issue.
>
> Of all science journals, *Nature* has the highest impact factor, meaning that work published there is highly cited by other researchers. [The petitioner's] paper in *Nature* has received more than 100 citations, attesting to the powerful impact of his work. As an expert in the field of spintronics, I fully endorse [the petitioner's] work as a major, original achievement in this field.

The petitioner's motion includes supporting evidence from [redacted] showing that his research regarding the [redacted] effect in magnetic tunnel junctions" published in [redacted] states:

> [The petitioner's] work in spintronics is quite well known. His papers on [redacted] imaging of magnetization switching" published in [redacted] *Letters* have significantly impacted our field. His pioneering work on the spin-torque diode effect has proven to be an extremely useful technique for understanding the nature of the spin torque phenomenon, and has been followed up by many groups worldwide.

The petitioner's research regarding "X-ray imaging of magnetization switching" was not published in [redacted][3] Thus, the article post-dates the petition's February 19, 2008 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. 45, 49 (Regl. Commr. 1971). Accordingly, the AAO will not consider the petitioner's June 2008 article published [redacted] in this proceeding. All of the case law on the issue of when eligibility must be established focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak*, 14 I&N Dec. at 49; *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.") Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008). Nevertheless, there is no citation evidence showing that the petitioner's article in *Physical Review Letters* is frequently cited by independent researchers in the same manner as his *Nature* article.

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[3] *See* http://prl.aps.org/abstract/PRL/v100/i24/e247201, accessed on December 15, 2010, copy incorporated into the record of proceeding.

The number of independent citations (107) to the petitioner's research in *Nature* regarding [redacted] in magnetic tunnel junctions" and the statements from the preceding experts are sufficient to demonstrate that his discovery of this novel effect constitutes an original scientific contribution of major significance in the field. However, there is no documentary evidence demonstrating that any of the petitioner's other scientific discoveries qualified as contributions of major significance in the field at the time of filing. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "*contributions* of major significance" in the plural. [Emphasis added]. Qualifying evidence limited to a single original contribution of major significance in the field as of the petition's filing date does not satisfy the plain language requirements of the regulation. Without documentary evidence of more than one qualifying contribution of major significance in the field as of the filing date of the petition, the petitioner has not established that he meets the requirements of this criterion.

The preceding reference letters are not without weight and have been considered above. 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). USCIS 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; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of the experts' 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 that one would expect of a research physicist who has made original contributions of "major significance." Without supporting evidence showing that any of the petitioner's other research advancements in addition [redacted] qualified as original contributions of major significance in his field as of the filing date of the petition, we cannot conclude that he meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(v).

In light of the above, we reaffirm our appellate finding that the petitioner has not met all of the elements of this criterion as of the filing date of the petition.

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

The petitioner has documented his authorship of scholarly articles in professional journals and, thus, has submitted qualifying evidence pursuant to 8 C.F.R. § 204.5(h)(3)(vi). Accordingly, the petitioner has established that he meets this criterion.

*Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.*

In finding that the petitioner's evidence did not satisfy this criterion, the AAO's appellate decision stated:

> The petitioner initially claimed to meet this criterion based on his presentations "at international conferences." In his RFE, the director advised the petitioner that this criterion pertained to the visual arts. The petitioner did not challenge this finding either in response to the RFE or on appeal.
>
> In this case, the petitioner's field is not in the arts. The plain language of this criterion indicates that it applies to visual artists (such as sculptors and painters) rather than to scientists such as the petitioner. The ten criteria in the regulations are designed to cover different areas and not every criterion will apply to every occupation.

On motion, counsel does not challenge the AAO's determination that the petitioner has not established that he meets this criterion and we reaffirm our appellate findings.

*Summary*

In this case, we affirm our prior decision that the petitioner has failed to demonstrate his receipt of a major, internationally recognized award, or that he meets at least three of the ten categories of evidence that must be satisfied to establish the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 204.5(h)(3). A final merits determination that considers all of the evidence follows.

***B. Final Merits Determination***

In accordance with the *Kazarian* opinion, we must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) 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 (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." Section 203(b)(1)(A) of the Act; 8 C.F.R. § 204.5(h)(3). *See also Kazarian*, 596 F.3d at 1119-1120. In the present matter, several of the deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. §§ 204.5(h)(3)(i), (v), and (vii).

With regard to the petitioner's [redacted] submitted for 8 C.F.R. § 204.5(h)(3)(i), we note that this fellowship is annually received by hundreds of applicants. For example, the evidence submitted by the petitioner indicates that "1,818 fellows" received [redacted]. Further, [redacted]'s February 26, 2009 letter stated that the ratio of successful applicants for the FY2003 [redacted] was 16.8%. Moreover, page 28 of the 2008-2009 [redacted] indicates that the program for [redacted] is intended for "promising young researchers." Page 28 also mentions the existence of the [redacted] which is far above the petitioner's level of achievement. In this case, the submitted documentation does not establish that the petitioner's [redacted] for "promising young researchers" is an indication that he "is one of that small percentage who have risen to the very top of the field of endeavor." *See* 8 C.F.R. § 204.5(h)(2). USCIS has long held that even athletes performing at the major league

level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899.[4] Likewise, it does not follow that selection for [redacted] limited to recent doctoral graduates in the early stage of their career who submit promising research proposals should necessarily qualify for an extraordinary ability employment-based immigrant visa. 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 that have risen to the very top of their field of endeavor."

Ultimately, the evidence in the aggregate does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. The petitioner, a research associate, relies primarily on his selection for a [redacted] his co-discovery of [redacted] with his superiors at [redacted], his publication record, and the praise of his colleagues. While the petitioner need not demonstrate that there is no one more accomplished than himself to qualify for the classification sought, it appears that the very top of his field of endeavor is above the level he has attained. In this case, the petitioner has not established that his achievements at the time of filing were commensurate with sustained national or international acclaim as a research physicist, or being among that small percentage at the very top of the field of endeavor.

## III. Conclusion

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 and 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. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

An application or petition 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 at 1043, *aff'd*, 345 F.3d at 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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[4] While we acknowledge that a district court's decision is not binding precedent, we note that in *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated:

> [T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

Although the present case arose within the jurisdiction of another federal judicial district and circuit, the court's reasoning indicates that USCIS' interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable.

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 AAO's November 4, 2009 decision dismissing the appeal is affirmed. The petition will remain denied.