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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
and Immigration
Services

B2

[Redacted]

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **AUG 13 2010**

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:

[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 \$585. 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

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DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on August 21, 2009, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary 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 as a senior vice-president. The director determined that the petitioner had not established the beneficiary's requisite extraordinary ability and failed to submit extensive documentation of his 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 beneficiary's "sustained national or international acclaim" and present "extensive documentation" of his or her 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, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific 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.

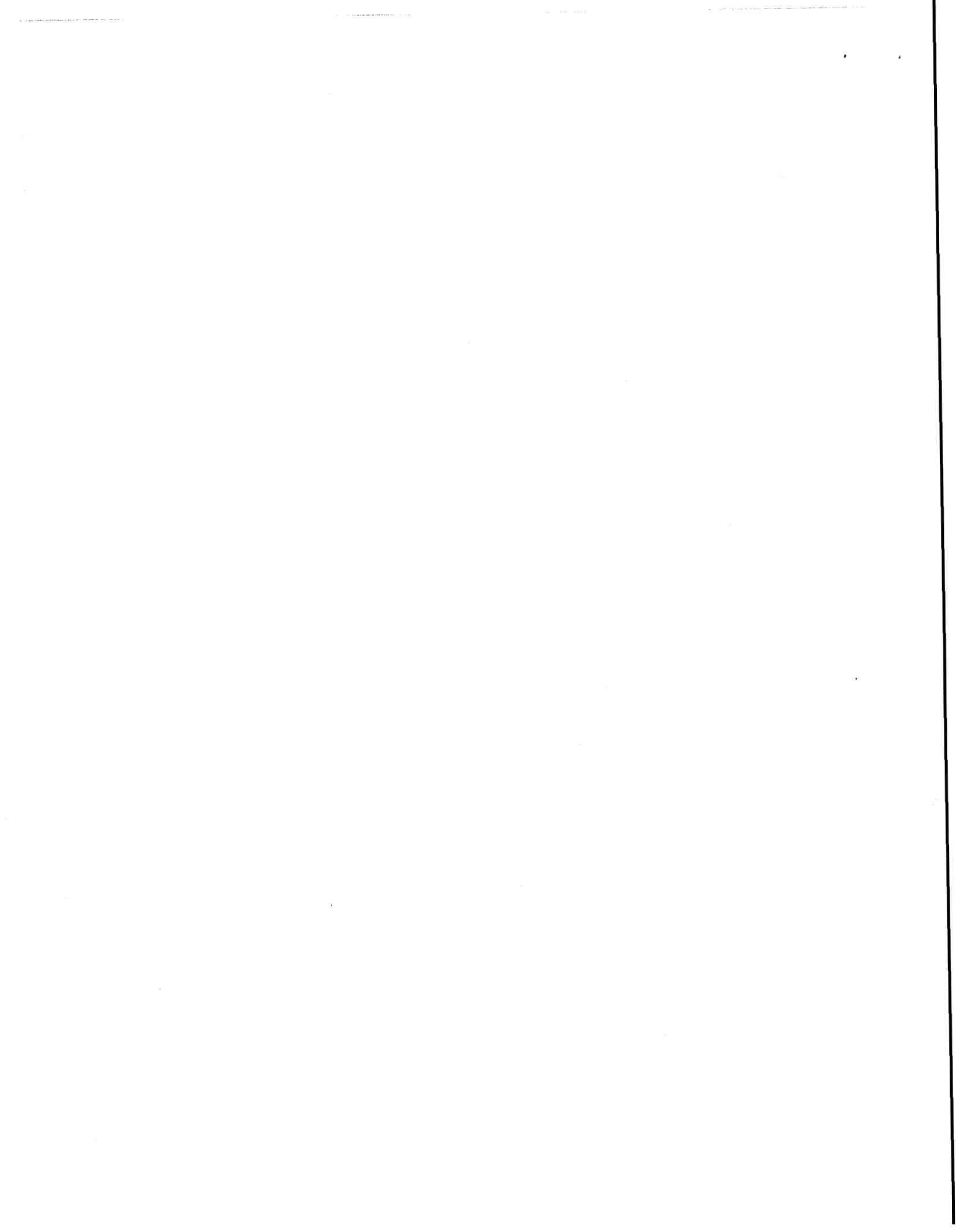
On appeal, counsel claims that the beneficiary meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

I. Request for Evidence

In addition, counsel argues that the director erred in denying the petition without first issuing a request for evidence (RFE). The regulation at 8 C.F.R. § 103.2(b)(8) provides in pertinent part:

(ii) Initial evidence. If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

(iii) Other evidence. If all required initial evidence has been submitted but the evidence submitted does not establish eligibility, USCIS may: deny the application or petition for ineligibility; request more information or evidence from the applicant or petitioner, to be submitted within a specified period of time as determined by USCIS; or notify the applicant or petitioner of its intent to deny the application or petition and the basis for the proposed denial, and require that the applicant or petitioner submit a response within a specified period of time as determined by USCIS.



A review of the record reflects that the director adjudicated the petition based on the evidence submitted at the time the petition was filed. The director did not deny the petition because initial evidence was missing; rather the submitted evidence failed to establish eligibility for the benefit. We find that in denying the petition, the director complied with the regulation at 8 C.F.R. §§ 103.2(b)(8)(ii) and (iii). Furthermore, the regulation at 8 C.F.R. §§ 103.2(b)(8)(ii) and (iii) provides for discretionary authority to request additional evidence, provide notice of the director's intent to deny the application or petition, or deny the petition or application. In this case, the director exercised his discretionary authority and denied the petition based on the evidence submitted by the petitioner not establishing eligibility for the benefit. For these reasons, we are not persuaded by counsel's argument that the director erred in his decision regarding this matter.

II. 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 --

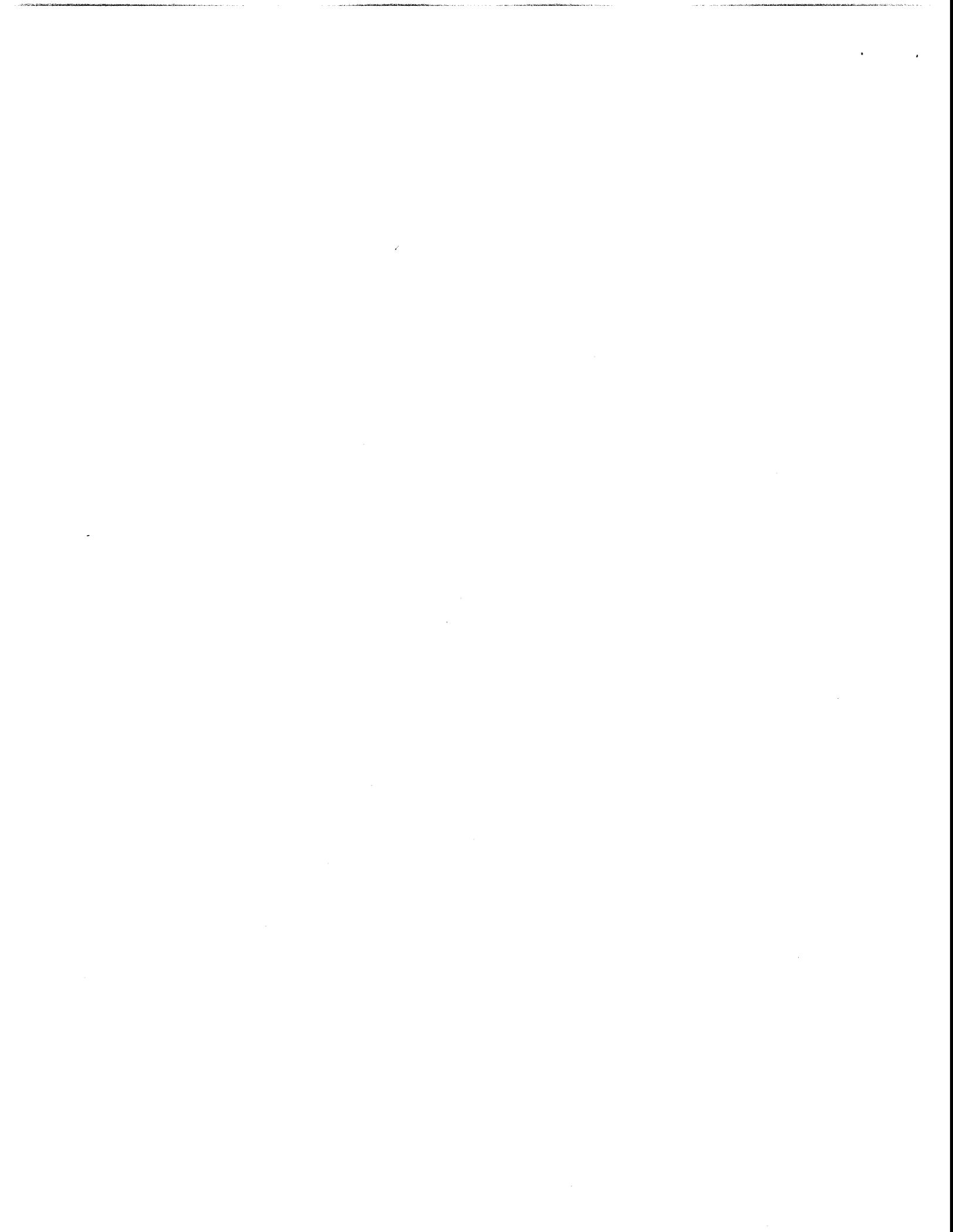
(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(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 the petitioner demonstrate the beneficiary's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international



recognized award) or through the submission of qualifying evidence under 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

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).



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.*

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.

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).

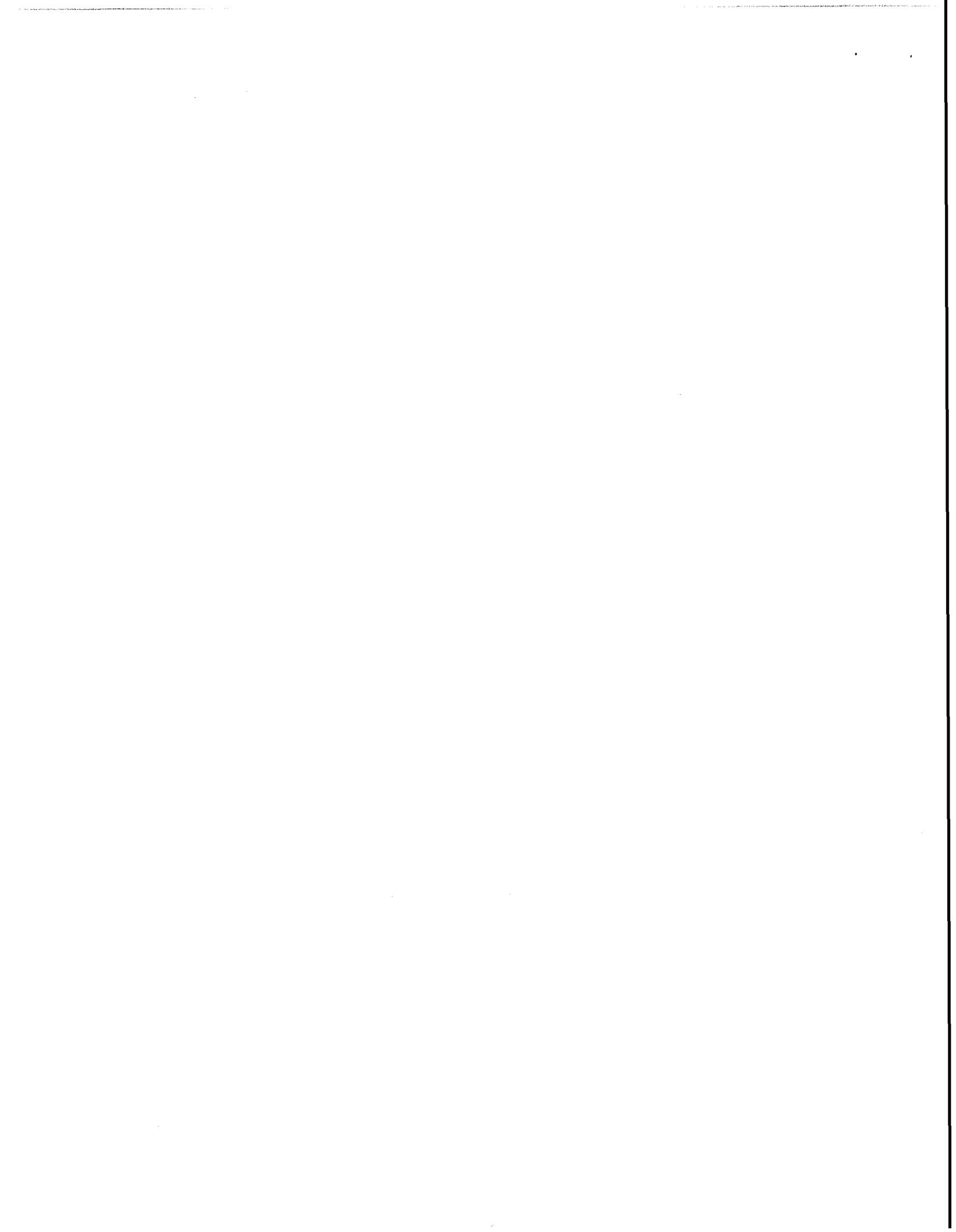
III. Analysis

A. Evidentiary Criteria

This petition, filed on August 12, 2009, seeks to classify the beneficiary as an alien with extraordinary ability as a senior vice-president. 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.

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



At the time of the original filing of the petition, the petitioner claimed the beneficiary's eligibility for this criterion based on the following submitted documentation:

1. A document certifying that the beneficiary was elected on February 5, 2008, as a fellow by the Board of the Society of Operations Engineers (SOE) IPlantE;
2. A document reflecting that the beneficiary was awarded a fellowship in Engineering Construction Site Management from the Engineering Construction Industry Training Board (ECITB) on November 15, 2001; and
3. A Certificate of Completion for the beneficiary for The President's Leadership Excellence Program by Halliburton on October 16, 2006.

Counsel claimed at the time of the original filing of the petition:

SOE IPlantE Fellowship class is awarded to senior engineers with a high level of academic achievement or many years of training, coupled with extensive experience; making contributions to engineering and to the aims of the Society. Awarded to [the beneficiary] on February 28, 2008.³

Fellowship in Engineering Construction Site Management awarded to [the beneficiary] on November 15, 2001 by the [ECITB], which is dedicated in ensuring that there are sufficient, well trained and qualified people both entering the vital engineering construction industry and being retained within the sector to maintain its competitiveness [sic].

However, counsel failed to submit any documentary evidence supporting his claims. As such, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1,3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires "[d]ocumentation of the alien's receipt of lesser *nationally or internationally recognized prizes or awards for excellence* in the field of endeavor [emphasis added]." While the petitioner submitted documentation evidencing the beneficiary's receipt of these items, the petitioner, however, failed to submit any documentation demonstrating these items are tantamount to nationally or internationally recognized prizes or awards for excellence. In other words, the petitioner failed to establish that the beneficiary's documents are recognized national or international awards beyond the awarding entities.

³ According to the document submitted by the petitioner, the beneficiary received the fellow on February 5, 2008, rather than February 28, 2008, as claimed by counsel.



We note that academic study is not a field of endeavor, but training for a future field of endeavor. Similarly, fellowships cannot be considered nationally or internationally recognized prizes or awards in the beneficiary's field of endeavor. The petitioner failed to submit any documentation regarding any of the beneficiary's fellowships to demonstrate recognition beyond the presenting organizations to establish that they are nationally or internationally recognized awards or prizes. In this case, the petitioner failed to establish that the beneficiary's fellowships or his completion of a Halliburton course equate to lesser nationally or internationally recognized prizes or awards for excellence in his field of endeavor.

In the director's decision, he found that the documentation submitted by the petitioner failed to establish the beneficiary's eligibility for this criterion. On appeal, the petitioner did not address this criterion or contest the decision of the director. Therefore, we will not further discuss the beneficiary's eligibility for this criterion on appeal.

Accordingly, the petitioner failed to establish that the beneficiary 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.

At the time of the original filing of the petition, the petitioner claimed the beneficiary's eligibility for this criterion based on the beneficiary's membership with the Institution of Plant Engineers (IPE) and the Association for Project Management (APM). At that time, counsel claimed:

Full membership at the [IPE] which requires a balance of academic qualifications or training, coupled with extensive experience, the [IPE] was founded in 1946 and is the Professional Sector for engineers and technicians involved in the specification, installation, operation and maintenance of industrial plant and services.

Full membership at the [APM] which requires at least five year relevant project management experience, including project and budgetary responsibility, as well as technical understanding.

APM's mission is to develop and promote the professional disciplines of project and programme management for the public benefit. APM is the largest independent professional body of its kind in Europe. APM has over 16,500 individual and 500 corporate members throughout the UK and abroad.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires "[d]ocumentation of the alien's membership in associations in the field for which is 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.

While the petitioner submitted two documents reflecting the beneficiary's membership with IPE and APM, the petitioner failed to submit any documentary evidence demonstrating that membership with IPE and APM requires outstanding achievements of their members as judged by recognized national or international experts to support counsel's claims. Without documentary evidence to support the claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

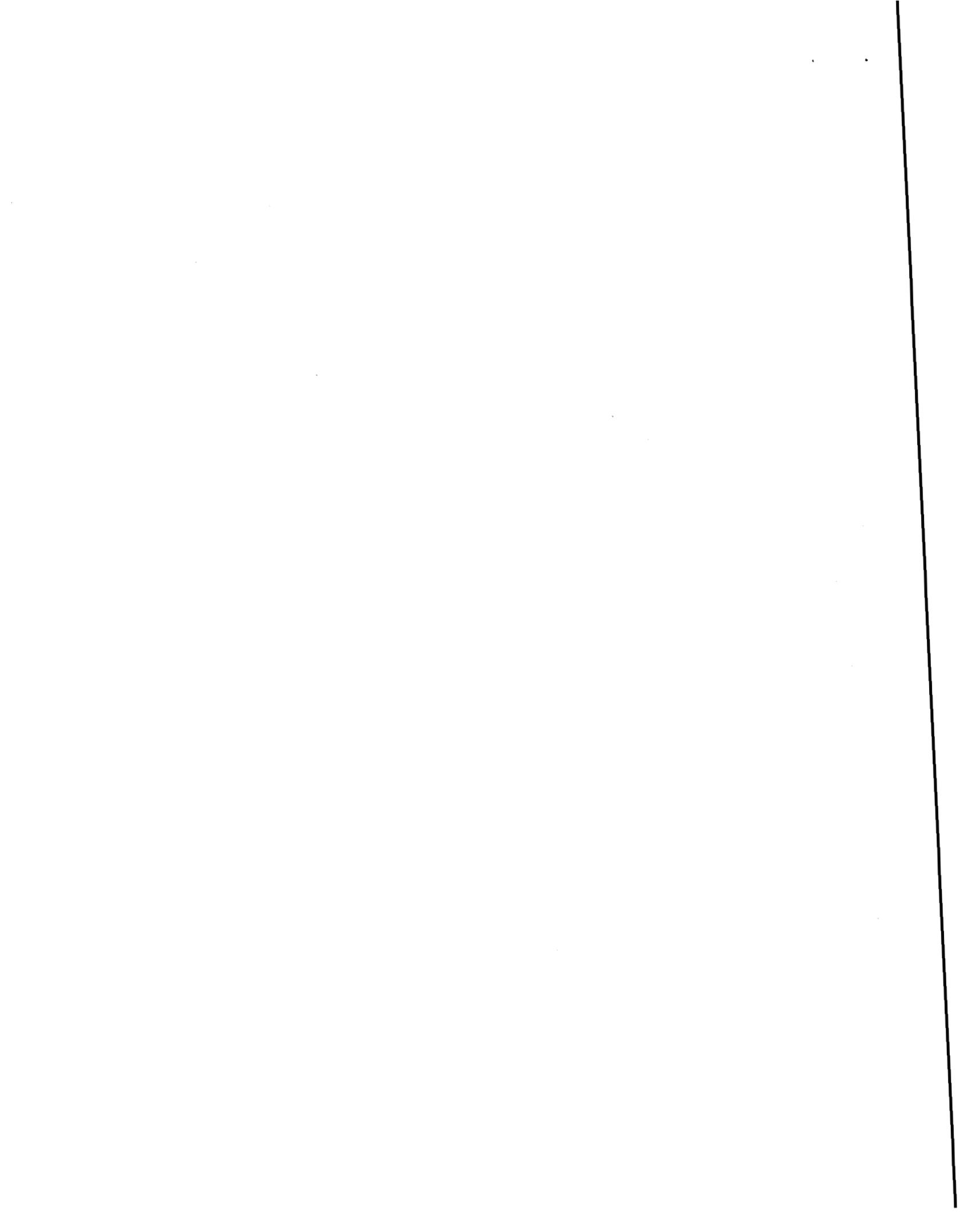
On appeal, counsel did not submit any documentation regarding IPE or APM. Instead, counsel claimed the beneficiary's eligibility for this criterion based on his membership with Construction Labour Relations (CLR). Counsel submitted documentation of CLR's meeting minutes reflecting that the beneficiary was nominated as a board member and vice-chairman. In addition, counsel submitted two letters from R. Neil Tidsbury, President of CLR, who stated:

The [CLR], for 28 years, has represented the main employers within the construction industry in all aspects of labor relations. It comprises some twenty (20) employers in Canada and supports a 40,000 strong unionized workforce and over one hundred twenty (120) employers. Its focus is on administration of labor relations and employee legislation across the unionized construction industry in Alberta, Canada.

* * *

CLR is an employers' organization, and is mandated by way of Alberta Labour Relations Board "registration" orders to exclusively represent employers in collective bargaining and collective agreement administration in respect to sixteen province wide trade jurisdictions. We are very diligent in fulfilling our statutory obligations, including the nomination and election of individuals who direct and carry out these functions on behalf of construction companies that collectively perform about 60 million hours of construction and contract maintenance annually.

Among the criteria by which the Nominating Committee selects individuals to recommend to our annual general meeting for officer and director positions are:



- Demonstrated ability to assess the disparate interests and manage the interface with leading industry stakeholders (Government/Union/Contractor);
- Intimate familiarity with the complex public policy framework within which we operate, development of strategic CLR policy to be consistent with public policy, and assessment of suggested adjustments to the public policy framework;
- Recognized leadership within the industry, provincially and globally;
- Extensive experience as the directing mind and strategic decision maker of their respective contracting organization;
- Ready acknowledgement throughout the Alberta construction industry as a figurehead, one who's [sic] counsel is frequently sought by peers and others;
- Extensive knowledge of economics and finance, capacity to analyze the impact on business and the economy of various collective bargaining outcomes; [and]
- Strength in rallying consensus among highly varied interest groups, facilitation of the coordination of collective bargaining processes and results across diverse stakeholders across an industry with a Major Projects Inventory that includes in excess of 1,000 major projects valued in excess of \$230 Billion.

Although Mr. [REDACTED] indicated the nominating criteria for officer and director positions within CLR, the letters fail to reflect the initial membership requirements for CLR to establish that membership with CLR requires outstanding achievements of its members, as judged by recognized national or international experts. Notwithstanding, while CLR provides criteria for electing and nominating internal positions, we are not persuaded that those requirements demonstrate outstanding achievements its members. Rather, the criteria reflect experience and knowledge than outstanding achievements. Furthermore, the petitioner failed to submit any documentary evidence reflecting that the "Nominating Committee," cited by Mr. [REDACTED] above, is comprised of "recognized national or international experts in their disciplines or fields." The documentation submitted by the petitioner for the beneficiary's membership with IPE, APM, and CLR is insufficient to make a favorable finding under the regulation at 8 C.F.R. § 204.5(h)(3)(ii).

Accordingly, the petitioner failed to establish that the beneficiary 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.



At the time of the filing of the original petition, the petitioner claimed the beneficiary's eligibility for this criterion based on the article entitled, *KBR's Brand Holds Up*, April 2008, by [REDACTED] in Exploration + Processing.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires “[p]ublished 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.” In other words, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be “about” the petitioner relating to his work. *Compare* 8 C.F.R. § 204.5(i)(3)(i)(C) relating to outstanding researchers or professors pursuant to section 203(b)(1)(B) of the Act, which only requires published material about the alien’s work.

In this case, while the article quotes the beneficiary extensively, the article is not primarily about the beneficiary but about KBR’s accomplishments, reputation, and history. In fact, the entire article only designates two sentences about the beneficiary by briefly describing the beneficiary’s employment background. We are not persuaded that such brief mention meets the plain language of the regulation. Furthermore, the petitioner failed to submit any documentary evidence establishing that Exploration + Processing is a professional or major trade publication or other major media. Finally, even if we considered the article to be qualifying, which we do not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires more than one.

Regardless, the director determined the documentary evidence submitted by the petitioner failed to establish the beneficiary’s eligibility for this criterion. The petitioner did not address or contest the decision of the director for this criterion on appeal. Therefore, we will not further discuss the beneficiary’s eligibility for this criterion on appeal.

Accordingly, the petitioner failed to establish that the beneficiary meets this criterion.

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 specification for which classification is sought.

At the time of the original filing of the petition, counsel claimed the beneficiary’s eligibility by stating:

Proof of supervision of thousands of employees on multimillion dollar projects; proof of supervision of all professionals in the Delayed Coking, Refining and Upstream groups at [the petitioner] (550 employees).

In addition, counsel submitted an organizational chart of the petitioner and referred to a letter from the petitioner. A review of the organizational chart reflects that the beneficiary is the senior vice-president for three departments – delayed coking, refining, and upstream. We note the organizational chart also indicates that the beneficiary is “[r]esponsible for 550 Unit



Employees.” In addition, while the petitioner’s letter provides background information regarding the petitioner and the beneficiary, the letter, however, fails to provide any evidence of the beneficiary’s participation as a judge of the work of others.

On appeal, counsel stated:

As documented above, [the petitioner’s letter]. It was [the petitioner’s] clearly stated intention that [the beneficiary] was targeted for hire for the purpose of leading other engineering and construction professionals across multiple Business Units in [the petitioner] because of his recognized and extraordinary ability in the field. The sustained national and international acclaim that [the beneficiary’s] extraordinary ability is documented in the expert reference letters, the complex multi-million dollar projects he lead and his election as a Director and Vice-Chair of the Executive Committee of the [CLR] Association.

[The beneficiary’s] extensive project work requires that he regularly hire, assemble and direct the work of expert engineering, procurement and construction engineers on multidisciplinary tasks on key multimillion dollar projects.

Counsel also referred to a submitted list of five projects involving the beneficiary, which appears to be compiled by the beneficiary:

1. SEGAS Egypt LNG Project;
2. Shell Canada Downstream Upgrader Expansion Project;
3. North West Upgrading LC Finer Project;
4. North West Upgrading Gasifier Project; and
5. Syncrude Electro Precipitator Project.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires “[e]vidence 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 specification for which classification is sought.” The petitioner relies entirely on self-compiled documentation, such as a letter from the human resources director and organizational chart from the petitioner, and a self-described project list from the beneficiary. Without independent, objective evidence, we are unable to determine if the documentation supports the claims of the petitioner and beneficiary.

Regardless, the documentation submitted by the petitioner fails to reflect that the beneficiary has participated as a judge of the work of others. Even if we would accept the petitioner’s claim that as vice-president the beneficiary is responsible for 550 employees, the petitioner’s position as a vice-president does not necessarily equate to the beneficiary’s participation as the judge of the work of others. Counsel failed to establish that the beneficiary’s routine duties as a vice-president, as well as Vice-Chairman of CLR, which included oversight of his employees’ job responsibilities demonstrate his participation as a judge of the work of others.



Finally, we note that the roles performed by the beneficiary as vice-president and vice-chairman are far more relevant in the leading or critical role criterion at the regulation at 8 C.F.R. § 204.5(h)(3)(viii) and will be discussed later in this decision. The regulatory criteria under the regulation 8 C.F.R. § 204.5(h)(3) are separate and distinct from one another. Because separate criteria exist, USCIS clearly does not view these criteria as being interchangeable. If evidence sufficient to meet one criterion mandated a finding that an alien met another criterion, the requirement that an alien meet at least three criteria would be meaningless.

Accordingly, the petitioner failed to establish that the beneficiary meets this criterion.

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

At the time of the original filing of the petition, counsel claimed the beneficiary's eligibility for this criterion by stating:

[The beneficiary] is directly responsible for securing the following contract awards for his present employer, KBR, and bringing innovative project construction execution strategies and plans to these projects:

- Syncrude ESP Project - \$50MM (August 08);
- NWU LC Finer Project - \$275MM (May 08);
- NWU Gasifier Project - \$225MM (November 07); [and]
- Shell Scotford Upgrader Project - \$500MM (May 07).

On appeal, counsel refers to recommendations letters that were originally submitted at the time of the filing of the petition. We cite representative examples here:

[REDACTED], Construction Director of KBR, stated:

As a well-experienced and extraordinarily accomplished construction engineer and business professional, [the beneficiary's] record of success is one that is set out in a continuum of ever more important achievements. This makes it apparent that he possesses a unique knowledge of the issues and challenges that arise in constructing world scale energy projects and has the singular ability and command of the technology and managerial skills to complete these projects despite the unique challenges presented. His extraordinary ability in the negotiation and management of energy industry construction of the kind of massive scale, labor intensive, long term projects that are part and parcel of assuring a ready supply of energy within the oil, gas and petrochemical industry has led to incredible benefits to U.S. trade and significant levels of new job creation for highly skilled U.S. (and global) workers.



[REDACTED], General Organizer of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, stated:

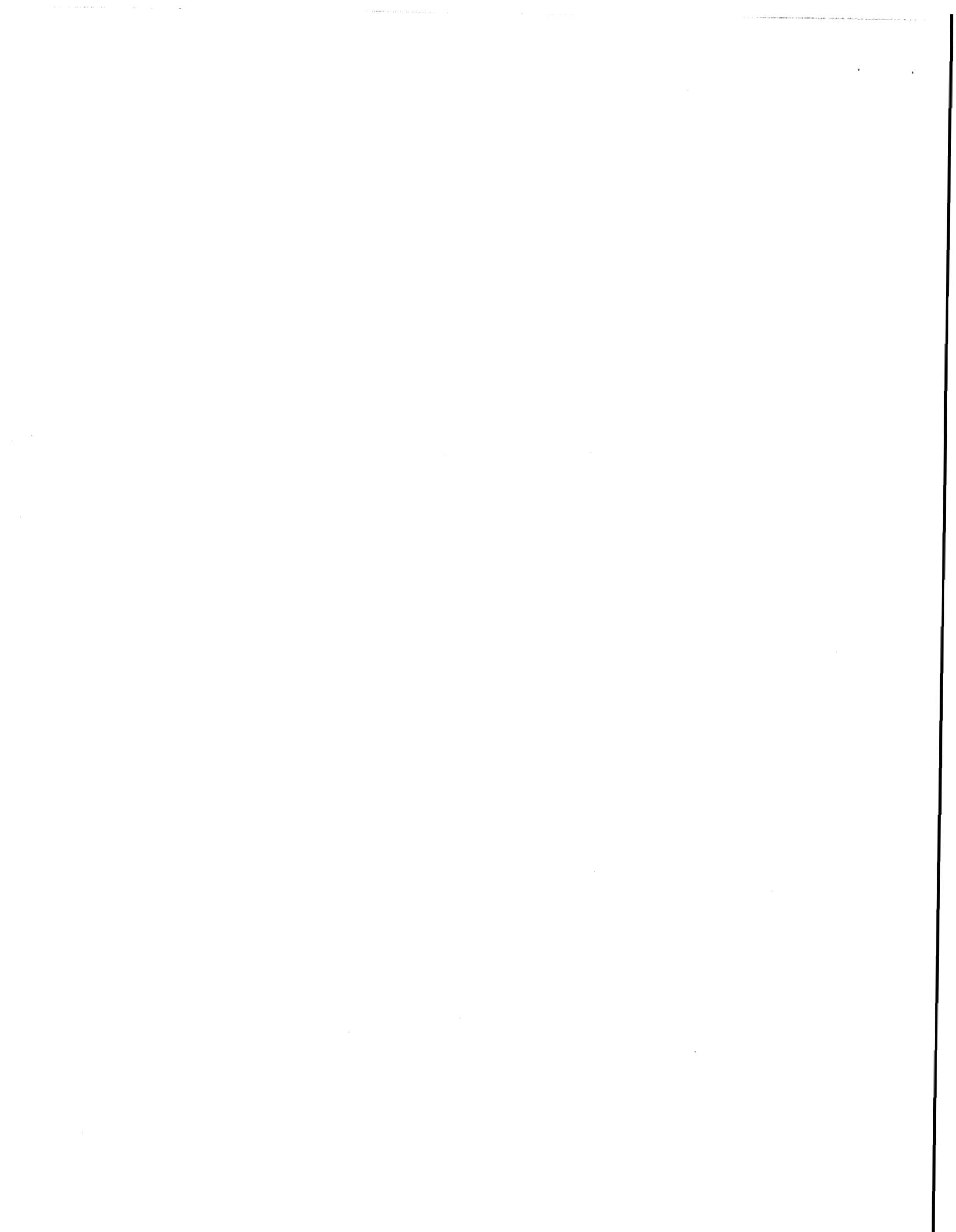
I believe that I am able to assess [the beneficiary's] excellence due to his very visible contributions to developing the Alberta Oil Sands, his drive (and success in the effort) to improve labor relations across the entire unionized workforce in Alberta (of 30,000 skilled workers) and confirm his qualification for the category reserved for an individual of extraordinary ability (in the field of engineering and construction execution and development) who functions in a position that places him at the top of his field. [The petitioner's] well recognized mastery of business and scientific concepts, combined with his innate ability to improve and invent important new techniques has created a compelling reputation for outright excellence in this area, and makes him exceptionally well suited for inclusion in the category reserved for individuals whose work demonstrates their extraordinary ability.

[REDACTED], International Representatives of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths and Forgers Union, stated:

[The beneficiary's] extraordinary engineering and technical ability and intimate knowledge of massive scale project facility construction within the unionized industry sector has placed his U.S. employer as one of the most well known construction companies in the Canadian Oil Sands area, with access to a \$15BN annual market that has created over 1300 jobs for the unionized sector. [The beneficiary's] peers universally applaud his significant, original contributions including the following:

First, as an exceptionally talented individual, who understands the requirements (technology, equipment, logistics, legal, contractual, financial, labor, etc.) to build major construction projects in some cases the size of small cities, [the beneficiary] has developed and implemented (and established systems to maintain and enhance) training programs that have improved the skill base of thousands of professionals who work within the Canadian construction sector, securing highly visible and tremendously successful efforts in that kind of high level training and development ensure that thousands of skilled workers enter the industry and are ready to begin work immediately upon contract award to build the projects that provide our energy way into the future.

Second, [the beneficiary's] unparalleled leadership skills, both as a director of [CLR] of Alberta and as President of KBR Canada (two (2) posts to which he ascended as a result of his reputation and extraordinary ability) have enabled us to bridge the often large cavern of differences in interests, and strengthened the relationships, between unions and employers, to an unheard of level. The tough collective agreement negotiations in 2007 (with which he was intimately



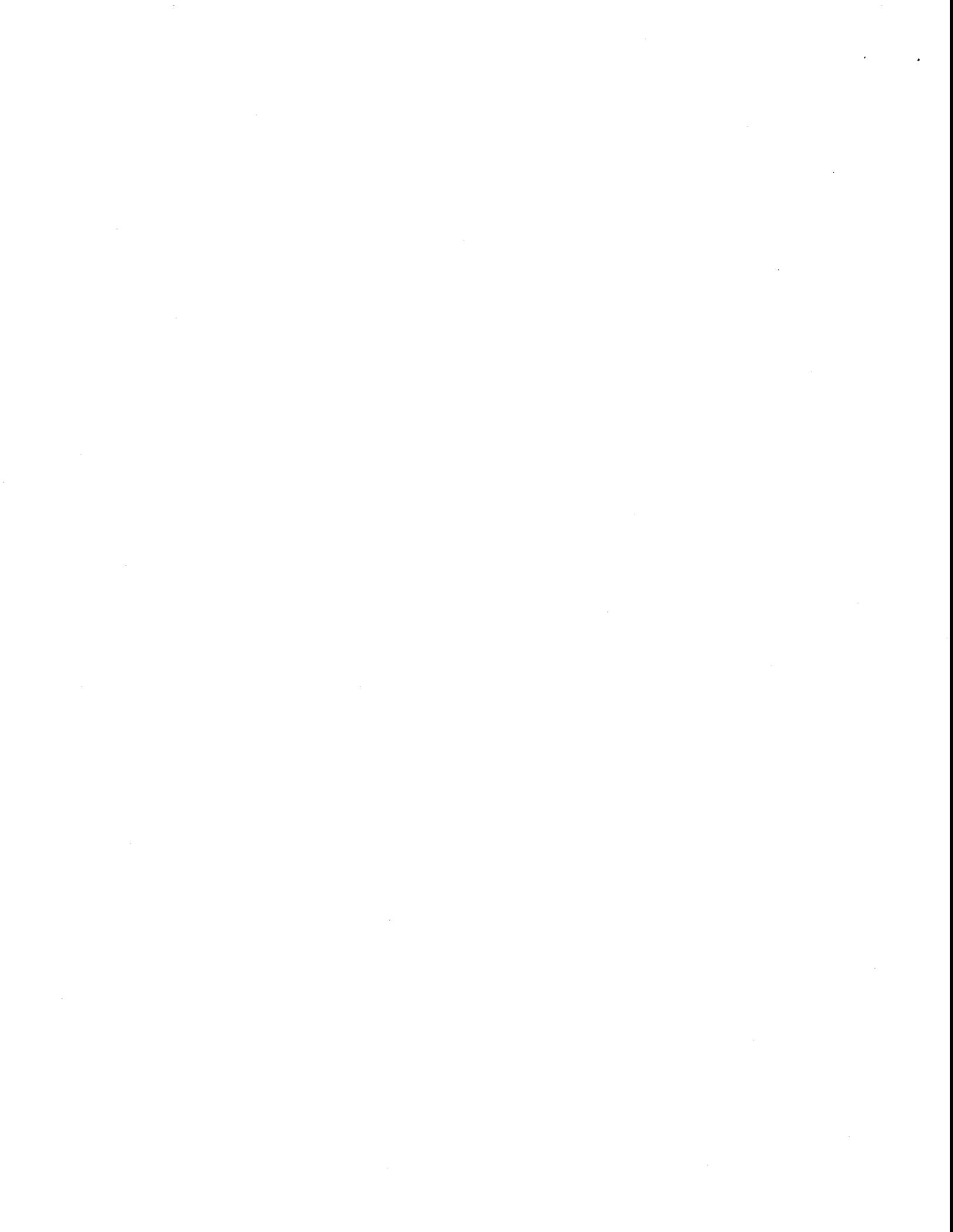
involved), and that included over 65,000 industry workers, concluded successfully and avoided any major industrial action largely as a result of [the beneficiary's] efforts. His well recognized leadership and mastery of industrial construction labor relations, along with the key collaborations he has forged with members of the union and CLRa, were crucial in securing this fundamental agreement in Canada. His ability to manage union relations, at an industry executive level across Alberta, is quite impressive. It is clear that he not only has the legitimacy both of his expertise in engineering, but also that of his MBA degree which establishes an educational pedigree that enables him to speak both knowledgeably and intelligently to all participants in the process, and makes him as highly skilled negotiator able to relate to the needs of both sides.

Vice-President and District Manager PCL Industrial Constructors Inc., stated:

[The beneficiary's] abilities have been both well recognized in his field and amply rewarded (with the grant to him of some of the industry's most prestigious commendations). He is acknowledged by his peers (and his adversaries and competitors) as an industry leader who has taken what was once a fledgling construction business of only a few hundred employees to an enviable position as an industry recognized, major construction company that has secured in excess of \$1BN of contract awards over the last few years under his management. His contributions to the engineering and construction industry have not only strengthened the sector (it has created over 1500 new skilled jobs), it has also expanded and broadened the productivity of an aging industry leading it to a clear and unprecedented renaissance.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires “[e]vidence of the alien’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.” In this case, the petitioner relies exclusively on recommendation letters as qualifying evidence under the regulation at 8 C.F.R. § 204.5(h)(3)(v). We note that while the reference letters consistently refer to the petitioner’s “extraordinary ability,” merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof.⁴ While the reference letters describe contributions made by the beneficiary, they do not reflect original contributions of major significance to the beneficiary’s field. The regulation does not merely require an alien to make contributions to the field but requires those contributions to be original and of major significance. Although counsel references the beneficiary’s development of a “novel Business Model and Execution Plan that can be routinely and universally applied” to management and execution of the most sophisticated oil, gas, and petrochemical facilities and that the beneficiary’s work is “noteworthy for having set new parameters within engineering,” the reference letters do not provide specific details or descriptions to support these claims. Specifically, while some of the reference letters refer to the

⁴ *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d* 905 F.2d 41 (2d. Cir. 1990), *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y. 1997).

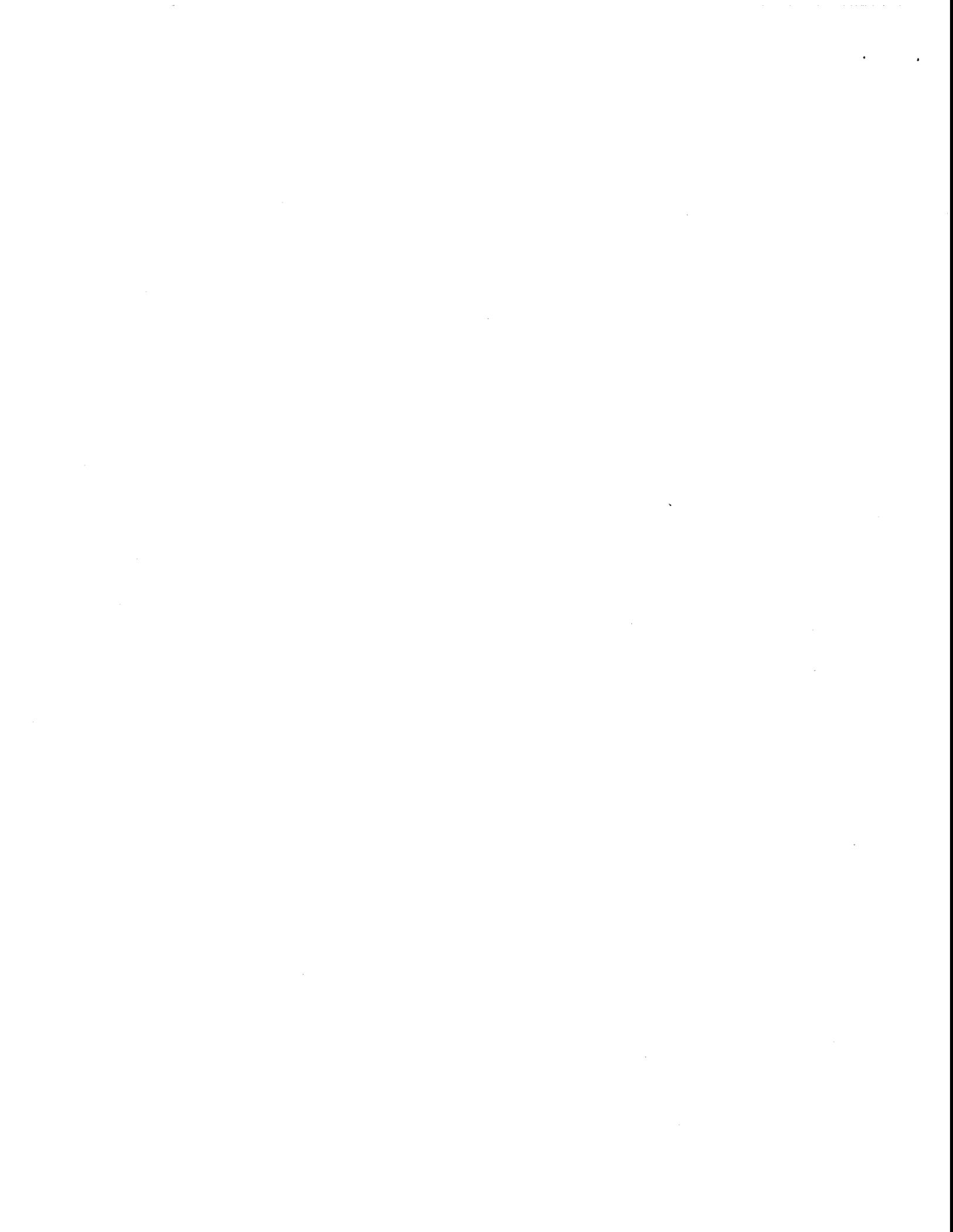


beneficiary's project as "setting new industry benchmarks in LNG plant construction," the specific benchmarks are not listed and the letters do not indicate how the industry has implemented and is currently using those benchmarks. Similarly, while the letters also indicate that the beneficiary has "made a deep imprint on 'best practices,'" and has invented "new techniques," no detailed or specific examples have been cited or described.

Regarding Mr. [REDACTED]'s letter, while he praised the beneficiary for his involvement with the ELNG Project in Damietta, Egypt such as "guid[ing] the construction effort to build the world's largest Liquefied Natural Gas Project, on a new, record breaking schedule of only 35 months," Mr. [REDACTED] failed to demonstrate how the beneficiary's contributions were both original and of major significance to the field as whole and not limited to his employer, KBR. Regarding, Mr. [REDACTED]'s letter, he described the beneficiary's impact and contribution to his field in terms of future possibilities. For example, he stated that the beneficiary "offered comprehensive, ingenious solutions to the problem of declining workforce productivity via the need for cutting edge systems and supervision that *could* save billions of dollars each year in the engineering and construction industry. . . [emphasis added]." Regarding Mr. [REDACTED]'s letter, while he credited the beneficiary with "build[ing] major construction projects" and resolving "tough collective agreement negotiations in 2007," he failed to specifically identify how the beneficiary's original contributions impacted the industry. It is quite apparent from Mr. [REDACTED]'s letter that he respects the work of the beneficiary, however, an individual's reputation is insufficient to meet the plain language of this regulation without evidence reflecting original contributions that have impacted the field at a level consistent with contributions of major significance. Similarly, regarding Mr. [REDACTED]'s letter, he makes general claims without providing specific details of the beneficiary's original contributions. While he credits the beneficiary with securing billions of dollars worth of contracts and creating new jobs, Mr. [REDACTED] failed to provide particulars explaining how acquiring contracts for a construction company is an original contribution of major significance to the field as a whole.

In this case, the reference letters are from individuals who praise the beneficiary's work. While such letters can provide important details about the beneficiary's talents and accomplishments, they cannot form the cornerstone of a successful extraordinary ability claim. Further, USCIS may, in its discretion, use as advisory opinion 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 beneficiary'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. Thus, the content of the writers' statements and how they became aware of the beneficiary'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.

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. Without extensive documentation showing that the beneficiary's work has been unusually influential or widely accepted throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

Accordingly, the petitioner failed to establish that the beneficiary 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.

At the time of the original filing of the petition, the petitioner claimed the beneficiary's eligibility for this criterion based on the following documentation:

1. A presentation entitled, *Opportunities in the Industrial Heartland*, at the Energy Services Summit in Edmonton, Canada, from July 24 – 25, 2008;
2. A presentation entitled, *Module Fabrication Yards*, for the Karsto Development Project on February 7, 2001; and
3. A research paper entitled, *Does the Fluctuation in the Oil Price Really Affect Capital Investment Within the Oil Industry*, in support of the beneficiary's degree of Masters of Business Administration in 2001.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires “[e]vidence of the alien's authorship of *scholarly articles* in the field, in professional or major trade publications or other major media [emphasis added].” Generally, scholarly articles are written by and for experts in a particular field of study, are peer-reviewed, and contain references to sources used in the articles. In this case, the beneficiary's presentations fail to meet the plain language of the regulation requiring authorship of scholarly articles. Regarding the beneficiary's research paper, it does not contain the characteristics of a scholarly article and appear to be more for completing an educational requirement than scholarly purposes. As there is no evidence demonstrating that the beneficiary's presentations and research paper were peer-reviewed, contain any references to sources, or were otherwise considered “scholarly,” the beneficiary's presentations and authorship of a research paper are insufficient to meet this criterion. Furthermore, the petitioner failed to submit any documentary evidence establishing that the beneficiary's presentations and research paper were “in professional or major trade publications or other major media,” as required by the regulation at 8 C.F.R. § 204.5(h)(3)(vi). Regardless, the petitioner did not address or contest the decision of the director for this criterion on appeal. Therefore, we will not further discuss the beneficiary's eligibility for this criterion on appeal.

Accordingly, the petitioner failed to establish that the beneficiary meets this criterion.

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



Although the petitioner submitted documentation, such as reference letters and organizational charts, a review of the director's decision reflects that he found that the petitioner failed to submit any documentation to demonstrate that the beneficiary performed in a leading or critical role for organizations or establishments that have a distinguished reputation. A review of the documentation reflects that it is sufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). As such, we withdraw the findings of the director for this criterion.

Accordingly, the petitioner established that the beneficiary meets this criterion.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

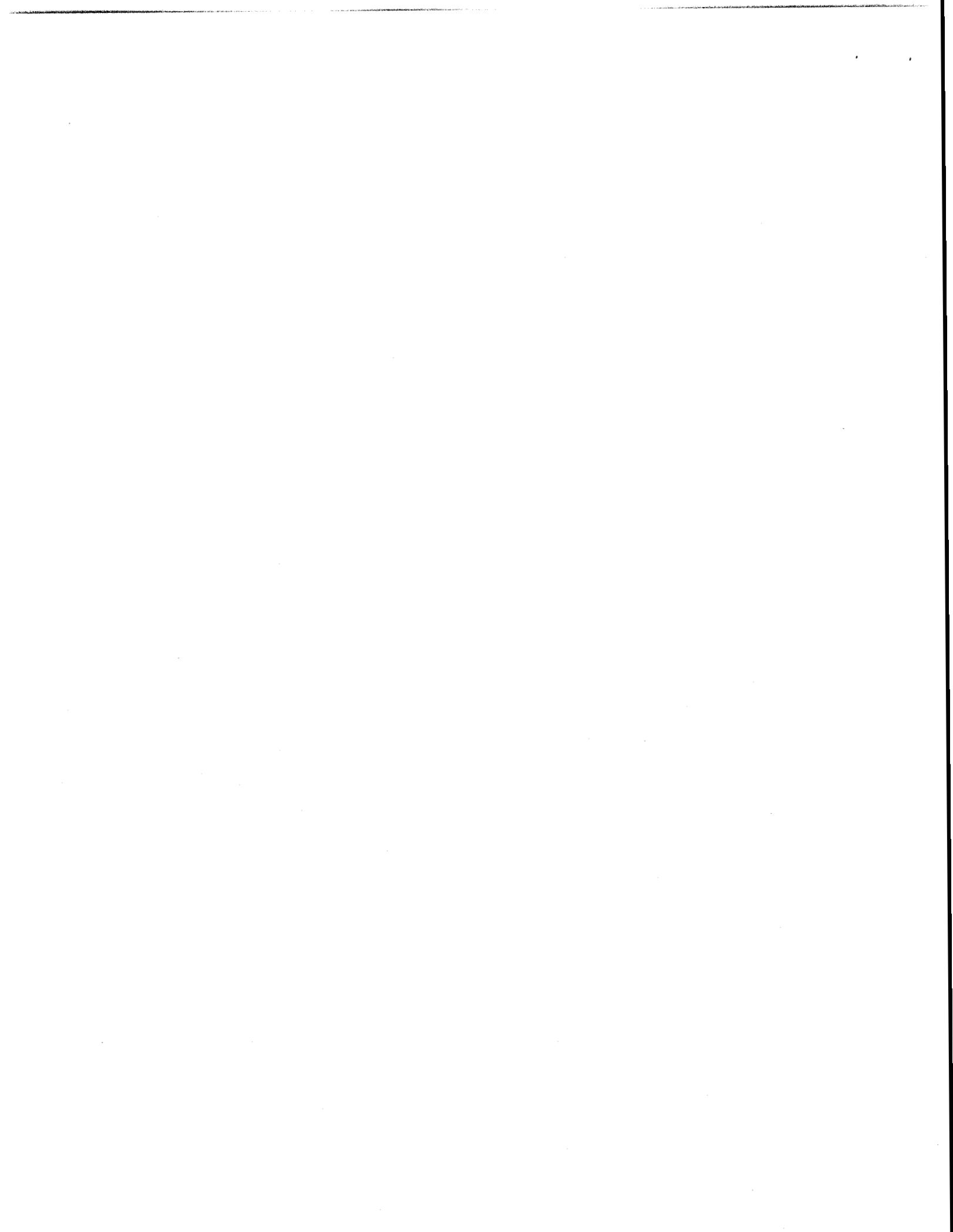
In the director's decision, he found that the petitioner established that the beneficiary meets this criterion. Specifically, the director found:

In this case, the petitioner submitted an offer of employment letter demonstrating the beneficiary's salary as \$340,000. According to Career Infonet (<http://www.careerinfonet.org/>), Vice Presidents in Texas earn anywhere from \$68,600 to \$145,600; therefore it appears that the beneficiary commands a high salary in relation to others in the field.

Upon review, we find the director's decision must be withdrawn. The petitioner submitted the following documentation:

1. A Notification of 2008 Focal Point Action letter from KBR reflecting the beneficiary's salary in 2008 was \$285,380;
2. A letter from Global Project Services indicating that the beneficiary received a long-term incentive plan award grant of \$125,000, composed of \$50,000 in KBR restricted stock units and \$75,000 in performance award units;
3. An offer of employment letter, dated February 12, 2009, from the petitioner reflecting a base salary of \$340,000; and
4. An Employment Agreement between the petitioner and the beneficiary indicating a base salary of \$340,000, with the potential to receive cash incentives and equity awards.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires “[e]vidence that the alien has commanded a high salary or other significantly high remuneration for services, *in relation to others in the field* [emphasis added].” This regulatory requires the petitioner to demonstrate that the beneficiary has commanded a high salary “in relation to others in the field.” Although the petitioner failed to submit any documentary evidence comparing the beneficiary's salary to others in his field, the director based his decision on the information contained on the website, <http://www.careerinfonet.org/>. We note that the director did not incorporate the referenced information from the website into the record of proceeding.



Regardless, the information referenced by the director is based on "Vice Presidents in Texas." In this case, the petitioner must demonstrate that the beneficiary commands a high salary compared to others in his field in which the beneficiary's field is construction and engineering projects for oil, gas, refinery, and petrochemical industries. We find that the director's comparison of the beneficiary's salary to the general occupation of vice-presidents in Texas is insufficient to meet the plain language of the regulation, which requires "in relation to others in the field." Moreover, the petitioner failed to submit any documentary evidence comparing the beneficiary's salary to other vice-presidents in the construction and engineering field for oil, gas, refinery, and petrochemicals. Accordingly, the petitioner has not established that the beneficiary's salary is significantly high in relation to other vice-presidents in the oil and gas construction and engineering industry as a whole and not limited to vice-presidents in Texas.

We also note that the petitioner relies on job letters and an offer of employment and an employment contract from the petitioner to reflect the beneficiary's salaries and compensation. However, the petitioner failed to submit any supporting documentary evidence such as pay stubs or income tax documents verifying that the beneficiary earned the claimed salary or was compensated with cash incentives or equity awards. Without independent, objective evidence, the petitioner has failed to establish his burden of proof for this criterion. For the reasons discussed, we withdraw the findings of the director for this criterion.

Accordingly, the petitioner failed to establish that the beneficiary meets this criterion.

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." 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). See also *Kazarian*, 2010 WL 725317 at *3. The petitioner established the beneficiary's eligibility for one of the criteria, in which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3). In this case, many 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).

The regulation at 8 C.F.R. § 204.5(h)(3) provides that "[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." The weight given to evidence submitted to fulfill the criterion at 8 C.F.R. § 204.5(h)(3)(i), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of



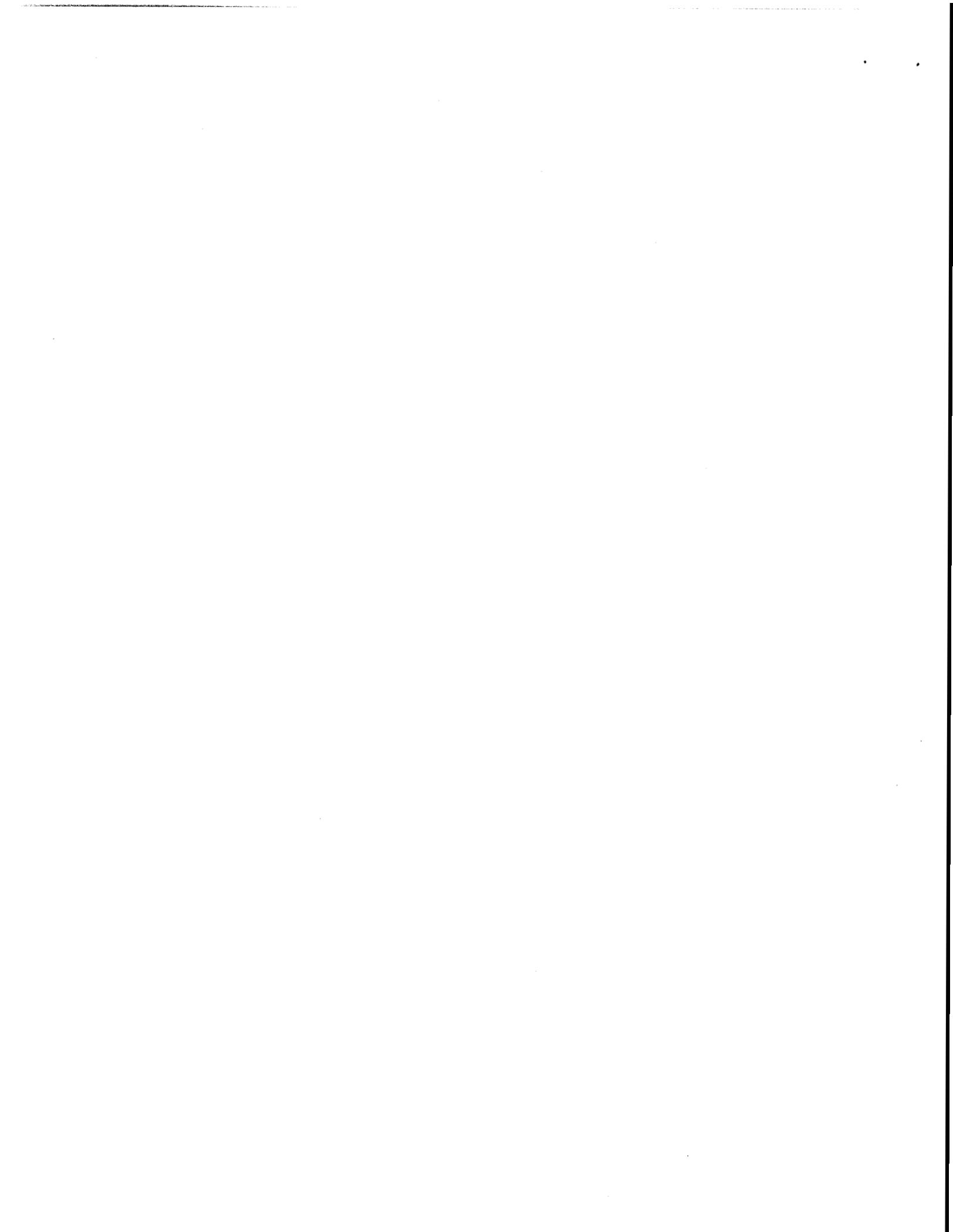
“extraordinary ability” as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2). The documentation submitted by the petitioner is insufficient to establish the beneficiary’s sustained national or international acclaim required for this highly restrictive classification.

We note that the petitioner relied heavily on recommendation and reference letters. However, such letters cannot form the cornerstone of a successful extraordinary ability claim. Further, USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. at 795. However, USCIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.*

Moreover, regarding the petitioner’s claim for lesser nationally or internationally recognized awards or prizes, the petitioner submitted evidence of fellowships and a course completion certificate. However, academic study is not a field of endeavor, but training for a future field of endeavor. As such, academic scholarships, student awards, and fellowships cannot be considered prizes or awards in the beneficiary’s field of endeavor. Moreover, competition for fellowships is limited to other students. Experienced experts do not compete for fellowships. Thus, they cannot establish that a beneficiary is one of the very few at the top of his field. Significantly, this office has held, in a precedent decision involving a lesser classification than the one sought in this matter, that academic performance, measured by such criteria as grade point average, is not a specific prior achievement that establishes the alien’s ability to benefit the national interest. *Matter of New York State Dep’t. of Transp.*, 22 I&N Dec. 215, 219, n.6 (Comm’r. 1998). Thus, academic performance is certainly not comparable to the awards criterion set forth at 8 C.F.R. § 204.5(h)(3)(i), designed to demonstrate an alien’s eligibility for this more exclusive classification.

Furthermore, a review of the evidence shows that the beneficiary’s memberships in associations are not restricted to outstanding achievements of its members. An organization such as CLR, who claims 40,000 members, does not represent only that very small percentage at the top of the field. Similarly, regarding the petitioner’s claim of the beneficiary’s judging 550 employees, internal review responsibilities as a supervisor or manager of subordinates’ job performances are not indicative of or consistent with national or international acclaim.

Finally, we cannot ignore that the statute requires the petitioner to submit “extensive documentation” of the beneficiary’s sustained national or international acclaim. *See* section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provide that the “intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required” for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). The petitioner failed to submit evidence demonstrating that the beneficiary “is one of that small percentage who have risen to the very top of the field.” In addition, the petitioner has not demonstrated the beneficiary’s “career of acclaimed work in the field” as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990).



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 beneficiary as one of the small percentage who has risen to the very top of the field of endeavor. The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

IV. O-1 Nonimmigrant Admission

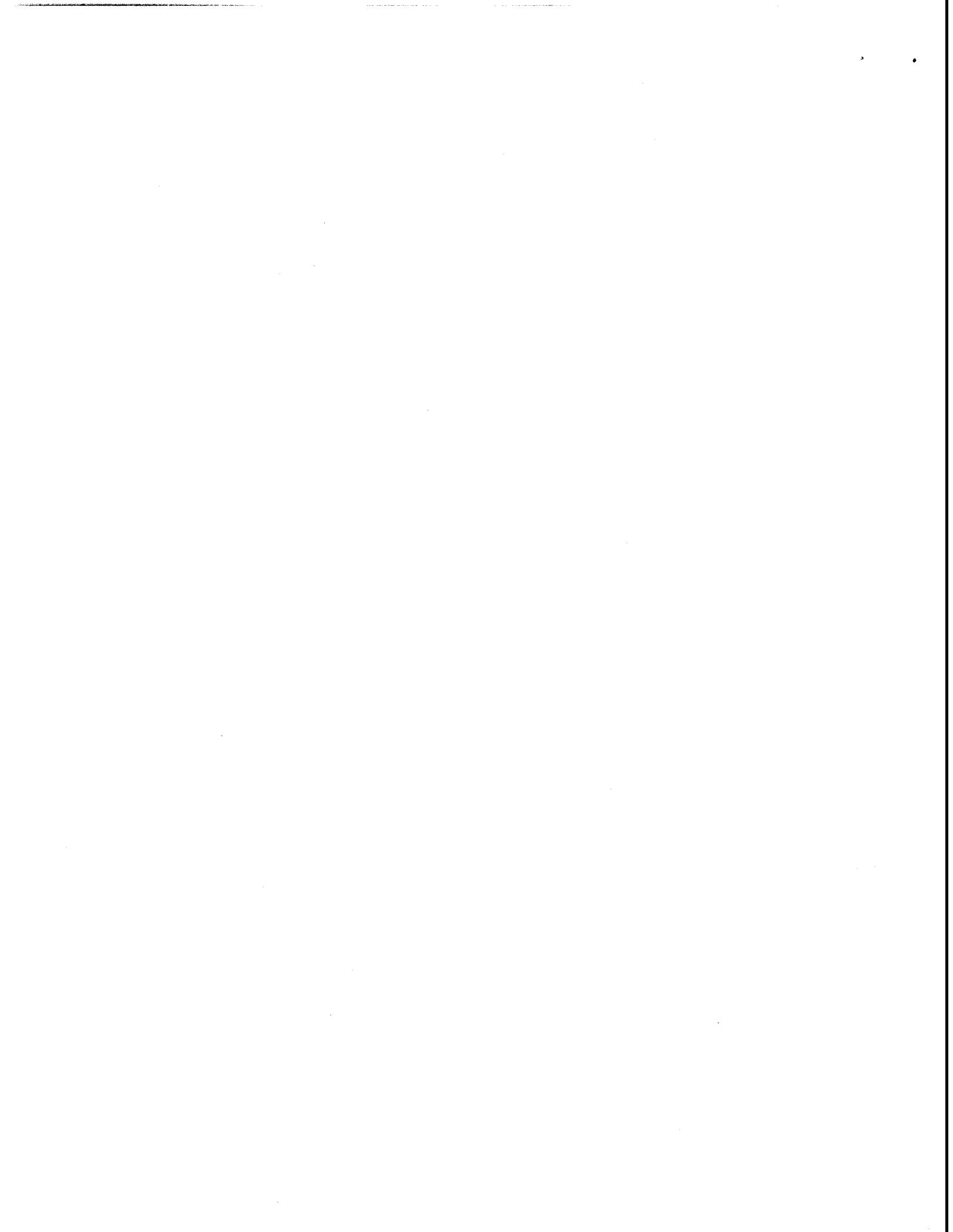
We note that at the time of the filing of the petition, the beneficiary was last admitted to the United States as an O-1 nonimmigrant on May 21, 2009. However, while USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the beneficiary, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d at 1090.

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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).

V. Conclusion



Review of the record does not establish that the beneficiary 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 beneficiary's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(1)(A) of the Act, and the petition may not be approved.

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.

