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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

B2

[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **AUG 19 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

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on June 18, 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 research scientist. 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:

However, with all due respect to USCIS, the Director's decision is littered with blithe assertions of Congressional intent wholly lacking in reference to legal authority or the Congressional record, improper statutory interpretation not entitled to *Chevron*¹ deference, and numerous factual errors regarding the record and the evidence contained within.

Furthermore, counsel claims that the beneficiary meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). On appeal, we will address counsel's arguments as they pertain to the specific criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3).

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):

¹ See *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 1984.

(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 his or her 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.² 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.*

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

² 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).

“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).

II. Analysis

A. Evidentiary Criteria

This petition, filed on November 7, 2008, seeks to classify the beneficiary as an alien with extraordinary ability as a research scientist. The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).³

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.

The petitioner never claimed the beneficiary's eligibility for this criterion at any time during this proceeding. However, in the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) on April 24, 2009, the director referred to the beneficiary's membership with the Florida Nursery, Growers and Landscape Association (FNGLA) and indicated that the petitioner failed to submit the admission standards in order to determine the beneficiary's eligibility for this criterion.

A review of the record of proceeding reflects that in support of the original contributions of major significance criterion set forth at 8 C.F.R. § 204.5(h)(3)(v), the petitioner submitted a letter from [REDACTED] FNGLA, who stated that the beneficiary “is a very active and prominent member of the FNGLA.” A further review of the record fails to reflect that any additional documentation regarding FNGLA was submitted by the petitioner.

In response to the director's request for additional evidence, counsel stated:

³ The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

The petitioner did not make a claim of extraordinary ability under subcategory two as at 8 C.F.R. § 204.5(h)(3)(ii). In its haste to find reasons to deny this petition, USCIS states “the record does not provide the admission standards for the [FNGLA]. Hence, it cannot be said belonging to this organization meets criterion number two.” [The beneficiary] fully agrees, and therefore he did not argue that his membership in this particular organization should qualify under 8 C.F.R. § 204.5(h)(3)(ii).

As the petitioner is not claiming the beneficiary’s eligibility for this criterion, and the record fails to reflect the beneficiary’s eligibility, no further discussion of this criterion is necessary.

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

1. An article entitled, “Arsenic-Eating Fern Holds Hope for Tainted Soils,” June 17, 2005, [REDACTED], www.thenewstribune.com;
2. An article entitled, “Ferns May Put Brakes on Arsenic,” February 21, 2002, [REDACTED], *Orlando Sentinel*;
3. An article entitled, “Systems Agriculture: Towards a Sustainable Agricultural and Environmental Policy,” unidentified date, [REDACTED] *Agricultural Biotechnology: Beyond Food and Energy to Health and the Environment*;
4. A summary of an article entitled, “A Fern that Hyperaccumulates Arsenic,” February 1, 2001, [REDACTED] [REDACTED], www.nature.com;
5. An article entitled, “Ferns Remove Arsenic from Soil and Water,” August 6, 2004, [REDACTED], www.genomenetwork.org;
6. An article entitled, “Pteris Vittata (FERN) Sucks Arsenic Out of Water,” unidentified date, [REDACTED], www.annieappleseedproject.org; and
7. A Florida International University News Release entitled, “FIU Researching Arsenic-Eating Ferns,” May 21, 2001, [REDACTED] [REDACTED], www.news.fiu.edu.

In the director’s request for additional evidence, he stated:

Also, the articles provided from media such as the *Tacoma News Tribune*, *Orlando Sentinel* and *Nature* may discuss the same type of work which the

beneficiary is involved. However, none of these or any other article submitted with the petition is about the beneficiary as required by the statute governing criterion number three. None of them even mention his name.

In response to the director's request for additional evidence, counsel claimed:

The statute mentions nothing about published materials, but the regulations at 8 C.F.R. § 204.5(h)(3)(iii) do. The Service seems confused by the definition of "about" in 8 C.F.R. § 204.5(h)(3)(iii). As a Plant Biologist, whenever major or trade media discuss advanced scientific discoveries, these publications (suffering from rapidly declining circulation figures due to the proliferation of different types of media sources) are likely to generally discuss the research finding and its practical applications to society at large, as opposed to a profile exclusively devoted to the inventor.

The publishing world has changed significantly since 1990 (the year the Extraordinary Ability category was created by Congress), with declining circulation figures and changing reader tastes forcing surviving newspapers to adjust to these changing realities. Thus, while the Service's position may have been relevant in 1991, the brutally changing nature of major media and the types of stories it publishes in 2009 signifies that the Service's position is antiquated at best. Just because [the beneficiary] may not be as well known or recognizable in areas outside of his field as perhaps a movie star or head of a British airline or even a Nobel Prize winner may be, it nonetheless does not in any way diminish his expertise and exceptional ability in his scientific field.

Furthermore, counsel claimed the beneficiary's eligibility under 8 C.F.R. § 204.5(h)(iii) because "major media sources seek out [the beneficiary] because of his expertise in the field" and referred to a letter by [REDACTED] [REDACTED] for the University of Florida IFAS, who stated:

When I write features for the Orlando Sentinel and any other periodical I look for the best experts in the field. I'm [REDACTED] an Extension Agent of 37 years now with Emeritus status with the University of Florida. I am very active in the media of TV, Radio and Newspaper and often need the help of the best and most knowledge [sic] experts in the field. That is why I went to [the beneficiary] of [the petitioner] for help with a Fern feature.

Ultimately, the director concluded that the documentary evidence submitted by the petitioner and counsel's arguments failed to establish eligibility for this criterion. Specifically, the director stated in the denial of the petition:

However, this statute remains as clear as of this writing as it was in the early 1990's when passed by Congress. The printed articles appearing in professional

or major trade publications or other major media must have the beneficiary as its' [sic] focal point. Printed articles about work similar to that which the beneficiary is engaged without him being the main topic do not qualify here, declining circulation figures and potential perceptions as to the challenging nature of major media notwithstanding. Otherwise, any number of individuals working in any given area could conceivably state a published article implicitly concerned them despite being unnamed by the author.

The obvious and undeniable reality is that none of the articles submitted with the petition even mention the beneficiary, let alone treat him personally as the central topic as originally – and currently – intended by Congress.

* * *

However, being used as a source in articles – if indeed the beneficiary has been so employed by [REDACTED] or any other journalist – would not necessarily qualify him as having met this criterion as it would not automatically mean the beneficiary was the central topic of that written piece.

On appeal, counsel argues:

The Director first radically expands the definition of “about” contained within 8 C.F.R. § 204.5(h)(3)(iii), claiming that “the printed article...must have the beneficiary as its' [sic] focal point.” The Director further claims that this “focal point” standard was “originally – and currently – intended by Congress.” However, the Director fails to cite any legal authority, case law, the Congressional record, committee reports, or anything else other than the Director’s own word for his assertion that “about” equates to “focal point.” This “trust me, what I say is true and should be accepted” approach was deemed improper by *Matter of Treasure Craft*, 14 I&N Dec. 190. *Matter of Treasure Craft* considered the question of whether a petitioner’s statement of fact, unsupported by documentary evidence submissions, should be accorded that status of being “on record.” (*Id.* at 190). The petitioner is entitled to the same standard. The Director is asking us to accept his interpretation of Congressional intent without offering an iota of proof beyond his word, denying the petitioner and beneficiary their right to substantive due process under the Administrative Procedures Act (“APA”).

The Director’s newly created “focal point” standard radically narrows the range of beneficiaries who could ever demonstrate acceptable evidence of articles “about” them under 8 C.F.R. § 204.5(h)(3)(iii). Under this “focal point” standard, the Director would no longer accept evidence under the following scenario in which four scientists, all of whom are Nobel laureates (assuming that 8 C.F.R. § 204.5(h)(3) would not otherwise accept a Nobel Prize an internationally

recognized award), have their cure for cancer discussed in a front page feature in the Sunday edition of the New York Times.

Plainly, under this “focal point” standard, four people cannot serve as a focal point of an article. Thus, under the Director’s new “focal point” standard, an adjudicator would have no choice but to not accept this front-page feature in the nation[’]s most widely circulated newspaper because four people and their work are discussed. Congress could not have intended such a result. As the Supreme Court stated in *Chevron*, “*first always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress.*” *Chevron U.S.A. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 1984).

Despite the Director’s assertion, the intent of Congress is far from clear and Congress has done nothing to provide additional clarity. *Chevron* also stands for the proposition that “if the statute is silent or ambiguous with respect the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” (*Id.*) The imposition of this new “focal point” standard is an “arbitrary and capricious” interpretation of the statute by the Director. Since the Director’s interpretation of the statute in devising this new “focal point” standard is unreasonable, the Director’s decision is not entitled to *Chevron* deference.

We are not persuaded by counsel’s arguments. Counsel claimed in response to the director’s request for additional evidence that the director’s interpretation of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) was “relevant in 1991” and “the brutally changing nature of major media and the types of stories it publishes in 2009 signifies that the Service’s position is antiquated at best.” Therefore, while counsel did not claim that the director’s interpretation of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) was in error, she argued that the director’s interpretation was outdated and did not take into account the changing nature of the media. Hence, whenever the media publishes material about the beneficiary’s field, they “are likely to generally discuss the research finding and its practical applications to society at large, as opposed to a profile exclusively devoted to the inventor.” Moreover, while the changing nature of the media may be relevant to what constitutes “major media,” it has no bearing on what constitutes material that is “about” the alien.

Regarding the powers and duties of the Secretary of Homeland Security, section 103(a)(3) of the Act, 8 U.S.C. § 1103(a)(3) provides that “[h]e shall establish such regulations.” As such, DHS has broad authoritative power to establish regulations. Specifically regarding 8 C.F.R. § 204.5(h)(3)(iii), the rule was published in accordance with the Administrative Procedures Act, and the public was given the proper notice and opportunity to comment on the rule. The appropriate time for counsel to make objections regarding this regulatory criterion was during the allowable notice and comment period. Moreover, the regulation at 8 C.F.R. § 204.5(h)(3)(iii)

is consistent with the legislative history, which indicated that documentation may include “media accounts of the alien’s contributions to his profession.” Therefore, 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 [emphasis added].” In other words, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be about the beneficiary relating to his work. Merely submitting documentary evidence reflecting published material in the beneficiary’s field fails to meet the plain language of the regulation and fails to comply with the legislative intent of this regulatory criterion. *Compare* 8 C.F.R. § 204.5(i)(3)(i)(C) (requiring only published material about the alien’s work).

On appeal, counsel shifts her argument from the director’s antiquated position and interpretation to the director’s creation of a “focal point” position. As cited above, 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 petitioner is required to submit published material about the beneficiary relating to his work. In this case, the petitioner submitted articles that relate to the field in which the beneficiary is employed. However, as correctly indicated by the director, none of the submitted articles are about the beneficiary relating to his work in horticulture. In fact, none of the articles even mention the beneficiary or discuss work that can be specifically credited to the beneficiary. Simply submitting articles that relate to the beneficiary’s field, without documentary evidence reflecting published material about the beneficiary relating to his work, is insufficient to meet the plain language of this regulatory criterion. Moreover, even providing expert guidance to reporters for articles fails to meet the plain language of the regulation since the articles are not about the beneficiary relating to his work.

While the regulation at 8 C.F.R. § 204.5(h)(3)(iii) does not specifically state that the beneficiary must be the “focal point” of the published material, we agree with the ultimate decision of the director for this criterion. Ultimately, under any reasonable definition of the word “about,” the articles submitted cannot be credibly considered to be “about” the beneficiary.

For the reasons stated above, none of the documentary evidence submitted by the petitioner qualifies the beneficiary for eligibility under this criterion. Furthermore, counsel’s argument that any published material about the beneficiary’s field is sufficient to establish eligibility for this criterion is not persuasive, fails to meet the plain language of the regulation, and does not contravene the intent of Congress in limiting this classification to those able to demonstrate sustained national or international acclaim. Section 203(b)(1)(A)(i) of the Act.

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.

The petitioner claims the beneficiary's eligibility for this criterion based on patents and several recommendation letters. In response to the director's request for additional evidence, counsel argued:

The Service also seeks to reject [the beneficiary's] patents as evidence of original scientific contributions. A patent is, by definition, an original scientific contribution. One is not granted a patent by the U.S. Patent & Trademark Office unless the patent submission is for something that can only be described as "original." For the Service to take the position that a patent is not evidence of an original scientific contribution strains all reason and constitutes an abuse of discretion.

The record of proceeding reflects that the petitioner submitted the following documentation from the U.S. Department of Commerce, Patent and Trademark Office:

1. Approval for a patent for New Guinea Impatiens Plant Named, Volcano Fuchsia Pink, on February 3, 1998, Inventor: [REDACTED]
2. Approval for a patent for New Guinea Impatiens Plant Named, Volcano Deep Red, on February 10, 1998, Inventor: [REDACTED]
3. Approval for a patent for New Guinea Impatiens Plant Named, Volcano Light Pink, on February 24, 1998, Inventor: [REDACTED]
4. Approval for a patent for Spathiphyllum Plant Named, Himalaya, on August 4, 1998, Inventor: [REDACTED]
5. Approval for a patent for Spathiphyllum Plant Named, Pollux, on August 4, 1998, Inventor: [REDACTED]
6. Approval for a patent for Spathiphyllum Plant Named, Vanessa, on May 11, 1999, Inventor: [REDACTED]
7. Approval for a patent for Spathiphyllum Plant Named, Nurit, on January 2, 2001, Inventor: Issachar [REDACTED]
8. Approval for a patent for Fern Plant Named, Regina, on May 8, 2001, Inventor: [REDACTED]
9. Approval for a patent for Spathiphyllum Plant Named, Kalypso, on August 7, 2001, Inventor: [REDACTED]
10. Approval for a patent for Spathiphyllum Plant Named, Galaxy, on August 14, 2001, Inventor: [REDACTED] and
11. Approval for a patent for Spathiphyllum Plant Named, Piccolino II, on October 22, 2002, Inventor: [REDACTED]

We also cite representative examples of the beneficiary's recommendation letters:

[REDACTED] for the petitioner, stated:

In his capacity as head grower, [the beneficiary's] unique knowledge and experience in the field of environmental horticulture have been proven pivotal in

that process, and the eventual patents that ensue. He travels overseas to identify potentially marketable plants in their embryonic stage, introduces and trials [sic] them at our R & D facilities, makes the right selections, develops the growing protocols, comments to the offshore breeders, and develops the marketing agenda for the few varieties that are selected and proven to be patentable.

Next, [the beneficiary] works closely with the patent lawyers to apply and receive the plant patent and guarantees our Company's contribution by getting the assignment and ownership of the patent in the U.S. The ability of the company to secure these rights is a result of his personal contribution and participation in the process and development of the new plant without which there would have been no commercially viable patent.

In a separate letter, [redacted] asserts that the attached patents, listed above and filed between 1996 and 2002, were granted "as a result of the [beneficiary's] effort, involvement and extraordinary skill." As the patents filed in 1996 and 1997 predate the beneficiary's involvement with the petitioner by one or two years and none of the patents list the beneficiary as a co-inventor, [redacted] credibility is diminished.

[redacted] for the petitioner, stated:

The exclusive rights for commercial propagation and growing of [Pteris vittata] were given to our company due to the initial contribution and the unique production methods developed by [the beneficiary], our expert grower. [The beneficiary] is currently the only national grower capable of and licensed to commercially produce the mass quantities needed to satisfy the market for this unique ecological breakthrough.

[redacted], stated:

In his professional career as Head Grower [for the petitioner], [the beneficiary] has emerged as the nation's premier propagator, grower, and commercial distributor of ferns. The products he grows and delivers fuel a national economic engine estimated at tens of millions of dollars.

Most noteworthy of his commercial products are both the EdenfernTM, the unique phytoremediation fern proven to clean arsenic-laden sites (used extensively in government, public, and military institutions) and also the Lauae fern, widely considered by the Hawaiians to be a revered, traditionally spiritual plant. It is also an indigenous plant of considerable landscape value here in the Hawaiian Islands.

[redacted] stated:

[The beneficiary] was specifically chosen as a trial grower for our new product, Fertiss[®] Growing media, as he and his company are well known to be reputable producers of high quality liners in the Florida foliage market. With the positive results that [the beneficiary] experienced, he was then asked to be featured in a testimonial advertisement that would have circulation in the North American market and beyond. We appreciated the cooperation from [the beneficiary] and, as a result of his testimonial we have expanded our business in North America. Many growers in the United States and Canada are familiar with [the beneficiary's] extraordinary high quality plant production ability and great service to his customers.

According to counsel's letter submitted in support of the filing of the petition, the beneficiary "has been employed by [the petitioner] since 2003 after graduating from Florida Southern College [emphasis added]." [REDACTED] indicates that the beneficiary worked as an intern for the petitioner beginning in 1998, which is also reflected on the beneficiary's self-serving curriculum vitae. The petitioner filed five of the eleven patents with the U.S. Department of Commerce in 1996 and 1997, prior to the beneficiary's employment with the petitioner. Furthermore, as indicated above, the beneficiary is not listed as the inventor for any of the patents. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* While the petitioner can be credited with receiving eleven patents, the record does not consistently demonstrate that the beneficiary was involved in any way with the submission or approval of any of these patents.

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, while the recommendation letters praise the beneficiary for his employment skills, they fail to indicate any *original contributions* of major significance to the field of horticulture. The letters provide only general statements without offering any specific information to establish how the beneficiary's work has been original and of major significance. This regulatory criterion not only requires the beneficiary to make significant contributions, the regulatory criterion also requires those contributions to be original. We are not persuaded by vague, solicited letters that simply repeat the regulatory language but do not specifically identify contributions or how those contributions have influenced the field.

In this case, the majority of the reference letters are from individuals who worked with or otherwise interacted with the beneficiary. While such letters can provide important details about the beneficiary's skills, they cannot form the cornerstone of a successful extraordinary ability claim. Further, USCIS may, in its discretion, use as advisory opinion statements 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 any immigration petition are of less weight than preexisting, independent evidence.

The remaining information contained in the reference letters, while describing the beneficiary's accomplishments and job responsibilities, fails to explain how his research has currently impacted his field so as to be considered contributions of major significance. Assuming the beneficiary's skills are unique, that issue properly falls under the jurisdiction of the Department of Labor. *See Matter of New York State Dep't. of Transp.*, 22 I. & N. Dec. 215, 221 (Commr. 1998). We note that while [REDACTED] indicates the beneficiary's "initial contribution and the unique production methods," he fails to identify the initial contribution and how this contribution has affected the field as a whole. Further, although [REDACTED] refers to [REDACTED], he failed to demonstrate that these commercial products are the beneficiary's original contributions and have been of major significance to the field. Finally, while [REDACTED] credits the beneficiary for expanding his business in North America, it does not reflect any original contributions of major significance to the field, rather than to the specific business of [REDACTED].

Finally, although we found that the petitioner can not be credited for his involvement with any of the eleven patents, 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. *Id.* at 221, n.7. Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* A patent recognizes the originality of the idea, but it does not state that the beneficiary made a contribution of major significance in the field through his development of this idea.

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

At the time of the initial filing of the petition, counsel claimed the beneficiary's eligibility for this criterion was based on the eleven patents mentioned above, which were granted to the petitioner. As discussed previously, the record fails to reflect that the beneficiary was involved in any way in the petitioner's obtaining any of these eleven patents. Therefore, we are not persuaded that the beneficiary meets this criterion based on the patents.

In response to the director's request for evidence, the petitioner submitted three recommendations from the following individuals:

[REDACTED] from the University of Florida, stated:

[The beneficiary] has been working in fern production for the past 10 years in central Florida. Through the course of his career, he has established his credentials by producing and supplying tens of millions of fern liners (young plants) to nurseries all across the United States and beyond. In addition, he is now in charge of producing over a million finished (potted) plants every year. The ultimate retail economic impact of his work easily surpasses \$20 MIL/year, all of which would not have been possible without his expertise in the field.

[REDACTED], stated:

In order to assure crop availability for our commercial applications, we have partnered with [the beneficiary] of [the petitioner], widely known as the nation's premier propagator, cultivator, and commercial grower of fern liners (starter plants). [The petitioner] has provided ferns for our research and commercial applications for the past nine years and [the beneficiary's] practical application and field production are essential to the success of our [REDACTED] business. He has a proven extraordinary ability and track record in the field of fern cultivation and propagation.

The record also includes a letter purportedly from [REDACTED]. The letter, however, is unsigned and, thus, has no evidentiary value. On appeal, counsel argues:

The Director again attempts to introduce new adjudicative standards not contemplated by Congress. The Director does concede "USCIS agrees the beneficiary has performed in a leading or critical role for the petitioner." However, the Director attempts to reject the volume of evidence submitted about the distinguished reputation by introducing a new element not permitted in the regulations by claiming "the record does not prove either the petitioner's size or reputation or indicate the approximate number of these businesses that exist in this country.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires "[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." At issue for this criterion are the position the beneficiary was selected to fill and the reputation of the entity that selected him. While the director determined that the beneficiary performed in a leading or critical role for the petitioner, we are not persuaded that the documentary evidence submitted by the petitioner is sufficient to establish the beneficiary's eligibility for this criterion. Moreover, although the number of individuals employed by the

petitioner is not necessarily indicative of the petitioner's "distinguished reputation," we do find that the size of the petitioner, generated revenue, and geographic national or international locations can be a factor in determining the petitioner's "distinguished reputation." In this case, as indicated in the director's decision, the petitioner failed to submit sufficient documentary evidence demonstrating that the petitioner has a distinguished reputation. We are not persuaded that letters from the petitioner describing its own business is sufficient to establish the distinguished reputation, without objective, independent documentary evidence.

Even if we found that the petitioner established that the beneficiary performed in a leading or critical role for an organization or establishment that has a distinguished reputation, which we do not, the plain language of this regulatory criterion requires the petitioner to demonstrate the beneficiary's critical or leading role with more than one organization, consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. In this case, the petitioner only claimed the beneficiary's eligibility with one organization.

Accordingly, the petitioner failed to establish 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.

At the time of the original filing of the petition, the petitioner claimed the beneficiary's eligibility for this criterion based on a letter from [REDACTED] who stated:

Whereas the standard income in this position within the horticulture industry, for a company our size, is \$70,000 - \$80,000 per year we are willing to offer him an annual salary of \$120,000 plus all the benefits including health insurance and a company car.

In response to the director's request for evidence, counsel claimed:

Objective data was presented that [the beneficiary's] annual salary figure exceeds the Level Four prevailing wage salary figures for horticulture researcher in Apopka, Florida, as determined by the U.S. Department of Labor's Occupational Employment Statistics (OES) by 176%.

However, a review of the record of proceeding fails to reflect that this documentation was ever submitted either at time of the original filing of the petition or in response to the director's request for evidence. As 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," the director found that there was no documentary evidence supporting the claims of counsel.

On appeal, counsel submitted "Online Wage Library – FLC [Foreign Labor Certification] Wage Search Results" showing the median wages of soil and plant scientists in the Orlando – Kissimmee,

FL area. For example, the Level 4 Wage (fully competent) for soil and plant scientists was \$68,266 per year. However, median regional wage statistics do not meet this requirement. Accordingly, the petitioner has not established that the beneficiary's salary is high in relation to other soil and plant scientists as a whole and not limited to the Orlando and surrounding areas.

We also note that the petitioner relies on a job letter from the petitioner expressing a willingness to offer the beneficiary a particular salary. However, the petitioner failed to submit any supporting, objective evidence such as pay stubs or income tax documents verifying that the beneficiary had already earned the claimed salary as of the filing date. The regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires that the beneficiary already have commanded such a salary. The petitioner must establish the beneficiary's eligibility as of the date the petition was filed. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Without independent, objective evidence that the beneficiary had already received a high salary in relation to others in the field, the petitioner has failed to establish his burden of proof for this criterion.

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

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

The petitioner failed to claim the beneficiary's eligibility for this criterion at the time of the original filing of the petition. In response to the director's request for evidence, counsel then claimed the beneficiary's eligibility for this criterion based on the above mentioned reference letters. On appeal, counsel did not contest or address the decision of the director for this criterion.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(x) requires "[e]vidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales." This criterion, however, relates to the "performing arts." The petitioner is a scientist, and therefore, does not meet the plain language of the regulation.

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*, 596 F.3d at 1115. The petitioner failed to establish the beneficiary's eligibility for any 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 petitioner’s evidence must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), 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 petitioner’s submission of articles that relate to the beneficiary’s field without submitting published material about him relating to his work is insufficient to establish the sustained national or international acclaim required for this highly restrictive classification. Similarly, the petitioner’s claim that the beneficiary was responsible for eleven patents when the documentary evidence submitted by the petitioner reflects otherwise is not persuasive evidence that the beneficiary has made original contributions of major significance or performed in a leading or critical role for an organization.

Furthermore, while the petitioner submitted numerous recommendation letters praising the skills of the beneficiary, 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. Moreover, as previously indicated USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony, it is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *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.* 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.

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). Although we found the beneficiary ineligible for the critical role criterion, we note that the petitioner only claimed the beneficiary’s eligibility with one organization. In addition, the petitioner failed to submit sufficient documentary evidence comparing his salary with others in his field.

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.

III. 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 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).

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.