

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

B₂

FILE:

Office: TEXAS SERVICE CENTER Date:

OCT 25 2010

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

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

On appeal, counsel states: “Note that no request for evidence had ever been made prior to this denial.” Counsel’s statement is incorrect. On August 25, 2009, the director issued a request for evidence to the petitioner, which he subsequently responded to on September 2, 2009.¹ The petitioner’s response consisted of copies of the same documents that he initially submitted.

Counsel argues that the petitioner meets at least three of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3). For the reasons discussed below, we uphold the director’s decision.

I. Law

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

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

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

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

¹ According to the Form G-28, Notice of Entry of Appearance as Attorney or Representative, in the record counsel did not enter his appearance in this proceeding until October 2009.

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

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

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.* and 8 C.F.R. § 204.5(h)(2).

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

(i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

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

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

(iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;

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

(vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

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

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

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification, *See 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 "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at 1119-1120.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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).

II. Analysis

A. Evidentiary Criteria

According to the petitioner's initial statement, this petition, filed on August 16, 2009, seeks to classify the petitioner as an alien with "extraordinary ability in the field of Materials Science and Engineering, particularly research of magnetic tunnel junctions, dielectric and solar thin films." The petitioner's field is materials science. At the time of filing, the petitioner was working as a [REDACTED] From October 2004 to September 2008, the petitioner was a full time [REDACTED]. 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 receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

[REDACTED] that [REDACTED] This award equates to local or regional recognition rather than a nationally or internationally recognized prize or award for excellence in the field of endeavor. The record does not include information from the presenting organization indicating the significance of this award or its evaluation criteria. Further, there is no documentary evidence demonstrating that the petitioner's award is recognized beyond the presenting organization and therefore commensurate with a nationally or internationally recognized prize or award for excellence in the field.

The petitioner submitted documentation showing that his Master's degree thesis was incorporated into the "[REDACTED]." There is no evidence demonstrating that inclusion of one's master's thesis in this database equates to receipt of a nationally or internationally recognized prize or award for excellence in the field of materials science and engineering.

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

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

In order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to

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

⁴ "The local regional branch of the [REDACTED] is called the [REDACTED]" See [REDACTED], accessed on August 2, 2010, copy incorporated into the record of proceeding.

membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The petitioner submitted evidence showing that he is a "Full Member" of [REDACTED] which has "membership of more than 60,000 active members." The submitted materials about [REDACTED] indicate that the society invites to full membership "those who have demonstrated noteworthy achievements in research." These achievements must be evidenced by "publications, patents, written reports or a thesis or dissertation, which must be available to the Committee on Admission if requested." A noteworthy achievement is not necessarily an outstanding achievement. In fact, the record reveals that [REDACTED] does not take a particularly strict view of noteworthy achievements. Specifically, the petitioner submitted an August 28, 2008 letter from [REDACTED]'s Executive Director, stating that the "Committee on Qualifications and Membership interpreted this qualification to include primary authorship of two papers." In addition, an earned doctoral degree may be substituted for one paper. We cannot conclude that primary authorship of one or two papers equates to outstanding achievements. Even if we were to conclude that the petitioner's [REDACTED] membership meets the elements of this criterion, which we do not, section 203(b)(1)(A)(i) of the Act requires the submission of extensive evidence. Consistent with that statutory requirement, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires the submission of evidence of membership in more than one association requiring outstanding achievements.

The petitioner submitted a letter from the [REDACTED] stating that he is an "Associate Member." The letter further states that an Associate Member "must have completed a degree in the physical sciences or engineering or its equivalent or are alternatively able to demonstrate an equivalent level of attainment through a combination of education, training and experience." The petitioner also submitted a letter from the [REDACTED] stating that he "holds the grade of Graduate Student Member" and that "[m]embership grade in the [REDACTED] is determined by education and professional experience." The petitioner's evidence also included a letter from the [REDACTED] stating that he is a member in good standing and that "[t]o become a member of the Society, an individual must be actively engaged in work relating to the research and development of advanced materials or material processes." Finally, the petitioner submitted a letter stating that he is a member of [REDACTED] but there is no information regarding its specific membership requirements. With regard to the petitioner's memberships in the Institute of [REDACTED] the [REDACTED], and [REDACTED] there is no evidence showing that they require outstanding achievements of their members, as judged by recognized national or international experts in the petitioner's field or an allied one.

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

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

In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.⁵

The petitioner submitted citation evidence from [REDACTED] showing an aggregate of 27 cites to his body of published work. The petitioner's evidence also included copies of some of the articles citing to his work. Regarding the citing articles that merely reference the petitioner's published work, we note that the plain language of this regulatory criterion requires that the published material be "about the alien." In this case, the articles citing to the petitioner's work are primarily about the authors' work, not the footnoted material identifying the petitioner. With regard to this criterion, a footnoted reference to the alien's work without evaluation is of minimal probative value. Further, we note that the articles citing to the petitioner's work similarly referenced numerous other authors. The submitted citations to the petitioner's work do not discuss the merits of his work, his standing in the field, any significant impact that his work has had on the field, or any other aspects of his work so as to be considered published material about the petitioner as required by this criterion. Instead, these citations are more relevant to the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(v) and will be addressed there. Accordingly, the petitioner has not established that he 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.

The petitioner submitted an October 1, 2008 letter from [REDACTED] Professor in Experimental [REDACTED] and editor for the journal [REDACTED] stating that he "selected [the petitioner] to review papers for [REDACTED]" [REDACTED]'s letter specifically identifies one paper reviewed by the petitioner as "Improvement of [REDACTED]" [REDACTED]'s October 1, 2008 letter, however, does not specify the total number of manuscript reviews completed by the petitioner for [REDACTED] or identify any other manuscript titles. The petitioner's supporting evidence included December 15, 2006 and December 16, 2006 e-mail messages from Professor [REDACTED] inviting the petitioner to review the aforementioned manuscript

⁵ Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the [REDACTED] but in a section that is distributed only in [REDACTED] for instance, cannot serve to spread an individual's reputation outside of that county.

entitled [REDACTED]
and thanking the petitioner "for agreeing to review the manuscript."

The record contains evidence specifically identifying only one manuscript review completed by the petitioner as of the petition's filing date. Nevertheless, this evidence meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). However, certain deficiencies pertaining to this evidence will be addressed below in our final merits determination regarding whether the submitted evidence is commensurate with sustained national or international acclaim, or being among that small percentage at the very top of the field of endeavor.

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

The petitioner submitted several letters of support discussing his work.

[REDACTED]
[REDACTED] Inc., states:

During first years at [REDACTED] [the petitioner] is resolving cutting edge problems in the semiconductor industry equipment manufacturing in general and, specifically, in [REDACTED] – one of the most challenging steps in [REDACTED]

While the petitioner's work involving [REDACTED] is important to his present employer [REDACTED], there is no evidence demonstrating that his work regarding this technology is recognized beyond his company such that it equates to an original contribution of major significance in the field.

[REDACTED]

[The petitioner's] work on structural characterization of magnetic tunnel junctions has earned him a reputation of a first-rate researcher. The importance of his accomplishments is, in particular, evident from his work on the characterization of the interface structure of high-quality Fe/MgO/Fe magnetic tunnel junctions on atomic scale. Using sophisticated techniques, e.g. high-resolution transmission electron microscopy, [the petitioner] was able to determine atomic positions and separations between atoms at the interface with an accuracy exceeding a fraction of an Angstrom. These data provided invaluable information and allowed him to correlate the experimental data to available theoretical calculations. Thus, [the petitioner's] work offered a methodology to characterize the interface structure of magnetic tunnel junctions, which is critical to advance the magnetic storage industry.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for

graduation, publication, presentation, or funding, must offer new and useful information to the pool of knowledge. It does not follow that every research engineer who performs original research that adds to the general pool of knowledge has inherently made a contribution of major significance to the field as a whole.

I became well acquainted of [the petitioner's] work through our discussion of his initial design of a [redacted] for thin film growth. His ability to develop robust and unique [redacted] is extraordinary. Based on the sputtering system he designed, [the petitioner] successfully fabricated high quality tantalum oxide high-k materials on an innovative glass substrate. The transistor device that was based on this advancement achieved high performance. He frequently discussed the problems during his research until his work was published in an internationally recognized journal [redacted] *et al.*, [redacted], 458, 246(2004), which attracts great interests in this field. More importantly, his work demonstrated how advanced materials can be integrated with cheap substrates, which makes future applications widely available. This innovation inspired other scientists to extend the research of high-k materials on flexible substrates and even further progress [the petitioner's] success.

The petitioner submitted an [redacted] citation index for his article in [redacted] indicating that it has been cited to only seven times since its publication.

[The petitioner's] more recent research accomplishments with [redacted] continue to demonstrate his very high level of outstanding ability. His work on proposing a novel method to remove sacrificial via fill materials in the ashing process is of great significance to the international integrated circuit back end community. This significant research work has been made into a U.S. patent. The potential of this novel research and its findings will immensely increase the efficiency and quality of ashing process to save tremendous cost in mass semiconductor manufacturing.

[redacted] does not provide specific examples of industry applications where petitioner's findings actually increased "the efficiency and quality of ashing process to save tremendous cost." The petitioner submitted evidence showing that the petitioner and two others coauthored a "United States Patent *Application* Publication" [emphasis added] entitled "[redacted]" but there is no evidence showing that a U.S. patent was granted for their invention. The petitioner also submitted what he claims is documentation of three [redacted] that he coauthored, but the English language translations accompanying this documentation were incomplete and were not certified by the translator. Pursuant to the regulation at 8 C.F.R. § 103.2(b)(3), any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation that the translator has certified as complete and accurate, and

by the translator's certification that he or she is competent to translate from the foreign language into English. Moreover, according to the deficient English language translations accompanying the documentation submitted from the State Intellectual Property Office of [REDACTED] the documentation relates to patent "applications" rather than approved [REDACTED] patents. Even if the petitioner were to establish that his innovations received a [REDACTED] patent, the grant of a patent demonstrates only that an invention is original. This office has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 n. 7, (Commr. 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* The petitioner's patent applications are assigned to Semiconductor Manufacturing International Corporation and Tsinghua University. There is no evidence from the petitioner's superiors at these institutions indicating the extent to which these devices or innovations have been licensed or successfully marketed in the industry. Thus, the impact of the petitioner's inventions is not documented in the record.

[REDACTED]
states:

I have known [the petitioner's] work since he started his Ph.D. in 2004. The project he was working on is one of the most important topics in magnetic recording industries: based magnetic tunnel junctions. His work involves the newly emerging [REDACTED] magnetic tunnel junctions that have been recognized as high performance in hard disk sensor and memory devices. As the inventor of the first commercialized hard disk sensors using [REDACTED] and more than 15 years in semiconductor industries, I can objectively attest to his contribution to the magnetic record industry.

[The petitioner] not only designed high performance magnetic devices, but also conducted remarkable structural characterization of the device. In order to resolve a controversial problem involving the interface, [the petitioner] innovatively investigated the structure using different advanced transmission electron microscopy. He identified the existence of a non-oxidized interface, which is crucial for device growth and performance. This work has been published in a leading semiconductor journal, [REDACTED] . . . His other work including structural studies in exchange bias, exchange spring systems, made him an influential expert in structural characterization of magnetic materials. [The petitioner's] work bridges the experimental data and theory calculations. The results will have extensive effects on device growth and fabrications.

[REDACTED] opines that the petitioner research "results will have extensive effects on device growth and fabrications." A petitioner, however, cannot file a petition under this classification based solely on the expectation of future eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The burden is on the petitioner to establish that his work has already significantly impacted the field as of the petition's filing date. To satisfy the criterion relating to original contributions of major significance, the petitioner must demonstrate not only that his work is novel and useful, but also that it had a demonstrable impact on his field. The petitioner has not shown, for instance, how the field has

significantly changed as a result of the petitioner's work, beyond the incremental improvements in knowledge and understanding that are expected from valid original engineering research.

As [the petitioner's] direct supervisor and frequent contact for nearly 10 years, I am in worthy a position to adjudge his research work

* * *

[The petitioner] assembled a sputtering system when he was completing his master's degree in the [redacted]. He independently designed the key components, such as the mechanical shutter, sample holder and vacuum valve. His ability for troubleshooting is extraordinary – such that the system was finished two months ahead of schedule. The equipment has been proved to be a state-of-the-art facility through which more than 40 publications including international scientific papers and degree thesis have been made.

Based on this sputtering system, he creatively fabricated the metal-insulator-metal (MIM) transistor on the glass substrate, which no one had ever done before. As the fabrication is extremely difficult, the high performance he achieved made his work at a world class achievement. His work has been cited many times since its publication in several international and [redacted] domestic well recognized magazines. [The petitioner's] extraordinary contributions to the thin film deposition field is not only limited to high-k materials. He has been enthusiastic seeking new emerging environmental and energy-saving multilayered thin films with high efficiency in infrared light anti-reflection. Later on, the project has been successfully applied to glass windows of buildings and transportation tools.

[redacted] does not specify the extent to which the petitioner's work "has been successfully applied to glass windows of buildings and transportation tools" or identify the companies utilizing his innovations. [redacted] asserts that the petitioner's work "has been cited many times," but the citation indices submitted by the petitioner from [redacted] indicate that his most frequently cited article, published in *Journal of Magnetism and Magnetic Materials*, was cited to only eight times. We agree with [redacted] that cites to a journal article are a reliable measure of the level of significance attributable to a researcher's findings. For example, a large number of independent cites to an article authored by the petitioner would provide solid evidence that other researchers have been influenced by his work and are familiar with it. In this case, the limited number of independent cites to the petitioner's body of work as of the petition's filing date is not an indication that his research findings equate to original contributions of major significance in the field. While the petitioner's equipment designs may have contributed to the Mechanical Engineering [redacted] the petitioner must demonstrate a contribution of major significance in the field as a whole.

I have followed closely [the petitioner's] progress as a graduate student here from 2004 to 2008

* * *

[The petitioner's] research work has focused on fabricating innovative epitaxial magnetic tunnel junctions with MgO barriers, which is a promising structure for use in future memory devices. The particular structure on which he worked has achieved one of the best performances yet reported, and [the petitioner] carried out structural characterization to resolve the interface problem, which was a controversial topic in the field. These results have been published by a leading journal, [REDACTED]

[The petitioner's] work has provided him with a growing reputation in the characterization of magnetic materials. For example, he is the first researcher to apply chemical analysis to the challenging Laves phase structure using transmission electron microscopy. This phase is another potential material for use in information recording, but suffers from issues related to the roughness and interlayer diffusion. [The petitioner] successfully studied these issues with various transmission electron microscopy techniques.

I would judge that [the petitioner's] research achievements demonstrate a high level of experimental ability, and he has an excellent understanding of the materials issues in spintronic devices which may be a future important technology for the computer industry.

[REDACTED] discusses the petitioner's research experience and experimental abilities, but his letter does not provide specific examples indicating how the petitioner's work has significantly impacted the field. A number of the petitioner's references such as [REDACTED] and Grovenor mention the petitioner's publication record. The regulations contain a separate criterion regarding the authorship of scholarly articles. 8 C.F.R. § 204.5(h)(3)(vi). We will not presume that evidence relating to or even meeting the scholarly articles criterion is presumptive evidence that the petitioner also meets this criterion. Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for authorship of scholarly articles and original contributions of major significance, USCIS clearly does not view the two as being interchangeable. To hold otherwise would render meaningless the statutory requirement for extensive evidence or the regulatory requirement that a petitioner meet at least three separate criteria. We will fully address the petitioner's scholarly articles under the next criterion.

[REDACTED]

I know [the petitioner] from his work in this Department as a [REDACTED] student, and from discussing with him his research in the field of nano-scale materials characterization of advanced semiconductor materials. [The petitioner] was one of the first researchers to apply advanced [REDACTED] studies to magnetic tunnel junctions. Using this dedicated technique, [the petitioner] studied the interface oxidization of real devices instead of real time growth as used by other researchers.

This work provides some of the first experimental values for interplanar distances between Fe and MgO layers, which is crucial in adjusting the magnetic performance of the devices.

* * *

During [the petitioner's] study, the work he has completed has been published in 6 papers and I expect his further results obtained from spherical aberration-corrected microscopy will be published in high ranking journals. He has the potential to make a significant contribution to the field and to benefit the U.S. and global research.

opines that the petitioner "has the potential to make a significant contribution to the field." In the same manner as noted that the petitioner "has an excellent understanding of the materials issues in spintronic devices *which may be a future important technology for the computer industry.*" [Emphasis added.] With regard to the witnesses of record, many of them discuss what may, might, or could one day result from the petitioner's work, rather than how his past research achievements already qualify as original contributions of major significance in the field. As discussed previously, a petitioner cannot file a petition under this classification based solely on the expectation of future eligibility. *Matter of Katigbak*, 14 I&N Dec. at 49.

a postdoctoral research associate at the Applied Research Center, Old Dominion University, states:

I know about [the petitioner] through his work on electrical properties of Tantalum Oxide in publication "*I-V characteristics of tantalum oxide film and the effect of defects on its electrical properties,*" published [i]n 458 (2004) 246-250.

* * *

[The petitioner's] pioneering experiment on low cost glass substrates was innovative in the application of tantalum oxide thin films. The results showing that the nanostructure affects the electronic properties like leak-current-voltage, and oxide breakdown characteristics. Without [the petitioner's] pioneering work, the structural work in my publication could not have been completed.

While indicates that he cited to the petitioner's article in and found that the petitioner's research was useful in his work, the limited number of submitted cites to the petitioner's article (7) does not establish that his findings equate to an original contribution of major significance in the field. A review of the article by citing the petitioner, submitted by the petitioner, reveals that merely cites the petitioner's article as one of two articles for the general proposition that Ta₂O₅ has attracted attention as a storage capacitor due to its attributes.

[REDACTED]

The research [the petitioner] conducted on metal-isolator-metal (MIM) capacitors using Ta/TaOx/Ta structure is a great interest to me. The findings from his work, especially information on defect analysis, surface roughness, electrical properties, were beneficial to my own research.

* * *

Another innovative accomplishment made by [the petitioner] was his attempt to try to use low cost glass as substrate to replace traditionally used high quality high cost Si substrate. By improving surface roughness and adhesion, devices performance can be improved on glass substrates. This original contribution to the field of MIM capacitors is significant.

The record, however, does not include evidence showing that the petitioner's MIM research is widely cited by independent researchers or otherwise equates to an original contribution of major significance in the field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the evidence indicates that the petitioner performed admirably on the research projects to which he was assigned, the submitted documentation does not establish that his work equates to original contributions of "major significance" in his field. For example, the record does not indicate the extent to which his findings have impacted others in the field of materials science and engineering at a level consistent with contributions of major significance in the field, nor does it show that the field has significantly changed as a result of his work.

In this case, the letters of recommendation submitted by the petitioner are not sufficient to meet this regulatory criterion. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. Thus, the content of the experts' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of a research engineer who has made original contributions of major significance. Without supporting evidence showing that the petitioner's work equates to original contributions of major significance in his field, we cannot conclude that he meets this criterion.

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

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

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

The petitioner submitted letters of support discussing his work at [REDACTED]

[REDACTED] While the petitioner has performed admirably on the engineering research projects to which he was assigned, there is no evidence showing that his roles as engineer and research assistant were leading or critical for the preceding institutions. For example, there is no organizational chart or other evidence documenting how the petitioner's positions fell within the general hierarchy of his educational institutions and employers. We note that the petitioner's role at the [REDACTED] was that of a student. The petitioner's evidence does not demonstrate how his positions differentiated him from the other research engineers employed by the preceding institutions, let alone their tenured faculty, principal investigators, department heads, and directors. The documentation submitted by the petitioner does not establish that he was responsible for the preceding institutions' success or standing to a degree consistent with the meaning of "leading or critical role." Accordingly, the petitioner has not established that he meets this criterion.

Summary

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

B. Final Merits Determination

In accordance with the *Kazarian* opinion, we must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2); and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." Section 203(b)(1)(A) of the Act; 8 C.F.R. § 204.5(h)(3). *See also Kazarian*, 596 F.3d at 1119-1120. In the present matter, 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)(i), (ii), (iii), (iv), (v), and (viii).

Regarding the documentation submitted for 8 C.F.R. § 204.5(h)(iv), we cannot conclude that the petitioner's review of one or more papers for a single professional journal, *IEEE Transactions on Magnetism*, demonstrates sustained national or international acclaim or a level of expertise indicating

that he is among that small percentage who have risen to the very top of the field of endeavor. *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)(2) and (3). In discussing the peer review process for IEEE publications, Professor Ackerman, editor for the journal *IEEE Transactions on Magnetics*, states:

Peer-review is an integral part of the publication process.

* * *

Consistent with [redacted] policies and procedures, all scientific papers and communications published in regular [redacted] periodicals shall be reviewed by at least two referees who are competent and have experience in the area of the subject matter of the paper. Referees are formal reviewers whose comments and opinions will form the basis upon which the Editor will decide whether or not to publish the paper, and with what changes. . . . The Editor's decision is always based on all the reviews received, but mixed reviews present the need for the exercise of editorial judgment. Thus, *the final decision for acceptance or rejection lies with the Editor.*

[Emphasis added.] We cannot ignore that the journal's editor (rather than individual reviewers such as the petitioner) ultimately determines which papers will be accepted for publication in [redacted]. Moreover, we note that peer review is a routine element of the process by which articles are selected for publication in scientific journals or for presentation at scientific conferences. Occasional participation in the peer review process does not automatically demonstrate that an individual has sustained national or international acclaim at the very top of his field. For example, according to [redacted] the [redacted] seeks referees "who are competent and have experience in the area of the subject matter of the paper." Competency and experience are not necessarily commensurate with sustained national or international acclaim at the very top of the field.

Reviewing manuscripts is recognized as a professional obligation of researchers who publish themselves in scientific journals. Normally a journal's editorial staff will enlist the assistance of numerous professionals in the field who agree to review submitted papers. It is common for a publication to ask multiple reviewers to review a manuscript and to offer comments. The publication's editorial staff may accept or reject any reviewer's comments in determining whether to publish or reject submitted papers. Without evidence that sets the petitioner apart from others in his field, such as evidence that he has received and completed independent requests for review from a substantial number of journals or served in an editorial position for a distinguished journal, we cannot conclude that his level of peer review is commensurate with sustained national or international acclaim at the very top of the field of endeavor. For example, the curriculum vitae submitted for [redacted] indicates that he has served on the editorial board of [redacted] since 1995.

With regard to the documentation submitted for 8 C.F.R. § 204.5(h)(vi), the petitioner has not established that his co-authorship of research articles with his superiors demonstrates a level of expertise indicating that he is among that small percentage who have risen to the very top of the field of endeavor. *See* 8 C.F.R. § 204.5(h)(2). As authoring scholarly articles is inherent to science and

engineering research, we will evaluate a citation history or other evidence of the impact of the petitioner's articles to determine the impact and recognition the petitioner's work has had on the field and whether such influence has been sustained.⁶ For example, numerous independent citations for an article authored by the petitioner would provide solid evidence that his work has been recognized and that other researchers have been influenced by his work. On the other hand, few or no citations of an article authored by the petitioner may indicate that his work has gone largely unnoticed by his field. As previously discussed, the petitioner submitted evidence showing that his body of published work has been independently cited to only 27 times. Moreover, there is no indication that any of the petitioner's individual journal articles have been cited to more than eight times. While this number of citations demonstrates some interest in his published work, it is not sufficient to demonstrate that his articles have attracted a level of interest in his field commensurate with sustained national or international acclaim at the very top of his field.

Ultimately, the evidence in the aggregate does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. The petitioner is presently a Mechanical Engineer III at [REDACTED] who submitted evidence of achievements originating mostly from his work as a graduate student and research assistant at the [REDACTED]. He relies primarily on a 3rd Place award in a "[REDACTED]" organized by a local society at his alma mater; memberships requiring education, experience, or primary authorship; an unspecified number of manuscript reviews for a single journal as part of the widespread review process; his patent applications and publications with his research supervisors; citation indices showing that his research articles have been minimally cited; and the praise of members of his field.

We note that many of the petitioner's references' credentials are impressive. For example, [REDACTED] states:

I am the [REDACTED]
[REDACTED]
[REDACTED]

⁶ For instance, we note that all of the scholarly articles submitted by the petitioner were authored in a university setting while he was working as a Research Assistant at the [REDACTED]. With regard to research in a university setting, the Department of Labor's Occupational Outlook Handbook, 2010-11 Edition (accessed at <http://www.bls.gov/oco/>), provides information about the nature of employment as a postsecondary teacher (professor) and the requirements for such a position. See <http://data.bls.gov/cgi-bin/print.pl/oco/ocos066.htm>, accessed on August 5, 2010, copy incorporated into the record of proceeding. The handbook expressly states that faculty members are pressured to perform research and publish their work and that the professor's research record is a consideration for tenure. Moreover, the doctoral programs training students for faculty positions require a dissertation, or written report on original research. *Id.* This information reinforces USCIS' position that publication of scholarly articles is not automatically evidence of sustained national or international acclaim; we must consider the field's reaction to those articles.

ultra-fast computer chips. I am the recipient of the 2005 [REDACTED] I am the co-recipient of the 2004 [REDACTED]. I am a Fellow of the [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED]. I have published over 400 papers, 10 patents, and have graduated 33 Ph.D. students I am also one of the founding members of the [REDACTED] and assumed the position of Associate Director for [REDACTED] in 1997. I am involved in the strategic planning/execution of [REDACTED] (\$9 M operation at the present time) direction/business. My research focuses on advanced microelectronic technologies and is one of the world's leading groups in this field.

[REDACTED] I am serving as the [REDACTED] that includes about twenty faculty members from different departments of College of Art and Sciences and College of Engineering and approximately the same number of graduate students and postdoctoral researchers. My research is focused on electronic, magnetic and transport properties of magnetic and ferroelectric nanostructures. I have published more than 120 papers and presented more than 50 invited talks at national and international conferences, seminars and colloquia on this subject. I have been the Principal Investigator of research projects funded by the [REDACTED], the [REDACTED], [REDACTED], [REDACTED], [REDACTED], and the [REDACTED].

[REDACTED] an internationally leading high-tech company in the hard drive industry. . . . Being a productive researcher, I have filed over 50 U.S. and international patents for the past two decades. In addition, I have published over 170 papers related to the hard drive technology on prestigious journals. . . . In addition, I am a member of [REDACTED], [REDACTED], and serve on the organizing committee for various professional organizations such as [REDACTED], [REDACTED], and [REDACTED]. Meanwhile, I am a Guest Professor at the [REDACTED], [REDACTED], and a Distinguished Researcher of [REDACTED].

[REDACTED] As the head of the thin film laboratory, which focuses on new emerging environmental materials, I serve as the director of the [REDACTED] [REDACTED] which includes more than fifty faculties of the department. My research work has been published in over 130 papers in international and Chinese journals. I also hold

more than ten patents in various countries. I have been in charge of several national projects including the [REDACTED] China (863 program) and the [REDACTED] of China.

While the petitioner need not demonstrate that there is no one more accomplished than himself to qualify for the classification sought, it appears that the very top of his field of endeavor is far above the level he has attained. In this case, the petitioner has not established that his achievements at the time of filing were commensurate with sustained national or international acclaim in materials science and engineering, or being among that small percentage at the very top of the field of endeavor.

C. Prior O-1 Nonimmigrant Visa Status

While USCIS has approved a prior O-1 nonimmigrant visa petition filed on behalf of the petitioner, this prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased standard. Each case must be decided on a case-by-case basis upon review of the evidence of record. 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 the alien'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. 593, 597 (Comm. 1988). 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 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

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 has approved a nonimmigrant petition on behalf of the alien, 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).

III. Conclusion

Review of the record does not establish that the petitioner has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of his field. The evidence is not persuasive that the petitioner's achievements set him significantly above almost all others in his field at a national or international

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

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d at 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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.