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



**U.S. Citizenship
and Immigration
Services**

B2



FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: APR 04 2011

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:

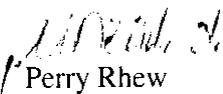


INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on September 23, 2009, and is now before the Administrative Appeals Office (AAO) 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. 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.

At the time of the original filing of the petition, counsel claimed the beneficiary's eligibility for this classification based on comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). Specifically, counsel argued:

The highest level of training to do [guided ultrasonic] inspections is monitored and granted internationally by [REDACTED]. The highest level of training is called a Level 3 Certificate. Until now, every holder of this level has a Ph.D. and is a faculty member of [REDACTED]. On July 3, 2009, [the beneficiary], a citizen of [REDACTED] and was awarded the Level 3 Certificate. He is the only other Level 3 holder in the world who does not also have a doctorate. He is the only lay person in the world who can teach and prepare trainees for Certificates needed for guided wave, non invasive inspection of virtually all types of pipelines.

* * *

The rarity and extraordinary achievement of this title cannot be overstated. To date, there are 8 holders of the Level 3 Certificate, seven of whom hold PhD's. There are only 17 holders of the Level 2 certificate. There are 11 in the United States and only seven are active. That means when a company requires Level 2 holders to comply with federal inspection regulations, they must wait until one is available to fly to the location for testing. Until now, no one was available in the United States to teach and train use of the equipment to create more Level 2

holders. Now, [the beneficiary] is available to perform this task. Besides this fact, [the beneficiary] is often requested by name to inspect especially challenging pipelines to satisfy national requirements.

Counsel then argued the beneficiary's eligibility as it related to an alien of exceptional ability pursuant to the section 203(b)(2)(A)(1) of the Act; 8 C.F.R. § 204.5(k)(1). Specifically counsel claimed that the beneficiary "has proof [of] certificate of exceptional ability in a limited, but vital field" and then described and submitted documentary evidence relating to the beneficiary's eligibility pursuant to the regulation at 8 C.F.R. §§ 204.5(k)(3)(ii) and 204.5(k)(3)(iii).

Again, the record of proceeding clearly reflects that the petitioner filed a petition seeking to classify the beneficiary as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act, and not as an alien of exceptional ability pursuant to section 203(b)(2)(A)(1) of the Act. Therefore, the petitioner must establish that the beneficiary meets the regulatory requirements pursuant to 8 C.F.R. § 204.5(h) and not pursuant to the regulation at 8 C.F.R. § 204.5(k). Moreover, even if the beneficiary met the regulatory requirements as an alien of exceptional ability, which we do not imply that he does, the regulatory requirements for an alien of extraordinary ability are separate and distinct, and would require a separate petition.

The record of proceeding reflects that the director issued a request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8) informing the petitioner of the regulatory requirements of an alien of extraordinary ability. In response, counsel argued:

This is not a request for an immigrant worker of extraordinary ability due to having a Ph.D, but a request for an immigrant of extraordinary ability by showing comparable evidence to establish the beneficiary's eligibility. He holds an advanced certificate to [REDACTED] and there are only [REDACTED] of them in the world. The other [REDACTED] Certificate 3 holders have doctorate degrees and are faculty members at [REDACTED]. [The beneficiary] has a number of qualifications which happen to comply with [the director's request for additional evidence], but complies with the definition of extraordinary ability in his own right.

Counsel again claimed the beneficiary's eligibility based on comparable evidence pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). Based on a review of the submitted documentary evidence, the director found that the beneficiary failed to meet the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v) and the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi), as well as the comparable evidence regulation pursuant to 8 C.F.R. § 204.5(h)(4).

At the time counsel filed Form I-290B, Notice of Appeal or Motion, on October 23, 2009, counsel argues:

Imposing 8 CFR 204.5(h)(2) and (3) is helpful in allowing us to show extraordinary ability, but 8 CFR 204.5(h)(4) is more appropriate. Beneficiary's unique award given by an internationally recognized institution of higher learning was gained after he published two articles in a major trade and scholastic journal, he trained others, underwent rigorous practical and scholastic exams and he gave a guest lecture on his techniques for visiting students at [REDACTED]. He is the only candidate without a doctorate to achieve this extraordinarily high level of training.

Counsel then argues, without referring to any documentary evidence, that the beneficiary has shown extraordinary ability based on the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), and the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(xi). Again, at no time during these proceedings has counsel identified which documents pertain to the specific claimed criteria. As counsel has failed to specify which documentary evidence relates to the regulatory criteria at 8 C.F.R. § 204.5(h)(3), we have considered the evidence submitted under the criterion we find to be most applicable. If it is counsel's contention that the documentary evidence meets a different criterion, she has never explained which criteria they are or how the evidence relates to those criteria. We note that counsel submitted a supplemental brief with additional documentary evidence but again claimed that it related to the comparable evidence regulation pursuant to 8 C.F.R. § 204.5(h)(4).

Here, we must address the beneficiary's Level 3 Certification by [REDACTED] in guided wave testing, and counsel's arguments that the beneficiary qualifies for an extraordinary ability immigrant visa based on the beneficiary attaining this "unique" and "rare" certification. Assuming the beneficiary's skills are unique, that issue properly falls under the jurisdiction of the Department of Labor. Moreover, whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor through the alien employment certification process. *See Matter of New York State Dep't. of Transp.*, 22 I & N Dec. 215, 221 (Commr. 1998). In order to meet the requirements of an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act, the petitioner must demonstrate that the beneficiary "has sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation." The 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, and absent the receipt of such an award, the regulation outlines ten categories of specific evidence in which the petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements. Therefore, while the beneficiary's possession of a Level 3 Certification is relevant to his qualifications as a vice president in [REDACTED] we are not persuaded that the beneficiary's educational or training experience alone establishes that he meets at least three of the ten regulatory categories of evidence and "has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise."

On appeal, we will address the beneficiary's eligibility as it relates to the criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3), and then we will address the beneficiary's eligibility as it relates to the comparable evidence regulation pursuant to 8 C.F.R. § 204.5(h)(4).

I. Law

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

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

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

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

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

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

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

The regulation at 8 C.F.R. § 204.5(h)(3) requires that 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.¹ With respect to the criteria at 8 C.F.R. §§ 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.*

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

¹ Specifically, the court stated that the AAO had unilaterally imposed novel, substantive, or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

proper procedure is to count the types of evidence provided (which the AAO did),” and if the petitioner failed to submit sufficient evidence, “the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded.)” *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the “final merits determination” as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a “level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor,” 8 C.F.R. § 204.5(h)(2), and “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered “sustained national or international acclaim” are eligible for an “extraordinary ability” visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at 1119.

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

II. Analysis

A. Evidentiary Criteria

This petition, filed on September 1, 2009, seeks to classify the beneficiary as an alien with extraordinary ability as a vice president in pipeline inspection. The petitioner has submitted evidence pertaining to the following criteria under the regulation at 8 C.F.R. § 204.5(h)(3).²

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

The petitioner did not claim the beneficiary's eligibility for this criterion at the time the petition was originally filed. However, on appeal, the petitioner is claiming the beneficiary's eligibility for this criterion. As such, the director could not have erred in his decision as the petitioner only claimed the beneficiary's eligibility for this criterion for the first time on appeal.

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

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires “[d]ocumentation of the alien’s receipt of lesser nationally or internationally recognized *prizes* or *awards* for excellence in the field of endeavor [emphasis added].” A review of the record of proceeding reflects that the petitioner submitted sufficient documentary evidence establishing that the beneficiary received Level 3 Certification from [REDACTED]. However, the petitioner failed to demonstrate that the beneficiary’s Level 3 Certification equates to a prize or award. The petitioner submitted the training curriculum for Level 3 Certification and a letter from [REDACTED] who stated that the beneficiary “has been appointed Level III practitioner qualification in guided wave testing in accordance with the [REDACTED] that was based on the following:

1. Gaining [REDACTED] Level II certification by examination and subsequent 6 years experience in using this technology in the field;
2. Successful ad-hoc review by a [REDACTED] Level III of testing data collected and analysis undertaken post Level II qualification;
3. Publication of papers on the application of guided wave testing in a recognized technical journal;
4. Successful interview and presentation to two non-executive members of the [REDACTED] Board of Directors;
5. Evidence of mentoring other [REDACTED] Is & IIs;
6. Standing within the guided testing community, among his peers and with the end clients is outstanding;
7. High level of performance on many guided wave test specimen [REDACTED] used by end clients to evaluate the guided wave technology; and
8. Involvement with on-site evaluation of new guided wave developments such as permanently installed monitoring systems.

It is clear from above that the beneficiary was “appointed” Level 3 Certification based on his successful completion of the [REDACTED] Training Scheme. We are not persuaded that completing training courses or receiving degrees or certificates in furtherance of a profession constitutes prizes or awards. Furthermore, academic study is not a field of endeavor, but training for a future field of endeavor. As such, education degrees or training certificates cannot be considered nationally or internationally recognized prizes or awards in the beneficiary’s field of endeavor.

Moreover, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires that the beneficiary’s prizes or awards be “nationally or internationally recognized” for excellence in the field of endeavor. On appeal, the petitioner submitted another reference letter from [REDACTED]

as well as reference letters from individuals involved with [REDACTED] training such as [REDACTED] all of whom indicated the petitioner's successful completion of [REDACTED] training course. However, the reference letters fail to demonstrate that Level 3 Certification is nationally or internationally recognized for excellence in the field of endeavor. Furthermore, the petitioner failed to submit any other documentary evidence to establish that Level 3 Certification is recognized nationally or internationally for excellence beyond [REDACTED]

As discussed above, the plain language of this regulatory criterion specifically requires that the beneficiary receive nationally or internationally recognized prizes or awards for excellence in the field of endeavor, and it is the petitioner's burden to establish every element of this criterion. In this case, there is no evidence demonstrating that the beneficiary has received any prizes or awards, and that Level 3 Certification is tantamount to a nationally or internationally recognized prize or award for excellence in the field of endeavor. Moreover, even if we found that the beneficiary's Level 3 Certification was a qualifying prize or award, which we clearly did not, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) requires the petitioner to demonstrate the beneficiary's receipt of more than one prize or award, in which the petitioner only claimed one prize or award.

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.

The petitioner did not claim the beneficiary's eligibility for this criterion at the time the petition was originally filed. However, on appeal, the petitioner is claiming the beneficiary's eligibility for this criterion. As such, the director could not have erred in his decision as the petitioner only claimed the beneficiary's eligibility for this criterion for the first time on appeal.

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 general, in order for published material to meet this criterion, it must be primarily about the beneficiary and, as stated in the regulations, be printed in professional or major trade publications or other major media. A review of the record of proceeding fails to reflect that the petitioner submitted any documentary evidence of published material *about* the beneficiary relating to his work in professional or major trade publications or other major media.

We note that the petitioner submitted an article and papers that were authored by the beneficiary. Articles authored by the beneficiary are not articles about the beneficiary relating to his work. However, although the beneficiary's article and papers are not relevant to this criterion, they will be

considered below as they relate to the authorship of scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi).

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

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

The director found that the petitioner failed to establish the beneficiary's eligibility for this criterion. In counsel's brief, she did not contest the decision of the director or offer additional arguments. We, therefore, consider this issue to be abandoned and will not further discuss this criterion on appeal. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005).

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

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

In the director's decision, he found that the petitioner failed to submit any evidence regarding the impact of the beneficiary's article on the field or evidence of the number of times that the article was cited by others. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires "[e]vidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media." Pursuant to *Kazarian*, 596 F.3d at 1122, the petitioner must establish that the beneficiary has authored scholarly articles in professional or major trade publications or other major media. Therefore, the impact or citation history of the beneficiary's article is irrelevant to meeting the plain language of the regulation for this criterion. While we do not agree with the basis of the director's decision, we concur with the ultimate decision of the director that the petitioner failed to establish the beneficiary's eligibility for this criterion.

A review of the record of proceeding reflects that the beneficiary authored one article, [REDACTED] in [REDACTED] February 2009 (Part 1) and March 2009 (Part 2). Moreover, the record of proceeding reflects that the petitioner submitted the following five papers that list the beneficiary as the author:

- 1.
- 2.
- 3.
- 4.



5. [REDACTED]

However, the petitioner failed to submit any documentary evidence reflecting that any of the five papers have been published “in professional or major trade publications or other major media.” Merely submitting documentary evidence reflecting that the beneficiary has authored papers is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) without documentary evidence establishing that the papers have been published in professional or major trade publications or other major media.

Although the petitioner established that the beneficiary has authored one scholarly article, the plain language of the regulation at 8 C.F.R. § 204.5(h)(vi) requires more than one scholarly article. We do not find that a single article that was merely divided into two parts is equivalent to more than one article.

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.

The petitioner did not claim the beneficiary’s eligibility for this criterion at the time the petition was originally filed. However, on appeal, the petitioner is claiming the beneficiary’s eligibility for this criterion. As such, the director could not have erred in his decision as the petitioner only claimed the beneficiary’s eligibility for this criterion for the first time on appeal.

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* [emphasis added].” In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment.

On appeal, the petitioner submitted a letter claiming that “3mm/yr average” was the income that was generated through the beneficiary’s training, that “15mm in 5 years” was the amount on contracts generated through the beneficiary’s training, that the beneficiary has trained six individuals for Level I or II certification, that the beneficiary has trained “more than 250” people to do inspections, that the beneficiary has taught or been an instructor for the petitioner on 10 occasions, that the beneficiary has been called upon in the last two years to inspect for or confirm compliance with DOT requirements “250 times,” and that the beneficiary “can go on any nuclear installation in the United States.” However, the petitioner failed to provide any documentary evidence supporting these assertions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

A review of the record of proceeding also reflects that the petitioner submitted the following documentation:

1. A "Customer Listing" claiming that it reflected 90 companies "for whom [the beneficiary] has done work";
2. A letter from [REDACTED] who stated that "[w]ithout [the beneficiary's] presence in this country with a company like [the petitioner] the safety of the pipeline infrastructure will be affected";
3. An email to the petitioner from [REDACTED] who thanked the beneficiary and others "for the outstanding work they did here on-site";
4. An email from [REDACTED] who stated that the beneficiary's "call[ing] out [of] a Casing Centralizer (-F3) and a wall loss Feature of approximately <25% at 5 o'clock (-F4)" was very accurate; and
5. A letter from [REDACTED] who stated that the beneficiary has provided the Guided Wave Technology procedures for the [REDACTED] inspections.

Although the documentary evidence reflects that the beneficiary has performed work on behalf of the petitioner for other companies or organizations, as well as praising the beneficiary for his work, the documentation provides no evidence that the beneficiary has performed in a leading or critical role for either the petitioner or the other companies. The documentary evidence contains general statements that lack specific details to demonstrate that the petitioner has performed in a leading or critical role. This regulatory criterion not only requires the petitioner to perform in roles, but also requires those roles to be leading or critical. We are not persuaded by vague documentation that only indicates that the petitioner has performed work but does not reflect how the beneficiary's roles have been leading or critical. Merely submitting documentary evidence demonstrating the beneficiary's employment with the petitioner is insufficient to establish eligibility pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii) without documentary evidence reflecting that the petitioner has performed in a leading or critical role. The petitioner failed to submit, for example, an organizational chart or other similar documentation that differentiates his position from other vice presidents or similar positions with the petitioner. For instance, [REDACTED] who submitted documentary evidence on the beneficiary's behalf, is also a vice president for the petitioner. There is no evidence distinguishing [REDACTED] position as a vice president from the beneficiary's position as technical vice president that would indicate that the petitioner has performed in a leading or critical role.

Regarding the beneficiary's roles with organizations on behalf of the petitioner, as indicated above, the record contains evidence related to the beneficiary's work with [REDACTED]

While the beneficiary's references praise his work, the petitioner failed to submit any other documentary evidence demonstrating that the beneficiary performed in leading or critical roles with these organizations as a whole. Simply submitting evidence that reflects the beneficiary has performed work for organizations on behalf of the petitioner does not meet the petitioner's burden of establishing that the beneficiary has performed in a leading or critical role for those organizations. In other words, the beneficiary failed to demonstrate that the beneficiary's specific or limited role in inspecting pipelines is leading or critical as a whole when compared to the roles of other employees of those organizations. Moreover, it appears that the positions of [REDACTED] are far more leading or critical to their organizations as compared to the beneficiary, who only provided a specific, but limited, service to those organizations.

Furthermore, according to Form G-325A, Biographic Information, which the beneficiary signed on August 6, 2009, the beneficiary claimed that he has been employed by the petitioner as a technical vice president since February 2004. Prior to the appeal, the petitioner failed to submit any documentary evidence regarding the beneficiary's specific duties, even though he has been working as a technical vice president since 2004. Moreover, on appeal, the petitioner submitted a letter, dated November 12, 2009, for the [REDACTED] [emphasis added]" that listed ten duties. As the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires that the petitioner to submit "[e]vidence that the alien *has performed* in a leading or critical role [emphasis added]" the submission of a letter reflecting the petitioner's proposed duties as a technical vice president is insufficient without documentary evidence establishing that he actually performed those duties. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Given the description of duties in terms of future applicability, the petitioner failed to demonstrate that the beneficiary performed those duties prior to the filing of the petition. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. The assertion that the beneficiary's role will likely be leading or critical is not adequate to establish that he has performed in a leading or critical role.

Finally, 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* [emphasis added]." The petitioner failed to identify any documentary evidence reflecting that it has a distinguished reputation, as well as any documentary evidence for the other organizations in which the beneficiary performed on the petitioner's behalf.

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.

The petitioner did not claim the beneficiary's eligibility for this criterion at the time the petition was originally filed. However, on appeal, the petitioner is claiming the beneficiary's eligibility for this criterion. As such, the director could not have erred in his decision as the petitioner only claimed the beneficiary's eligibility for this criterion for the first time on appeal.

A review of the record of proceeding reflects that the petitioner submitted the following documentation:

1. A job letter, dated November 19, 2009, from the petitioner to the beneficiary offering an annual salary of [REDACTED]
2. A job letter, dated July 15, 2009, from the petitioner to the beneficiary offering an annual salary of [REDACTED]
3. A job letter, dated October 23, 2008, from the petitioner to the beneficiary offering an annual salary of [REDACTED]
4. A job letter, dated April 15, 2002, from [REDACTED] Inc. to the beneficiary offering an estimated annual salary of [REDACTED] and [REDACTED]
5. A job letter, dated April 28, 2003, from [REDACTED] to the beneficiary offering an estimated annual salary of [REDACTED]

The petitioner failed to submit any documentary evidence demonstrating that the beneficiary was actually paid the amounts above such as through Form W-2, wage and tax statements, or paystubs. In addition, the petitioner submitted numerous bank statements for the beneficiary from [REDACTED] for 2008 and 2009. However, a review of the bank statements fail to reflect any salary or other deposits from the petitioner into the beneficiary's account. Although the bank statements reflect *general deposits each month*, there is no indication that the deposits are from the petitioner or any other entity. We note that the petitioner submitted several emails and wire transfer requests for the beneficiary in 2007 for training and consulting fees.

The plain language of this regulatory criterion requires the petitioner to submit evidence showing that the beneficiary has commanded a high salary "in relation to others in the field." In this case, the petitioner failed to establish that the beneficiary was paid the amount claimed and offers no basis for comparison showing that the beneficiary's compensation was significantly high in relation to others in his field. Merely submitting documentary evidence reflecting offers of salary or wire transfers is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix)

without documentary evidence demonstrating that the beneficiary has commanded a high salary or other significantly high remuneration for services, *in relation to others in the field*.

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

B. Comparable Evidence

As indicated previously, counsel claims the beneficiary's eligibility for the comparable evidence regulation pursuant to the regulation at 8 C.F.R. § 204.5(h)(4) based on the beneficiary's receipt of Level 3 Certification. The regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim "shall" include evidence of a one-time achievement or evidence of at least three of the following regulation categories. The ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. We further acknowledge that the regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." It is clear from the use of the word "shall" in 8 C.F.R. § 204.5(h)(3) that the rule, not the exception, is that the petitioner must submit evidence to meet at least three of the regulatory criteria. Thus, it is the petitioner's burden to explain why the regulatory criteria are not readily applicable to the beneficiary's occupation and how the evidence submitted is "comparable" to the objective evidence required at 8 C.F.R. § 204.5(h)(3)(i)-(x).

The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the beneficiary's occupation as a vice president in pipeline inspection cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, counsel mentions evidence in her brief that specifically addresses four of the ten criteria at 8 C.F.R. § 204.5(h)(3). An inability to meet a criterion, however, is not necessarily evidence that the criterion does not apply to the beneficiary's occupation. Moreover, although the petitioner failed to claim this additional criterion on appeal, we find that a vice president in pipeline inspection could make original contributions of major significance in the field pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v). Moreover, counsel failed to establish that the beneficiary, in his occupation, could not be a member of an association requiring outstanding achievements pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii), could not have published material about him regarding his work pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), and could not be a judge of the work of others pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv). Counsel provided no documentation as to why these provisions of the regulation would not be appropriate to the profession of a vice president in pipeline inspection.

Where an alien is simply unable to meet or submit documentary evidence of three of these criteria, the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. We note that we addressed the petitioner's documentary evidence as it related to the appropriate criteria under the regulation at 8 C.F.R. § 204.5(h)(3).

C. 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 beneficiary 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).

In evaluating our final merits determination, we must look at the totality of the evidence to conclude the beneficiary’s eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the beneficiary received Level III Certification by ██████ authored a scholarly article, and is employed as a vice president. However, the accomplishments of the beneficiary fall far short of establishing that he “is one of that small percentage who have risen to the very top of the field of endeavor” and that he “has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” See 8 C.F.R. § 204.5(h)(2), section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3).

The 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).

Although we found that the beneficiary failed to meet the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the petitioner’s submission of the beneficiary’s completion of Level III Certification is insufficient to establish the sustained national or international acclaim required for this highly restrictive classification. Furthermore, academic study is not a field of endeavor, but training for a future field of endeavor. As such, education degrees or training certificates cannot be considered nationally or internationally recognized prizes or awards in the beneficiary’s field of endeavor. In addition, the petitioner only claimed the beneficiary’s eligibility for one award.

While we found that the beneficiary did not meet the scholarly articles criterion pursuant to the regulation at 204.5(h)(3)(iv), we are not persuaded that a single article that was published six months prior to the filing of the petitioner demonstrates sustained national or international acclaim for this highly restrictive classification. Further, the petitioner failed to submit any documentary evidence regarding the impact or influence of the beneficiary's article on the field, so as to establish 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). The petitioner failed to submit, for example, evidence that the petitioner's work has been cited by others in the field that would reflect a level of interest in his field commensurate with sustained national or international acclaim at the very top of his field.

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 that the beneficiary did not meet the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), the petitioner failed to establish that the beneficiary has performed in a leading or critical role for the petitioner and for other companies on behalf of the petitioner. In fact, the petitioner claimed the beneficiary's eligibility based on "proposed duties" and not on evidence that the beneficiary has previously performed in a leading or critical role for the petitioner. An extraordinary ability claim cannot be based on prospective job duties but rather on the previous roles of the beneficiary consistent with sustained national or international acclaim. In addition, while we found that the beneficiary did not meet the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix), the petitioner claimed the beneficiary's eligibility without submitting documentary evidence comparing the beneficiary's salary to others in the field. The AAO is not persuaded that such evidence that fails to comply with the basic regulatory requirements equates to "extensive documentation" and is demonstrative of this highly restrictive classification. The truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010) citing *Matter of E-M*- 20 I&N Dec. 77, 80 (Comm'r. 1989).

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.