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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

[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: FEB 08 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:

[REDACTED]

**INSTRUCTIONS:**

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

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

Thank you,

  
Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is a medical technology company. It seeks classification of 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 in the sciences. 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 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 for the alien under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel argues that the beneficiary 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,

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

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

- (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- (iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
- (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;
- (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
- (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

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

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9<sup>th</sup> 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.<sup>1</sup> With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

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

*Id.* at 1119-1120.

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

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

## II. Analysis

### A. Evidentiary Criteria

This petition, filed on October 27, 2008, seeks to classify the beneficiary as an alien with extraordinary ability in “nanotechnology, biomaterials and polymer chemistry.” At the time of filing, the beneficiary was working as a Senior Scientist in the [REDACTED]. The petitioner has submitted documentation pertaining to the following categories of evidence at 8 C.F.R. § 204.5(h)(3).<sup>2</sup>

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

The petitioner submitted the beneficiary’s resume which lists the following information under “Honors and Awards:”

- Young Scientist Presentation, [REDACTED] [American Chemical Society] Fall Meeting, [REDACTED]
- 1<sup>st</sup> Postgraduate Presentation, Department of Chemistry, [REDACTED]

The record, however, does not include documentary evidence of the preceding awards. 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)). Rather than submitting primary evidence of the beneficiary’s awards from the ACS and [REDACTED] the petitioner instead submitted only the beneficiary’s resume and reference letters listing the awards. The self-serving claims in the beneficiary’s resume and the attestations of his references are not sufficient to meet the burden of proof for this regulatory criterion. A petition must be filed with any initial evidence required by the regulation. 8 C.F.R. § 103.2(b)(1). The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). According to the same regulation, only where the petitioner demonstrates that primary evidence does not exist or cannot be obtained may the petitioner rely on secondary evidence and only where secondary evidence is demonstrated to be unavailable may the petitioner rely on affidavits. Where a record does not exist, the petitioner must submit an original written statement on letterhead from the relevant authority indicating the reason the record does not exist and whether similar records for the time and place are available. 8 C.F.R. § 103.2(b)(2)(ii). The petitioner has not established that primary evidence of the preceding awards does not exist or cannot be obtained. Further, the beneficiary’s resume and the reference letters do not equate to secondary evidence or affidavits. Moreover, the record does not include information from the presenting organizations indicating the significance of the beneficiary’s awards or their evaluation criteria. Further, there is no documentary evidence demonstrating that

<sup>2</sup> The petitioner does not claim to meet or submit documentation relating to the categories of evidence not discussed in this decision.

the beneficiary's awards are recognized beyond the presenting organizations and therefore commensurate with nationally or internationally recognized prizes or awards for excellence in the field.

On appeal, counsel states: "We direct the reviewer's attention to the response to the RFE [Request for Evidence] in which we confirm that no claim was made by Beneficiary to satisfy this criterion."

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

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

In order to demonstrate that membership in an association meets this criterion, a petitioner must show that the association requires outstanding achievement as an essential condition for admission to membership. Membership requirements based on employment or activity in a given field, minimum education or experience, standardized test scores, grade point average, recommendations by colleagues or current members, or payment of dues, do not satisfy this criterion as such requirements do not constitute outstanding achievements. Further, the overall prestige of a given association is not determinative; the issue here is membership requirements rather than the association's overall reputation.

The petitioner initially submitted the beneficiary's membership card and payment information for the ACS. The record, however, does not include evidence of the membership requirements (such as bylaws or rules of admission) for the ACS showing that it requires outstanding achievements of its members, as judged by recognized national or international experts in the beneficiary's field or an allied one. The petitioner's initial evidence for this criterion also included documentation indicating that the beneficiary joined the [REDACTED]

[REDACTED] The beneficiary's Resident Faculty position with NJCBM equates to a post-doctoral research position rather than membership in an association in the field.

On appeal, counsel states: "Beneficiary did not provide any evidence for this criterion and made no claim it had been satisfied."

In light of the above, the petitioner has not established 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.*

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. To qualify as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication. 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.<sup>3</sup>

The petitioner initially submitted copies of seven research articles briefly citing to the beneficiary's work.<sup>4</sup> Articles which cite to the beneficiary's work are primarily about the author's own work, and are not about the beneficiary or even his work. The regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be "about the alien." The submitted articles do not discuss the merits of the beneficiary's 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 beneficiary as required by this criterion. With regard to this criterion, a footnoted reference to the alien's work without evaluation is of minimal probative value. Finally, we note that the submitted articles citing to the beneficiary's work similarly referenced numerous other authors.

On appeal, counsel states: "The Beneficiary made no claim to satisfy this criterion in either the initial submission or in response to the RFE." The research articles citing to the beneficiary's work are more relevant to the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(v) and will be addressed there.

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

*Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.*

The petitioner initially submitted a December 6, 2005 e-mail from [REDACTED] to the beneficiary and a coworker stating:

[REDACTED] has requested I sent you the attached JBMR [*Journal of Bone and Mineral Research*] article on matrix metalloproteinase for review.

Please provide [REDACTED] your comments regarding: novelty, significance, manuscript quality, soundness of methods and conclusions by December 17th.

<sup>3</sup> Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

<sup>4</sup> Two of the citing articles, entitled [REDACTED] with "Oppositely Charged Polyelectrolytes" and "Investigation of local chain dynamics in poly(di-*n*-alkylitaconate)s," were submitted in duplicate.

The limited information provided in the preceding e-mail does not identify the title of the article reviewed by the beneficiary. Further, there is no documentary evidence of the beneficiary's response to [REDACTED]

The petitioner also submitted a December 20, 2005 e-mail from [REDACTED] to the beneficiary and two coworkers stating:

I am sending you a draft manuscript which I received for review. Because of the interest you may have in the topic of this paper, I am sharing it with you. . . . Please look at the manuscript and provide me with your comments and critique which I will collect as part of my response to the editor.

The December 20, 2005 e-mail does not identify the title of the manuscript or the journal to which it was submitted. Further, there is no documentary evidence of the beneficiary's response.

The petitioner's initial submission also included an October 23, 2006 e-mail from [REDACTED] to the beneficiary and two coworkers stating: "I have received the attached proposals for evaluation. . . . At this point, I, and you are the only 4 people in the group who have seen this most relevant proposal. . . . Please read the proposal and in a few days, I will convene a meeting for us to discuss your thoughts about this proposal." The title and subject of the proposal are not specifically identified and there is no documentary evidence of the beneficiary's contribution to the evaluation.

With regard to the preceding review requests received by the beneficiary while on the research faculty at the NJCBM, there is no documentary evidence demonstrating that the beneficiary actually completed the preceding proposal and manuscript reviews. The plain language of this criterion, however, requires "[e]vidence of the alien's participation . . . as a judge of the work of others." Being asked to review a manuscript or proposal is not tantamount to evidence of one's actual "participation" as a reviewer. Moreover, the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires evidence that the beneficiary has served as "a judge of the work of others." The phrase "a judge" implies a formal designation in a judging capacity, either on a panel or individually as specified at 8 C.F.R. § 204.5(h)(3)(iv). The regulation cannot be read to include every informal instance of a supervisor requesting input from his subordinates. Regarding the two e-mails from December 2005, the submitted documentation indicates that the journals requested that [REDACTED] review the manuscripts. [REDACTED] then assigned the duty to the beneficiary and his coworkers. The record contains no evidence that the beneficiary served as part of a formal judging process (such as being specifically designated as a peer reviewer for a journal or evaluating a research proposal as an independent reviewer at the request of the funding organization). Nevertheless, there is no evidence establishing that the beneficiary actually completed the preceding manuscript and proposal reviews. Accordingly, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation set forth at 8 C.F.R. § 204.5(h)(3)(iv). Additional deficiencies pertaining to the petitioner's 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.



Specifically at [REDACTED], [the beneficiary] is responsible for applying his extraordinary level of expertise to extending the already elevated level of Pre-Analytical System (PAS) knowledge and innovation at the interface between specimen containment products, analytes and other compounds, and specimens and their interactions with diagnostic chemistries. At present, he is actively engaged in high-level activity focused on improving the technology and design of the [REDACTED] and has a provisional patent application pending. [REDACTED] offer a safe method for blood collection. They reduce the potential for tube breakage and specimen spillage, thereby reducing the potential for exposure to blood borne pathogens. This product line is in use in countries throughout the world and generates sales in the multimillions per year.

\* \* \*

Given his specialized education and Ph.D. degree in Physical Polymer Chemistry, as well as his spectacular research experience at DSM Research in the Netherlands, and at the New Jersey Center for Biomaterials, [the beneficiary] has the extraordinary ability required, and he is uniquely qualified to lead [REDACTED] within the company's Diagnostics Division, in the area of biomaterials research and the design of safety coatings for important medical devices.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires that the contributions be "of major significance in the field" rather than limited to a single research institution or employer such as the petitioner. With regard to the beneficiary's occupation, the Department of Labor's Occupational Outlook Handbook (OOH), 2010-11 Edition (accessed at [www.bls.gov/oco](http://www.bls.gov/oco) on January 20, 2011 and incorporated into the record of proceedings), states:

Many chemists and materials scientists work in research and development (R&D). In basic research, they investigate the properties, composition, and structure of matter and the laws that govern the combination of elements and reactions of substances to each other. In applied R&D, *these scientists create new products and processes or improve existing ones*, often using knowledge gained from basic research.

(Emphasis added.) See <http://www.bls.gov/oco/pdf/ocos049.pdf>. If the regulation at 8 C.F.R. § 204.5(h)(3)(v) is to have any meaning, it must be presumed that merely performing routine duties inherent to one's occupation is not necessarily indicative of scientific contributions of major significance in the field. While the beneficiary has helped to improve [REDACTED] product lines, there is no evidence showing that his level of contribution to the company's existing products equates to original scientific contributions of "major significance" in the field.

In response to the director's request for evidence, the petitioner submitted an August 31, 2009 letter from [REDACTED] stating:

Since joining [REDACTED] [the beneficiary's] work continues to have a significant impact, specifically on the PreAnalytical Medical Device Industry and Healthcare, because:

- He is directing a research team on Zenith P800, a blood collection diagnostic device, capable of stabilizing bioactive peptides (metabolites) related to metabolic diseases like Type II Diabetes, the fastest growing disease worldwide (estimated 130 MM additional people will be affected by metabolic disease in the next twenty (20) years);
- As the Core Team Leader on this product launch, he is collaborating with key Pharmaceutical and Clinical Research Organizations, because the Pre-Analytical device is capable of stabilizing metabolites offering extremely valuable insight into metabolic diseases like Type II Diabetes, a research area that consumes an estimated \$80 Billion dollars annually;
- [The beneficiary] advanced the improvement of serum specimen purity by developing an unprecedented Enzyme Linked Immunoassay (ELISA) method capable of translating serum quality from clinically subjective observations to a quantitative accurate determination which enabled him;
- He determined the root cause for specimen contamination in diagnostic devices (that use blood separation gel material), contamination that is a potential cause of erroneous diagnostics results that can lead to inaccurate diagnosis posing a serious threat to patient health;
- [The beneficiary] successfully led a project team to eliminate issues brought forward through seven (7) Non-Compliant Material Requests (NCMRs) relating to critical product component failures of a blood separation gel materials exclusively manufactured at [REDACTED];
- [The beneficiary] drastically decreased turn around time for diagnostic test results by developing a novel formulation that rapidly coagulates blood upon collection in [REDACTED] in less than 2 minutes compared to typically 30 minutes offered by conventional serum products on the market. [The beneficiary] holds an Invention Disclosure Report (IRD) for this work and the technology is scheduled to enter Product Development in 2010;
- Leading research on products manufactured and distributed by BD to hospitals (worldwide) which has improved existing products and prevented the erosion of a product line at [REDACTED] that generates \$150 MM annually which is a huge business contribution:

1. [REDACTED] Push Button Blood Collection Set, Blood Collection Tubes, SafetyLok™ Blood Collection Set, Passive Shielding Blood Collection Needle, Eclipse™ Blood Collection Needle, Holders
2. [REDACTED] Quikheel™ Lancet, Contact-Activated Lancet, Gene™ Lancet, Blood Collection Tubes
3. [REDACTED]

[REDACTED] discusses the beneficiary's activities at [REDACTED] but there is no evidence showing that the beneficiary's original work for the company equates to scientific or business-related contributions of major significance in the field. The submitted documentation does not establish that the beneficiary's work for [REDACTED] has significantly impacted the field beyond his projects for his

immediate employer. Once again, a contribution to the beneficiary's employer is not necessarily an original contribution of major significance to the field at large.

The petitioner's response also included an August 31, 2009 letter from [REDACTED] Senior Vice President and Chief Technology Officer [REDACTED] stating:

After joining [REDACTED] [the beneficiary] has been working at an extraordinary pace to provide breakthrough solutions on critical issues in several Manufacturing, Technology and Product Development initiatives. [The beneficiary's] exceptional work has identified the root cause for specimen contamination. At the same time, he was able to effect an elimination of customer complaints by directing a manufacturing process change at the plant which resulted in a significant improvement in product performance. [The beneficiary's] unparalleled talent in the field of bio-relevant characterization of biomaterial surfaces and protein adsorption, as evidenced by his extensive bibliography of peer reviewed publications and a patent, has uniquely qualified him to address the difficult issue of quantifying specimen quality in [REDACTED] serum products at the molecular level.

[REDACTED] discusses how the beneficiary's work at [REDACTED] has been beneficial to his company, but he does not provide specific examples of how the beneficiary's projects have impacted the field at large. [REDACTED] also comments on the beneficiary's "extensive bibliography of peer reviewed publications." The regulations contain a separate criterion regarding the beneficiary's 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 beneficiary 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 beneficiary meet at least three separate criteria. We will fully address the beneficiary's scholarly articles under the next criterion. Regardless, there is no documentary evidence demonstrating that the beneficiary's peer reviewed publications and patent application are frequently cited by independent researchers or otherwise rise to the level of original contributions of major significance in the field.

[REDACTED] Associate Research Professor at the Department of Chemistry and Biological Chemistry at [REDACTED] states:

I have known [the beneficiary] since he joined the New Jersey Center for Biomaterials.... Throughout his research and teaching work, [the beneficiary] has demonstrated outstanding knowledge of polymer chemistry and biomaterial surface characterization methods. Most notably, [the beneficiary] has developed important predictive tools that allow researchers to determine the compatibility of biomaterials surfaces with living cells, providing a new understanding of blood cell and serum protein interactions with surfaces, such that materials can be designed and manufactured that selectively favor mammalian cell attachment over infectious bacterial cell biofilm formation.

[The beneficiary] has performed groundbreaking work in improved bio-relevant high-throughput screening methods, which has resulted in essential new techniques for identifying novel polymeric biomaterial compositions. This state-of-the-art research, arising from a collaboration of Q-Sense AB, the world's leading industrial supplier of acoustic resonator instruments, with our Center, did much to establish [the beneficiary's] reputation internationally as one of the leading scientists in the design and integration of quartz crystal microbalance with dissipation (QCM-D) and immunofluorescence assay measurements for determining surface hemocompatibility (blood compatibility). This work has been published [REDACTED]

[REDACTED] "The Application of QCM-D Within a Biomaterials Discovery Process," Q-Sense [REDACTED] but the true tribute to its real-world value is the fact that the ideas elaborated on in [the beneficiary's] writings have lately been implemented by two Fortune 500 biotechnology companies.

[REDACTED] does not identify the "two Fortune 500 biotechnology companies" that have implemented the beneficiary's screening methods for determining surface hemocompatibility or indicate the extent of their implementation. Simply 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. at 165. Further, there is no evidence showing that the beneficiary's conference paper is frequently cited by other researchers or that his findings otherwise equate to original scientific contributions of major significance in the field.

[REDACTED], states:

I served as [the beneficiary's] Advisor while he completed a Post Doctoral Research assignment at my facility, the New Jersey Center for Biomaterials . . . .

\* \* \*

[The beneficiary's] appointment to the New Jersey Center for Biomaterials enabled him to achieve unparalleled advances in the field of biomaterials science and the rapid screening of bio-relevant properties aimed at accelerating the discovery of new biomaterials.

[REDACTED] does not provide specific examples of how the beneficiary's screening methods have influenced the field at large or have been successfully utilized by independent research teams.

[REDACTED] Associate Professor in the Department of Biomedical Engineering, and the Department of Chemical and Biochemical Engineering at [REDACTED], states:

From 2005 to present, researchers at the Department of Biomedical Engineering at [REDACTED] have engaged in an intensive collaboration with [the beneficiary] at the New Jersey Center for Biomaterials and it is through his extraordinary work on the project that I got to know him well. . . . The project objectives were to devise state of the

art combinatorial workflows for the discovery of new biomaterials and to identify the pitfalls and problems associated with this, which was, at that time, a rather new area of research. [The beneficiary] directed the work so well that a very useful resource was established, unique in that it makes it possible to evaluate the bio-response of a large number of potential biomaterials. This knowledge has already and will continue in the future to enable the New Jersey Center for Biomaterials to provide the best material candidates for medical devices while contributing strongly to the understanding of cell-materials interactions in scientific literature.

comments that the beneficiary established a "very useful" biomaterials resource for the NJCBM, but there is no documentary evidence showing that the beneficiary's original work for this project has significantly impacted others in the field. Once again, a contribution to the beneficiary's research institution is not necessarily a contribution of major significance in the field at large.

states:

I am . . . a Core Faculty member of the "Integrated Technologies Resource for Polymeric Biomaterials" (RESBIO) within the New Jersey Center for Biomaterials, where I am responsible leading research efforts in high-throughput screening experimentation of cell-material interactions.

\* \* \*

At the New Jersey Center for Biomaterials, Rutgers University, [the beneficiary] has made significant and lasting contributions to the RESBIO initiative, which is focused on developing new techniques to accelerate biomaterials discovery methods. [The beneficiary's] research contributions have proven invaluable to the ongoing and future collaborative research efforts between NIST and the New Jersey Center for Biomaterials. His efforts have dictated the research focus for a team of eight (8) postdoctoral fellows and faculty members at the New Jersey Center for Biomaterials, working to exploit and leverage the development of new automated combinatorial workflows, rapid screening of bio-response characterization assays and computational methods for the prediction of biomaterials properties. Evidence for the inherent merit and value of [the beneficiary's] work include the fact that the system and results developed by [the beneficiary's] research team were featured in a presentation to the Fall 2006

There is no evidence showing that the beneficiary's ACS conference paper is frequently cited by independent researchers or that his work otherwise equates to an original scientific contribution of major significance in the field.

Assistant Professor of Chemical Engineering and Molecular and Cellular Life Sciences at the states:

I worked as a Postdoctoral Fellow at the National Institutes of Health in the Department of Biomedical Engineering at where I conducted research on tissue engineering and had the pleasure of first meeting and collaborating with [the beneficiary].

\* \* \*

I am very familiar with the . . . research work that [the beneficiary] has carried out while working at the developing efficient combinatorial synthetic methods and rapid screening characterization methods for improving and accelerating the discovery of new biomaterials for application in medical devices and regenerative medicine. [The beneficiary's] excellent work, namely the development of predictive methods for determining surface hemocompatibility and combinatorial approaches for the development of polymer surfaces exhibiting cell-specific adhesion, is extremely important to a number of key advances within the medical device industry. Without these technologies and the creative and elegant solutions developed by [the beneficiary], the quality of many regenerative therapies and medical devices would be substantially inferior to their current state.

\* \* \*

As a Research Faculty Member, [the beneficiary]'s group at the has performed a good deal of collaborative work with my group at the Department of Biomedical Engineering at the objective of which was to investigate better methods for characterizing cell response on materials for development in medical devices and regenerative tissue scaffolds. Our highly successful project generated more efficient procedures for imaging cell response on polymer surfaces by developing high-throughput screening methods and implementing them in material array formats. Notably, [the beneficiary] was the driving force behind many of the most significant and useful innovations derived during our work. A testimony of [the beneficiary's] impact in this field is our seminal presentation at the 2006 Material Research Society Fall Meeting in and an article currently under peer review for publication in the journal *Biomaterials*.

The beneficiary's field, like most science, is research-driven, and there would be little point in publishing or presenting research that did not add to the general pool of knowledge in the field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. To be considered a contribution of major significance in the field of science or medicine, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the impact of the beneficiary's work. does not provide specific examples of how the beneficiary's predictive methods for determining surface

hemocompatibility and combinatorial approaches for the development of polymer surfaces exhibiting cell-specific adhesion are being successfully applied in the medical device industry. Further, there is no evidence showing that the beneficiary's methods for characterizing cell response on materials for development in medical devices and regenerative tissue scaffolds are frequently cited, widely utilized, or otherwise constitute original scientific contributions of major significance in the field.

██████████ Principal Scientist, Performance Materials, DSM Research, ██████████, states:

At his position in Performance Materials at DSM Research, where I had the pleasure of working with him, [the beneficiary] demonstrated his extraordinary skills in polymer chemistry by developing a mechanically robust nonfouling coating. He was the first scientist to graft hydrophilic polymer chains to reactive nanoparticles and incorporate them in a crosslinked polymer matrix to yield a superior mechanical and bioinert coating *for potential use in medical devices*. [The beneficiary] was responsible for spearheading the research collaborations at ██████████ which allowed him to characterize the bio-response of his nonfouling coatings, applying state-of-the-art measurements and bringing knowledge of immense importance to DSM Research. The coating technology [the beneficiary] developed is without question far superior to all others in this emerging field. This invention resulted in a DSM owned international patent application . . . .

(Emphasis added.) ██████████ comments about the "potential use" of the beneficiary's coating for medical devices. The petitioner, however, must demonstrate the beneficiary's eligibility as of the filing date. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). The burden is on the petitioner to establish that the beneficiary's 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 the beneficiary's work is novel and useful, but also that it had a widespread impact on his field.

██████████ Research and Development Manager, DSM Research, discusses the beneficiary's "postdoctoral research position in Performance Materials at DSM Research" stating:

[The beneficiary] showcased his exceptional skills in polymer chemistry in developing mechanically robust, non-fouling coatings. This coating technology he developed is, without question, superior to technology in this emerging field. The DSM coating technology [the beneficiary] developed is mechanically robust (i.e., resistant to wear and abrasive damage). By contrast, current non-fouling technologies published in peer reviewed literature and commercially available on the market are intrinsically frail and weak due to the nature of the soft materials used to generate their non-fouling surface properties. Upon damage, these coatings lose their non-fouling properties, leading to the adhesion of biological entities, such as bacterial cells that may result in an implant infection where medical devices are concerned.

[The beneficiary's] work resulted in a DSM-owned international patent application, scholarly publications, [REDACTED]

The beneficiary's article [REDACTED] was published subsequent to the petition's October 27, 2008 filing date. As previously discussed, the petitioner must demonstrate the beneficiary's eligibility as of the filing date. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Nevertheless, there is no evidence showing that the beneficiary's findings in [REDACTED]

[REDACTED] are frequently cited or otherwise equate to original contributions of major significance in the field. Regarding the comment from [REDACTED] that the beneficiary's work at DSM Research resulted in an international patent application, the petitioner submitted documentation indicating that the beneficiary, [REDACTED] and another scientist at DSM Research filed a [REDACTED] for their invention entitled "Coating composition, coating and object coated with the coating composition" in 2004. Even if the petitioner were to establish that the application resulted in a European patent, which it has not, the grant of a patent demonstrates only that an invention is original. A patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 n. 7, (Commr. 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* In this instance, there is no documentary evidence indicating that the invention has been successfully marketed in the medical device industry or other comparable evidence of its significant influence in the field. Thus, the impact of the beneficiary's invention is not documented in the record. Further, with regard to [REDACTED] statement that the beneficiary is improving "the technology and design of the [REDACTED] and has a provisional patent application pending," there is no evidence demonstrating the impact of the beneficiary's innovation for [REDACTED]. Accordingly, the petitioner has not established that the beneficiary's patent applications assigned to [REDACTED] and [REDACTED] equate to original contributions of major significance in the field. Moreover, we cannot ignore [REDACTED] comment that [REDACTED] alone "holds over 300,000 patents and trademarks."

[REDACTED] and Professor of Bionanotechnology at [REDACTED] states:

I had the unique pleasure of working with [the beneficiary] as a part of the collaboration he initiated with my group at [REDACTED] during his position at DSM Research. The objective of our study was to determine the ability of his novel coatings to resist bacterial adhesion, employing a state-of-the-art parallel flow plate method. This highly successful project demonstrated the excellent non-fouling properties of [the beneficiary's] coatings which he had generated through his novel and efficient procedure for creating and designing bioinert surfaces for application in medical and non-medical devices that contact biological systems.

With the full support of DSM Research, [the beneficiary] built up a fully marketable technology with which the potential of DSM Research Performance Materials was greatly enhanced. This initiative allowed us to continue efforts to bring hi [sic] new

technology to commercial market, the best possible testament to the value of his work. [The beneficiary's] impressive technique and clear expertise in the areas of nanotechnology, biomaterials and materials chemistry distinguished him as a driving force in this research project which contributed to our developing numerous new, very useful materials.

does not provide specific examples of how the beneficiary's coating technology is being utilized in the industry beyond DSM Research's collaborative project with . There is no evidence showing that the beneficiary's procedure for creating and designing bioinert surfaces is frequently cited by independent researchers or that his work otherwise equates to an original scientific contribution of major significance in the field.

Professor and Department Head at the Department of Biomedical Engineering at the University Medical Center states:

I met with [the beneficiary] the University Medical Center where, in 2003, he approached my department with a collaborative proposal concerned with his postdoctoral research at DSM Research. The project, devoted to the phenomenally important area of creating nonfouling surfaces, involved the surface characterization of protein adsorption and bacterial adhesion on coating materials he had designed and invented. Due to his impressive international reputation in physical polymer chemistry, it was my pleasure to collaborate with [the beneficiary] and allow him to perform his measurements in our laboratories. The objective was to create coatings resistant to the fouling of biological materials including proteins that can lead to the failure of implanted medical devices.

In the highly competitive and technologically important market of materials for medical devices such as that we experience today, worldwide, the effective implementation of coatings for medical devices, inert to biofouling and that resists bacterial infection, is one of the crucial elements for creating a successful, safe product. [The beneficiary's] expert research project ultimately generated a patent and was published in several compelling articles, greatly advancing the work being done in production of nonfouling coatings.

comments that the beneficiary has published "several compelling articles," but the limited number of submitted citations to the beneficiary's articles does establish that his work is indicative of contributions of "major significance" in the field.

states:

I came to know [the beneficiary] through his exceptional whilst [sic] at DSM Research where he was recruited into a Postdoctoral position within the Functional Coatings Division. Applying his unusually broad and deep background in polymer science, he went on to develop a significantly major contribution to the field, namely, non-fouling coatings. . . . [The beneficiary's] work is expertly written and described in his recent, peer-reviewed article "Surface-modified nanoparticles as a new, versatile, and

mechanically robust non-adhesive coating: Suppression of protein adsorption and bacterial adhesion" that appeared in the [REDACTED]

As previously discussed, the beneficiary's article in [REDACTED] was published subsequent to the petitioner's October 27, 2008 filing date. The petitioner must demonstrate the beneficiary's eligibility as of the filing date. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Nevertheless, there is no evidence showing that the beneficiary's work in [REDACTED] is frequently cited or otherwise equates to contribution of major significance in the field.

[REDACTED], Lecturer in Polymer Chemistry at Heriot-Watt University, United Kingdom, states:

[The beneficiary] completed his undergraduate dissertation project under my supervision and, considering his impressive knowledge and skills, it was my pleasure to accept his application to undertake his Ph.D. dissertation studies in my laboratory as well. [The beneficiary's] Ph.D. research was devoted to the complicated problem of correlating the chemical structure of polymers with their physical properties. . . . The objective of these measurements was to reveal structural ordering and dynamic information concerning the behavior in a class of nanostructured polymers which [the beneficiary] had synthesized in the laboratory. [The beneficiary] expertly managed his Ph.D. research project, to the end that he achieved a number of scientific discoveries that were previously unreported and led to publication of his compelling results, including six (6) articles in competitive peer-reviewed journals which provided a detailed and thorough understanding of the nanostructured and physical properties in nanophase separated polymers. This was a clear breakthrough in the area and the project's success was clearly due to [the beneficiary's] expert leadership.

While the beneficiary'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 researcher who performs original research that adds to the general pool of knowledge has inherently made a contribution of major significance to the field as a whole.

[REDACTED]

Culminating from [the beneficiary's] distinguished body of work are numerous publications, presentations and a patent. [The beneficiary] has earned a tremendous reputation among the international community of scientists, who have cited his work, both within the U.S. and abroad.

As previously discussed, the petitioner submitted copies of seven research articles citing to the beneficiary's work. The petitioner also submitted a citation list of 24 articles citing to the

beneficiary's body of published work. Two of the listed citations were self-citations by the beneficiary's coauthor and Ph.D. supervisor [REDACTED]. While a normal and expected process, the self-citations cannot demonstrate the beneficiary's influence beyond [REDACTED] laboratory. The source of the citation list compiled by the petitioner is not identified and copies of only seven citing articles were submitted. Rather than submitting evidence of citations records originating from an official source (such as an online scientific database) for the remaining articles or copies of those articles, the petitioner instead submitted a self-serving list of citing articles compiled by the petitioner. 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. at 165. Counsel provides no explanation for why the petitioner did not submit a printout from an official source such as [REDACTED]. Even if we accepted the petitioner's self-serving list of citations, no single article by the beneficiary has garnered more than twelve independent citations. For instance, the list of thirteen articles citing to the beneficiary's 2000 article in [REDACTED] includes a self-citation by the beneficiary's coauthor [REDACTED]. Ultimately, the limited number of submitted citations to the beneficiary's articles is not indicative of contributions of major significance in the field.

[REDACTED] Associate Professor of Medicine, [REDACTED]  
[REDACTED] and independent consultant, states:

I am particularly impressed by [the beneficiary's] work related to the development of combinatorial workflows and bio-relevant high-throughput screening assays for the discovery of new biomaterials. His groundbreaking work in this area has introduced useful tools for predicting the hemocompatibility of biomaterial surfaces, allowing researchers to assess the degree to which such materials resist adhesion of clotting blood and bacterial cells to the medical device, thereby reducing risks of bacterial infection or vascular occlusion. [The beneficiary] has developed screening assays that have successfully identified materials which can be applied in regenerative medicine by selectively favoring mammalian cell attachment and growth over that of bacteria; and this process is accomplished much more quickly than was ever previously possible.

[REDACTED] does not provide specific examples of how the beneficiary's combinatorial workflows and bio-relevant high-throughput screening assays are being implemented by others in the field beyond the NJCBM or otherwise constitute contributions of major significance in the field at large.

[REDACTED] Professor, Department of Polymer Science and Engineering, [REDACTED]  
[REDACTED] states:

[The beneficiary's] research is most certainly extraordinary, not merely on a theoretical level, but also in regard to its viability in real-world applications in medical devices. Such examples that demonstrate extraordinary achievements are, for instance:

- His patented creation of a non-fouling coating technology at DSM Research in [REDACTED] that resists the adhesion of proteins and biological cells to [REDACTED]

surfaces which received the American Chemical Society's Young Scientist Award at the 2005 Fall Meeting in Washington DC;

- The development of innovative techniques, such as the state-of-the art Quartz Crystal Microbalance with Dissipation, for the rapid and safe determination of surface blood compatibility that was so innovative that it was selected to be presented at the Q-Sense World conference in Boston, 2006; and
- The development of combinatorial approaches for developing polymer surfaces exhibiting cell specific adhesion that was likewise, so noteworthy that it was identified for presentation at the Materials Research Society Fall meeting in Boston, 2006.

As previously discussed, there is no documentary evidence of specific examples where the non-fouling coating technology developed by the beneficiary at DSM Research has been licensed, commercialized, or successfully utilized in the medical device industry. Moreover, [REDACTED] does not explain how receiving an ACS award restricted to "young" scientists in the early stages of their career equates to an original scientific contribution of major significance in the field. The petitioner's evidence includes documentation that the beneficiary has presented his findings at various scientific conferences along with numerous other participants. Many professional fields regularly hold conferences and symposia to present new work, discuss new findings, and to network with other professionals. These conferences are promoted and sponsored by professional associations, businesses, educational institutions, and government agencies. Participation in such events, however, does not equate to an original contribution of major significance in the field. There is no evidence showing that the beneficiary's conference presentations have been frequently cited by independent researchers or have otherwise significantly impacted the field. [REDACTED] does not state that he has cited to any of the beneficiary's conference presentations or journal articles in his own work and provides no specific examples of any independent researchers who have applied the beneficiary's findings in their work.

On appeal, counsel argues that the director disregarded the information contained in the letters of support. The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 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; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of the experts' statements and how they became aware of the beneficiary's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of a research scientist who has made original contributions of major significance. Without supporting evidence showing that the beneficiary'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 the beneficiary's authorship of scholarly articles in professional journals and, thus, has submitted qualifying evidence pursuant to 8 C.F.R. § 204.5(h)(3)(vi). Accordingly, we agree with counsel that the evidence submitted by the petitioner 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 aforementioned letters of support indicate that the beneficiary performed research as a Senior Scientist at BD, a student at [REDACTED] and as a postdoctoral researcher for both DSM Research and the NJCBM. The director's decision erroneously concluded that "since all these assignments were integral to the beneficiary's employment, they cannot be considered for this criterion." We withdraw the director's finding in that regard. On appeal, counsel argues that the letters of support confirm that the beneficiary has performed in a leading or critical role for the preceding institutions. Regarding the beneficiary's role at the NJCBM, the January 26, 2007 letter from [REDACTED] states:

[The beneficiary] manages and guides a team of fifteen (15) faculty members, postdoctoral fellows and graduate students working on the development of combinatorial synthetic workflows and biorelevant screening characterization for the discovery of new biomaterials. This program is a vital, core component of our NIH-funded, multi-million dollar National Center for Research Resource, "RESBIO," here at Rutgers. [The beneficiary] is the technical project leader for this core team and his unique combination of technical and organizational skills have ensured the success of this project and helped establish the [REDACTED] Biomaterials as a major national resource for biomedical research.

We acknowledge the beneficiary's service as a technical project leader for the NJCBM team working on the development of combinatorial synthetic workflows and biorelevant screening characterization for the discovery of new biomaterials, a component of RESBIO. However, leading this component of the RESBIO project does not necessarily translate to a leading or critical role for the NJCBM as a whole. The petitioner's initial evidence included informational material about the Biomedical Engineering program at [REDACTED] but the submitted documentation does not establish that the NJCBM has a distinguished reputation. 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. at 165. Further, while the beneficiary has performed admirably on the projects to which he was assigned at [REDACTED] DSM Research, and the NJCBM, there is no evidence showing that his roles as a student and postdoctoral researcher were leading or critical for the preceding institutions. For instance, the record does not include an organizational chart or other evidence documenting where the beneficiary's positions fell within the general hierarchy of DSM Research and the NJCBM.

We note that the beneficiary's postdoctoral research appointments at these institutions were designed to provide specialized research experience and training in his field of endeavor.<sup>5</sup> The petitioner's evidence does not demonstrate how the beneficiary's temporary postdoctoral appointments differentiated him from the other research scientists employed by the preceding institutions, let alone the institutions' senior management and tenured faculty such as [REDACTED]

The September 8, 2008 letter from [REDACTED] states that the beneficiary has worked for [REDACTED] as a Senior Scientist in the PAS Division since March 2007. In response to the director's request for evidence, the petitioner submitted an August 31, 2009 letter from [REDACTED] stating:

Recently the BD PAS Leadership Team (comprised of senior executives) selected [the beneficiary] to become a Core Team Leader for a new product launch program. This appointment was made in recognition of his outstanding business acumen, execution excellence, solid cross-functional knowledge and the breadth of his technical, organizational and leadership capability. In this capacity, [the beneficiary] is accountable to successfully lead and direct cross-functional team activities and deliver critical project outcomes. He is accountable for the successful launch and commercialization of the product on the worldwide market.

[REDACTED] states that the BD PAS Division Leadership Team "recently" selected the beneficiary to become a "Core Team Leader," but he does not specify the exact date of the beneficiary's appointment. There is no evidence establishing that the beneficiary had already performed as a Core Team Leader for the [REDACTED] as of the petition's October 27, 2008 filing date. As previously discussed, a petitioner must establish the beneficiary's eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. The petitioner's response to the director's request for evidence also included an August 31, 2009 letter from [REDACTED] stating that the beneficiary is "one (1) of only one hundred fifty (150)" Core Team Leaders employed at [REDACTED]. Without an organizational chart or other evidence documenting how the beneficiary's position as Senior Scientist or Core Team Leader fits within the general hierarchy of [REDACTED] or other evidence demonstrating what the alien does in his role that is critical to the petitioner, we cannot conclude that his role is leading or critical to the company as a whole. The petitioner's evidence does not demonstrate how the beneficiary's roles differentiated him from the numerous other Core Team Leaders and Senior Scientists employed by [REDACTED] let alone the company's senior managers and executives (such as [REDACTED]).

In this case, the documentation submitted by the petitioner does not establish that the beneficiary 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 the beneficiary meets this criterion.

<sup>5</sup> "Biological scientists with a Ph.D. often take temporary postdoctoral research positions that provide specialized research experience." See <http://www.bls.gov/oco/pdf/ocos047.pdf>, accessed on January 20, 2011, copy incorporated into the record of proceeding.

*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 submitted copies of three of the beneficiary's pay statements from May and June 2008 reflecting that he earns \$3,193.85 biweekly or \$83,040.10 annually. The plain language of this regulatory criterion, however, requires the petitioner to submit evidence showing that the beneficiary has commanded a high salary "in relation to others in the field." The petitioner offers no basis for comparison showing that the beneficiary's earnings are significantly high in relation to others in the field. On appeal, counsel states: "The Beneficiary made no claim to satisfy this criterion in either the initial submission or response supplied to the RFE." Accordingly, the petitioner has not established that the beneficiary meets this criterion.

#### *Summary*

In this case, we concur with the director's determination that the petitioner has failed to demonstrate the beneficiary's 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).

#### ***B. Final Merits Determination***

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

Even if the petitioner were to submit primary evidence of the beneficiary's ACS Young Scientist Award, which it has not, we cannot conclude that an award won by the beneficiary in an age-restricted competition or a competition limited to scientists in the early stage of their career indicates that he "is one of that small percentage who have risen to the very top of the field of endeavor." *See* 8 C.F.R. § 204.5(h)(2). USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899.<sup>6</sup> Likewise, it does not follow

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<sup>6</sup> While we acknowledge that a district court's decision is not binding precedent, we note that in *Matter of Racine*, 1995 WL 153319 at \*4 (N.D. Ill. Feb. 16, 1995), the court stated:

[T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a

that a researcher who has had success in a competition restricted to young scientists should necessarily qualify for an extraordinary ability employment-based immigrant visa. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 204.5(h)(2) that this visa category be reserved for "that small percentage of individuals that have risen to the very top of their field of endeavor."

With regard to the documentation submitted for 8 C.F.R. § 204.5(h)(iv), the nature of the beneficiary's judging experience is a relevant consideration as to whether the evidence is indicative of his recognition beyond his own circle of collaborators. *See Kazarian*, 596 F. 3d at 1122. Even if the petitioner were to submit evidence showing that the beneficiary actually completed the proposal and manuscript reviews, which it has not, we cannot conclude that the beneficiary's subordinate level of review demonstrates his 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). The record reflects that the journal manuscripts and proposal were first submitted to [REDACTED] for review who then assigned the duty to multiple subordinates at the NJCBM including the beneficiary. Being requested to review an article or proposal by one's supervisor is not evidence of national or international acclaim. Further, we note that peer review is a routine element of the process by which articles are selected for publication in scientific journals. Normally a journal's editorial staff will enlist the assistance of many 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 pre-dating the filing of the petition that sets the beneficiary apart from others in his field, such as evidence that he served in an editorial position for a distinguished journal or completed numerous manuscript reviews at the direct request of a substantial number of journals, 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.

Regarding the beneficiary's original research, as stated above, it does not appear to rise to the level of contributions of "major significance" in the field. Demonstrating that the beneficiary's work was "original" in that it did not merely duplicate prior research is not useful in setting the beneficiary apart through a "career of acclaimed work." H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). That page (59) also says that "an alien must (1) demonstrate sustained national or international acclaim in the sciences, arts, education, business or athletics (as shown through extensive documentation)..." Research work that is unoriginal would be unlikely to secure the beneficiary a master's degree, let alone classification as a scientist of extraordinary ability. To argue that all original research is, by

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professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

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

definition, "extraordinary" is to weaken that adjective beyond any useful meaning, and to presume that most research is "unoriginal." Notably, the Department of Labor's OOH, 2010-11 Edition (accessed at [www.bls.gov/oco](http://www.bls.gov/oco) on January 20, 2011 and incorporated into the record of proceedings), contains the following information on chemists and materials scientists:

Many chemists and materials scientists work in research and development (R&D). In basic research, they investigate the properties, composition, and structure of matter and the laws that govern the combination of elements and reactions of substances to each other. In applied R&D, these scientists create new products and processes or improve existing ones, often using knowledge gained from basic research. For example, the development of synthetic rubber and plastics resulted from research on small molecules uniting to form large ones, a process called polymerization. R&D chemists and materials scientists use computers and a wide variety of sophisticated laboratory instrumentation for modeling, simulation, and experimental analysis.

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Materials scientists study the structures and chemical properties of various materials to develop new products or enhance existing ones. They also determine ways to strengthen or combine materials or develop new materials for use in a variety of products. Materials science encompasses the natural and synthetic materials used in a wide range of products and structures, from airplanes, cars, and bridges to clothing and household goods. Materials scientists often specialize in a specific type of material, such as ceramics or metals.

See <http://www.bls.gov/oco/pdf/ocos049.pdf>. As researching chemical properties, developing new products or processes, and improving existing ones are inherent to chemists and materials scientists, the mere originality of the beneficiary's work does not set the beneficiary among "that small percentage of individuals that have risen to the very top of their field of endeavor." 8 C.F.R. § 204.5(h)(2). For the reasons discussed above, the record does not contain sufficient evidence that the beneficiary's original innovations had major significance in the field, let alone an impact consistent with being nationally or internationally acclaimed as extraordinary.

While the beneficiary has published scholarly articles based on his research at [REDACTED] the OOH (accessed at [www.bls.gov/oco](http://www.bls.gov/oco) on January 20, 2011 and incorporated into the record of proceedings) provides information about the nature of employment as a postsecondary teacher and the requirements for such a position. See <http://www.bls.gov/oco/pdf/ocos066.pdf>. 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 reveals that original published research, whether arising from research at a university or private employer, does not set the researcher apart from faculty in that researcher's field.

Moreover, the beneficiary's citation history is a relevant consideration as to whether the evidence is indicative of the beneficiary's recognition beyond his own circle of collaborators. *See Kazarian*, 596 F. 3d at 1122. As previously discussed, the documentation submitted by the petitioner indicates that the beneficiary's body of published work has been independently cited to less than two dozen times. Moreover, there is no indication that any of the beneficiary's individual journal articles have been independently cited to more than a dozen times. While the submitted citations demonstrate some interest in his published work, they are not sufficient to demonstrate that the beneficiary's 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 beneficiary as one of the small percentage who has risen to the very top of the field of endeavor. The petitioner relies primarily upon the beneficiary's research work (including two patent applications); less than ten journal articles published with his research supervisors (such as [REDACTED]) as of the petition's filing date; copies of only seven research articles by others briefly citing to the beneficiary's published work; his positions as a [REDACTED] and as a postdoctoral researcher for both DSM Research and the NJCBM; and the praise of members of his field.

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

I am the Board of Governors Professor of Chemistry and Chemical Biology at [REDACTED] and an Adjunct Associate Professor of Orthopedics at the [REDACTED] Medical School. I have served as Director of the [REDACTED] Center for Biomaterials since its establishment in 1997. I am a Fellow of the American Institute for Medical and Biological Engineering (AIMBE) and of the International Union of Societies for Biomaterials Science and Engineering (IUSBSE). I am the Principal Investigator of several leading federally-funded R&D programs: NIH-funded postdoctoral training program in Tissue Engineering, NSF-funded Partnership for Innovation designed to explore new plant-synthetic hybrid biomaterials, NIH funded National Resource for Polymeric Biomaterials (RESBIO), and the DoD-funded Center for Military Biomaterials Research (CeMBR).

\* \* \*

I pioneered the use of combinatorial and computational methods for the optimization of biomaterials for specific medical applications. . . . I have published over two hundred (200) scientific manuscripts and reviews and hold thirty five (35) patents.

\* \* \*

I am the scientific founder of two spin-off companies, and served on the Life Science Advisory Board of the [REDACTED] and as chair of the Scientific Advisory Board of [REDACTED]. As Director of the [REDACTED] Biomaterials, I initiated the

Center's industrial membership program that has currently 20 member companies. I currently serve on the Scientific Advisory Boards of three companies.

states:

I hold the position of Professor in the Department of Polymer Science and Engineering at [REDACTED]. I am the director of the UMASS Institute for Interface Science. I have held the positions of Head of the Department of Polymer Science and Engineering and co-principal investigator for the Center for UMASS-Industry Research on Polymers. . . . I have served on the Editorial Advisory Boards of [REDACTED]. In addition, I serve on the International Advisory Board of the ACS Polymer Surfaces and Interfaces Series. I have published over 125 peer reviewed publications and hold 6 patents.

states:

I am an Associate Director at the [REDACTED] and an Associate Research Professor at the Department of Chemistry and Biological Chemistry at [REDACTED] where I hold the position of Chief Operating Officer for the Center for Military Biomaterials Research, leading programs to develop biomaterials for combat casualty care and soldier protection. . . . My work is published in leading peer-reviewed journals including [REDACTED]. My industrial experience comprises over 36 patents and includes development and commercialization of a wide array of specialty chemical products including polymers and surfactants for such applications as tissue engineering, coatings paper making, water and wastewater treatment, and lubricants. I have served [REDACTED]

states:

I hold the position of Lecturer in Polymer Chemistry at [REDACTED] where I have worked since my appointment in 1996. I am preeminent in the research fields of the miscibility and physical ageing in blends; nanophase separation in polymers, polymer dynamics, liquid crystalline polymers, composites and systems containing nanoparticles. Much of this work has involved use of neutron scattering techniques and I have written various reviews and book chapters in this area, and served on selection panels to allocate beam time at [REDACTED]. I regularly review neutron proposals for the neutron scattering centre at NIST [REDACTED]. My research is represented by in [sic] over 80 published papers, including book chapters and articles for encyclopedias, and I have obtained funding from [REDACTED]

I am also a Fellow [REDACTED]

states: "I am a Professor of Biotechnology at [redacted] and of Colloid and Interface Science at [redacted]. I have over 200 scientific publications in the field of interaction between bio(macro)molecules and interfaces . . . ."

states:

I am an Associate Professor in the Department of Biomedical Engineering, and the Department of Chemical and Biochemical Engineering at [redacted]. I have published over 45 peer-reviewed publications and presented over 100 lectures at international conferences in this field. . . . I have served as [redacted] at [redacted] on Integratively Engineered Biointerfaces (2003), as the Undergraduate Program [redacted], and, now, as [redacted], a NIH-sponsored Integrated Research Center on Polymeric Biomaterials at the [redacted]. I was elected as a Fellow of the American Institute of Medical and Biological Engineering in 2004 and the American Academy of Nanomedicine (2006), and am the recipient of the [redacted]. I also serve on the Editorial board [redacted].

states:

I am Professor and Department Head at the Department of [redacted] at the University Medical Center [redacted], and a distinguished expert in the field of interaction forces between infectious microorganisms and biomaterial surfaces. My department has about seventy academic researchers . . . . My research has resulted in over 425 peer-reviewed articles, two book[s] and several book contributions.

states:

Over the past fourteen (14) years, now as Research and Development Program Manager DSM Biomedical at DSM Research in the division of Performance Materials, I have initiated and conducted fundamental research on various aspects of medical coatings. I am one of the principal founders of DSM Biomedical, established in 2005, now a 60 million dollar business that has been achieved both by organic growth and via an acquisition strategy. . . . I have authored/co-authored more than 20 technical papers published in several scholarly journals and hold over 30 pending international patents.

Finally, [redacted] states:

I joined [redacted] in September, 2007, as Senior Vice President and Chief Technology Officer. This role is a new position at [redacted] designed to provide technology, strategy and development leadership to the company as it focuses on innovation and impact in medical devices, diagnostics and biosciences. I am responsible for the corporate strategic planning

function, corporate business development, [REDACTED] and managing a corporate-wide program to improve the product development process across [REDACTED]. I oversee an [REDACTED] budget of more than \$400 million across 12 business units, consisting of more than 1,700 [REDACTED] in multiple countries. In addition to my responsibilities at [REDACTED], I serve on the Industry Advisory Councils of the [REDACTED]

[REDACTED] I have a faculty appointment in the Medical School at Case as well. I hold numerous patents on tissue engineering systems, and the biomedical application of peptide assemblies in medical devices, and have published extensively in scientific journals, books and the proceedings of national and international conferences. The significance of my research has been recognized by my receipt of multiple awards from the Orthopaedic Research Society, the American Academy of Orthopaedic Surgeons, and the Society for Bone and Joint Surgery.

While the petitioner need not demonstrate that there is no one more accomplished than the beneficiary to qualify for the classification sought, it appears that the very top of the beneficiary's field of endeavor is above the level he has attained. In this case, the petitioner has not established that the beneficiary's achievements at the time of filing were commensurate with sustained national or international acclaim in nanotechnology, biomaterials, and polymer chemistry, 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 beneficiary, 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 beneficiary has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of his field. The evidence is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established the beneficiary's eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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.