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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: NEBRASKA SERVICE CENTER

Date: FEB 14 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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

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

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we uphold the director's ultimate conclusion that the petitioner has not established his eligibility for the classification sought. On appeal, counsel asserts that a letter from [REDACTED] the petitioner's postdoctoral supervisor at [REDACTED] "ought to be dispositive of the case, unless there is some very good reason for not taking a Nobelist's opinion seriously." While we will consider all of [REDACTED] assertions in more detail below, we note that he does not suggest that the petitioner enjoys national or international acclaim or that he is one of the small percentage at the top of his field. Rather, he asserts that the petitioner's status in the United States is "in our national interest." The director approved a separate petition seeking a waiver of the alien employment certification process in the national interest pursuant to section 203(b)(2)(B)(i) of the Act. Our decision in this matter is without prejudice to the petitioner's other petition.

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.*; 8 C.F.R. § 204.5(h)(2).

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

- (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- (iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
- (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;
- (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;

- (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
- (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
- (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria 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).

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).

Id. at 1119-20.

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 8 C.F.R. 103.3(a)(1)(iv); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *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) (recognizing the AAO's *de novo* authority).

II. Analysis

A. Evidentiary Criteria²

One-time achievement (that is, a major international recognized award).

As stated above, counsel asserts on appeal that the reference letter from [REDACTED] is sufficient evidence by itself. While a Nobel Prize is a major internationally recognized award pursuant to 8 C.F.R. § 204.5(h)(3), a reference letter from a Nobel Laureate is not. Therefore, it cannot support eligibility by itself. Moreover, a single letter does not comply with the statutory requirement for extensive evidence or the regulatory requirement for evidence under three separate evidentiary criteria. Rather, we will consider [REDACTED] statements below as they relate to the petitioner's contributions to his field.

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

Initially, counsel asserted that the following evidence should be considered under this criterion: (1) the petitioner's "Preview" article in *Molecular Cell* summarizing an original article in that issue, (2) the petitioner's presentation at the [REDACTED] on Biomedical Research and (3) an Excellent Graduate Fellowship of the [REDACTED]. While the record contains the petitioner's "Preview" article and his presentation at the joint symposium, the petitioner did not submit evidence of his graduate fellowship. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In response to the director's request for additional evidence, counsel reasserted that the petitioner addressed the joint symposium and asserts that the petitioner recently spoke at [REDACTED]. The petitioner spoke at [REDACTED] in 2009, after the date of filing.

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

The petitioner must demonstrate his eligibility as of the filing date. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). In this matter, that means that he must demonstrate that he enjoyed national or international acclaim as of that date. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak*, 14 I&N Dec. at 49; see also *Matter of Izummi*, 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that his completed work will subsequently be recognized with a prize or award. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey*, 541 F.3d 257, 261 (4th Cir. 2008).

The director concluded that invited talks and fellowships are not "prizes or awards" and, thus, do not meet the plain language requirements set forth at 8 C.F.R. § 204.5(h)(3)(i). On appeal, counsel asserts that the director did not consider the petitioner's oral presentations under any criterion, but that an invited talk "could actually be considered under several, including prizes and awards." Counsel concludes that an invited talk is "an honor" and "should be considered an award."

USCIS may not utilize novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Kazarian*, 596 F.3d at 1221, citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir.2008). Thus, we are bound by the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i), which requires evidence of the alien's receipt of nationally or internationally recognized prizes or awards for excellence.

We concur with the director that an oral presentation is not a prize or award for excellence, but rather an opportunity to present one's research in a professional setting. We recognize that many conferences are peer-reviewed. Peer-review, however, is the same process used to accept manuscripts for publication in journals. Thus, an oral presentation, typically published in the conference proceedings, is properly considered as a scholarly article pursuant to 8 C.F.R. § 204.5(h)(3)(vi). Moreover, if the presentation subsequently impacts the field at a level consistent with a contribution of major significance, that presentation is also relevant evidence under 8 C.F.R. § 204.5(h)(3)(v). Thus, we are not persuaded that failing to consider the oral presentations under this regulatory criterion precludes any consideration of this evidence.

Finally, even if the petitioner had submitted evidence of his graduate fellowship, the petitioner has not demonstrated that an academic fellowship limited to students is a nationally or internationally recognized prize or award for excellence in the petitioner's field.

In light of the above, the petitioner has not submitted evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(i).

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.

Initially, the petitioner submitted evidence that he is a member of the [REDACTED]. In response to the director's request for additional evidence, the petitioner submitted evidence that the [REDACTED] membership "has featured leaders in science, business, academia, and government." At issue, however, are the requirements for membership. The petitioner also submitted evidence that the academy "is open to all scientists, physicians, and engineers, and to all other individuals interested in science, mathematics, and engineering, in the roles of science and technology in society, and in the objective of the Academy."

The director concluded that "the submitted evidence does not show that [the associations of which the petitioner is a member] require outstanding achievements of their members, as judged by recognized national or international experts in the petitioner's field or an allied one." On appeal, counsel asserts that the petitioner submitted evidence of the "criteria for membership" for the academy but that the director did not consider this evidence.

Contrary to counsel's assertion, the director did not state that the petitioner had failed to submit evidence of the academy's membership requirements. Rather, the director stated that the academy does not require outstanding achievements of its members. We concur with the director. The evidence of record states that the academy is not only open to everyone in the sciences, but even those with only an interest in the sciences. Counsel has not explained how an interest in the sciences is an outstanding achievement. Moreover, the record contains no evidence that anyone judges candidates for membership, let alone nationally or internationally recognized members of the petitioner's field.

Finally, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires evidence of memberships in the plural, consistent with the statutory requirement for extensive evidence. Section 203(b)(1)(A)(i) of the Act. Significantly, not all of the criteria at 8 C.F.R. § 204.5(h)(3) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(h)(3)(iv) and (ix) only require service on a single judging panel or a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, we can infer that the plural in a regulatory criterion has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation.³

³ See *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

In light of the above, the petitioner has not submitted evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(h)(3)(ii).

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

The petitioner's field, like most science, is research-driven, and there would be little point in publishing 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, 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 petitioner's work.

The record contains the petitioner's scholarly articles, a foreign language patent accompanied by an uncertified translation and several reference letters. On appeal, counsel asserts that the evidence supporting the reference letters includes the petitioner's 145 current citations in the aggregate, the petitioner's participation in a study published in *Nature* after the date of filing, the petitioner's articles in *Cell Research*, the petitioner's cover article in that publication, the petitioner's presentation at a conference in Cold Spring Harbor after the date of filing and the petitioner's patent. As stated above, the petitioner must establish his eligibility as of the date of filing. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49; see also *Matter of Wing's Tea House*, 16 I&N Dec. at 160; *Matter of Izummi*, 22 I&N Dec. at 175-76 (citing *Matter of Bardouille*, 18 I&N Dec. at 114, for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition."). Consistent with these decisions, the petitioner may not secure a priority date on the hope that his as of yet unpublished or recently published research will subsequently prove influential. Thus, we will only consider the petitioner's research published or presented as of the date of filing. Moreover, while subsequent citation can demonstrate a continued pattern of citation after the date of filing, the petitioner must demonstrate citation consistent with a contribution of major significance as of that date in order to meet this criterion.

In addition, the regulation at 8 C.F.R. § 103.2(b)(3) requires that the petitioner submit a full, certified translation in support of a foreign language document. As stated above, the petitioner did not submit a certified translation of the patent. Thus, the document has no evidentiary value. Two of the references discuss this patent, and we will address their letters below. We concur with the director, however, that a patent, by itself, is not evidence of contribution of major significance. On appeal, counsel notes that filing a patent application costs money and concludes that the filer must therefore be assured of its ultimate significance. This office, however, has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. See *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 n. 7, (Comm'r. 1998).

Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* We reiterate that we will address the reference letters below.

The petitioner initially submitted 15 articles published in journals or conference proceedings. The regulations contain a separate criterion regarding the authorship of published articles. 8 C.F.R. § 204.5(h)(3)(vi). If the regulations are to be interpreted with any logic, it must be presumed that the regulation views contributions as a separate evidentiary requirement from scholarly articles.⁴ The petitioner also submitted evidence that four of the petitioner's articles had garnered moderate citation, with one article from 2001 having garnered 36 citations. As of the date of appeal, 36 remained the most citations for any one of the petitioner's articles; thus, the petitioner has continued his pattern of low to moderate citation per article.

The petitioner's 2004 article in *Cell Research* appeared on the cover of that publication. The record, however, includes no evidence as to how the journal selects the cover article. For example, the record does not establish whether the cover article is the most promising research in the issue or the most photogenic. Even if the journal selected the petitioner's article as the most promising in that issue, more relevant to whether the research constitutes a contribution of major significance is how it ultimately impacted the field. As of the date of filing, this article had garnered 16 citations, at least two of which are self-citations by coauthors. The petitioner has not established that 16 citations are, by themselves, indicative of an article that is a contribution of major significance in the petitioner's heavily cited field. For example, a 2003 article in *Blood* that cites the petitioner's 2001 article has itself garnered 238 citations. A 2005 article in *Molecular and Cell Biology of Lipids* that also cites the petitioner's 2001 article has itself garnered 50 citations. In addition, a 2006 article in *Science* that cites the petitioner's 2004 article has itself garnered 114 citations. We will address the reference letters discussing the petitioner's published research below.

██████████ the petitioner's Ph.D. advisor at the ██████████ asserts that the petitioner is an "independent and talented young scientist" who published many peer-reviewed articles relating to the elucidation of human acyl coenzyme A: cholesterol acyltransferase (ACAT) expression regulation at both transcriptional and translation levels. ██████████, a ██████████, explains that ACAT "is the key and exclusive cellular enzyme for cholesterol homeostasis and is closely related to many serious diseases, such as atherosclerosis, Alzheimer's disease, etc." ██████████ concludes that the petitioner's most significant contribution is "his demonstration that a novel ACAT isoform is produced from the interchromosomal trans-spliced human ACAT1 mRNA." ██████████ explains that this work formed the basis of the petitioner's approved Chinese patent. While ██████████ references a license number, he does not identify any other independent laboratory utilizing the petitioner's patented innovation. Rather,

⁴ Publication and presentations are not sufficient evidence under 8 C.F.R. § 204.5(h)(3)(v) absent evidence that they were of "major significance." *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reaffirmed its holding that the AAO did not abuse its discretion in finding that the alien had not demonstrated contributions of major significance. 596 F.3d at 1122.

he asserts that the petitioner himself performed additional studies and that [REDACTED] laboratory "has received several grants to further study regulation mechanism(s) of expression and role of human ACAT including this novel isoform." The fact that the laboratory where the petitioner worked continues to pursue research that builds on its previous research, including that on which the petitioner worked, does not demonstrate that the petitioner's work is a contribution of major significance to the field.

[REDACTED], currently a [REDACTED], explains that he met the petitioner when the petitioner "was a Ph.D. candidate in my collaborator's laboratory." [REDACTED] asserts that the petitioner's work with the ACAT1 isoform "was the first time in the world that a trans-spliced mRNA produced a functional protein in a mammal." [REDACTED] further states that the petitioner identified the translation initiation codon for ACAT1, GGC, which encodes for glycine. [REDACTED] concludes that this work "is extremely important for dexamethasone usage in clinical treatment" but fails to explain how this research is already impacting the field beyond the laboratories where the petitioner has worked.

[REDACTED] asserts that the petitioner joined [REDACTED] laboratory in 2004 where the petitioner studied the function and regulation of RNase P. [REDACTED] explains that previous research in his laboratory "suggested RNA might carry out both the storage task of genetic information and the full range of activities of a catalyst." [REDACTED] continues that the petitioner "checked the RNase P RNA subunit activity from orthopoxviruses, to identify new non-coding RNA substrates of RNase P in yeast, and to manipulate gene silencing in the mammalian system through RNase P cleavage by specific designed external guide sequences." [REDACTED] notes that the petitioner's previous experience proved valuable in completing this work, disseminated in three published articles. [REDACTED] concludes that the petitioner has "unique skills" and "has already made significant contributions to knowledge in the RNA field." "Unique skills" are not dispositive of the matter before us. Moreover, USCIS need not accept primarily conclusory assertions.⁵ [REDACTED] does not explain how the petitioner's work is influencing the field, such as by providing examples of how it is being used at independent institutions. Thus, while we have carefully considered the letter from this Nobel Laureate, the content of his letter does not support a finding that the petitioner has made contributions of major significance.

At the time of filing, the petitioner was working in the laboratory of [REDACTED]. [REDACTED] asserts that the petitioner is working on the modENCODE project, which the [REDACTED] funds. [REDACTED] explains that the "goal of this landmark project is to obtain a complete understanding of the fruit fly genome and then to use the lessons learned from this project to tack the human genome." [REDACTED] continues that while working on this project, the petitioner "has pioneered the development of assays that allow us to study the global impact of alternative splicing changes for over 100 specific proteins that regulate this process." [REDACTED] however, only speculates as to the potential influence of this work, stating that this work "will clarify the alternative splicing and how this impacts human diseases, and will generate

⁵ *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

many important papers in top tier journals." While [REDACTED] notes that the petitioner has published a review article on splicing regulation in *Molecular Cell*, he does not explain how a review article summarizing recent research in the field constitutes an "original" contribution.

In a subsequent letter, [REDACTED] asserts that the petitioner has "recently finished individual RNAi knock-down experiments for 60 different regulators and has performed deep-sequencing assays to study their effects on alternative splicing." [REDACTED] asserts that this work represents "the first time anyone has determined the network of eukaryotic splicing regulation at the single-nucleotide level." [REDACTED] does not specifically assert that the petitioner completed this work prior to the date of filing. Regardless, while this statement confirms that the petitioner's work is original, the petitioner must demonstrate the impact of this work in the field generally to establish that it constitutes a contribution of major significance. The record does not establish that the petitioner had disseminated this work either at a conference or through a journal article as of the date of filing.

The petitioner also submitted a letter from [REDACTED] who explains that she is the principal investigator for the modENCODE transcriptome project. [REDACTED] asserts that the petitioner's task for the project "is to generate a comprehensive list of all the sequence-based functional elements for pre-mRNA splicing in the *Drosophila* genome." [REDACTED] continues that the petitioner "already finished preparing the RNAi libraries and testing a small portion of RNAi, and successfully used high throughput solex sequencing to illustrate global gene expression changes." [REDACTED] concludes that the team has requested the petitioner's help with other parts of the project. The record contains no modENCODE publications predating the filing of the petition. Thus, the petitioner had yet to disseminate his work on this project as of that date. As such, the petitioner cannot demonstrate the impact of this work in the field as of that date.

[REDACTED] provides similar information. He further asserts that deep sequencing has become the most popular technology to accelerate the study of whole genome mapping, transcriptome analysis and miRNA pooling, an area in which the petitioner has experience and skills. Experience and skills in procedures others have developed are not "original." [REDACTED] concludes that the petitioner's skills in this area "have opened up distinct directions for his research in the future." [REDACTED] then discusses his own collaboration with the petitioner. This letter does not provide examples of how the petitioner's work is being used beyond the [REDACTED]. Rather, [REDACTED] speculates that the petitioner's work "will enrich our knowledge on the expanding field of long ncRNAs, open new research directions in the study of gene regulation by long ncRNAs, and offer new insights into the role played by ncRNAs in human embryonic stem cell pluripotency and differentiation."

The record also contains a letter from [REDACTED] currently a professorial research fellow at the [REDACTED] who was previously at the [REDACTED]. [REDACTED] indicates that he first learned of the petitioner's work through his ACAT publications. [REDACTED] explains how the petitioner's work was original in that it did not duplicate previous research. [REDACTED]

concludes that the petitioner's findings "have profound implications in not only basic biomedical research, but also human health-related pharmaceutical trials and in clinics." [REDACTED] does not provide examples of independent laboratories, pharmaceutical companies or clinics applying the petitioner's work.

Finally, the petitioner submitted a letter from [REDACTED] in St. Louis. [REDACTED] indicates that his laboratory is also involved in modENCODE. While [REDACTED] explains the significance of the modENCODE project, he does not explain how the petitioner's completed work has already impacted the field at a level consistent with a contribution of major significance.

The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998). Vague, solicited letters from local colleagues that do not provide specific examples of how the petitioner's contributions influenced the field are insufficient.⁶

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, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *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"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

While the record includes numerous attestations of the potential impact of the petitioner's work, none of the petitioner's references provide examples of how the petitioner's work is already influencing the field. Merely repeating the language of the statute or regulations does not satisfy the

⁶ *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" was insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122.

petitioner's burden of proof.⁷ The petitioner did not submit any independent letters from individuals who have applied the petitioner's work. The remaining evidence, discussed above, is insufficient corroborating evidence that the petitioner's contributions are of major significance in the field. While the evidence demonstrates that the petitioner is a talented researcher with potential, it falls short of establishing that the petitioner had already made contributions of major significance.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(h)(3)(v).

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

As stated above, the petitioner submitted several scholarly articles published in journals and conference proceedings. We concur with the director that this evidence meets the plain language requirements set forth at 8 C.F.R. § 204.5(h)(3)(vi).

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

Initially, counsel asserted that the petitioner had performed in a leading and critical role for the [REDACTED]. The director's request for additional evidence did not list this criterion as one for which the petitioner had submitted evidence. Counsel's response did not address this criterion. The director concluded that the petitioner had not submitted evidence relating to this criterion. On appeal, counsel asserts that the director ignored evidence of the petitioner's leading and critical role at [REDACTED] and for modENCODE.

[REDACTED] asserts that the petitioner "has been a key researcher in the lab of [REDACTED] participating in many projects and making a substantial impact on all of them." Contrary to counsel's assertion on appeal, [REDACTED] does not explain the exact nature of the petitioner's role at [REDACTED] or assert that it was leading or critical for an organization or establishment. [REDACTED] explains that the petitioner conducted "post-doctoral training" with [REDACTED] also asserts that the petitioner "is a key member of the modENCODE project funded by the [REDACTED] Regarding modENCODE, [REDACTED] also asserts that the petitioner is "performing a leading and key role in this project." In a subsequent letter, [REDACTED] asserts that the petitioner "is without question playing a leading and critical role in my laboratory and the field in general." [REDACTED] also states, however, that the petitioner is working in a postdoctoral fellow position, a position he characterizes earlier as a "training" position.

⁷ *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc.*, 745 F. Supp. at 15.

A leading role should be apparent from the petitioner's title and how his position fits within the overall hierarchy of the organization or establishment. None of the letters demonstrate that the petitioner performed in a leading role for any organization or establishment. The petitioner was only a Ph.D. student in [REDACTED] laboratory. That is not a leading role. Similarly, the petitioner was only a postdoctoral trainee in the laboratories of [REDACTED]. The record does not contain an organizational chart or other evidence for [REDACTED] or the [REDACTED] demonstrating that postdoctoral trainees are leading roles for those universities. Even if we accepted that postdoctoral trainees perform leading roles for individual laboratories, and we do not, the laboratories of [REDACTED] are not organizations or establishments.

Regarding modENCODE, the petitioner submitted a document entitled "[REDACTED]" The consortium is identified beginning on page 16 of this document. The document lists approximately 50 researchers focusing on the transcripts of *Drosophila melanoaster* alone. Two of the names, including [REDACTED] but not the petitioner, are underlined. The document also lists 71 affiliated institutions working on this project. This document does not support a finding that the petitioner is performing in a leading role for this project.

We will next consider whether the petitioner has performed in a critical role for an organization or establishment. While we acknowledge [REDACTED] assertion that the petitioner played a "key" role in [REDACTED] laboratory, this highly conclusory statement does not satisfactorily explain how the petitioner's role while a Ph.D. student was critical to the [REDACTED] as a whole. As stated above, [REDACTED] does not expressly discuss the petitioner's role for [REDACTED]. We acknowledge that [REDACTED] and [REDACTED] have both asserted that the petitioner has performed a critical role for modENCODE. The petitioner, however, is not a listed author for any modENCODE publication as of the date of filing, the date as of which the petitioner must establish his eligibility. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. As such, we cannot conclude that he had performed a critical role for the consortium as of that date.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(h)(3)(viii).

Summary

In light of the above, the petitioner has not submitted the requisite evidence under at least three of the evidentiary categories for which evidence must be submitted to meet the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. Nevertheless, we will review the evidence in the aggregate as part of our final merits determination.

B. Final Merits Determination

In accordance with the *Kazarian* opinion, we must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a

“level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor,” 8 C.F.R. § 204.5(h)(2); and (2) “that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” 8 C.F.R. § 204.5(h)(3). *See Kazarian*, 596 F.3d at 1119-20.

As stated above, the petitioner has authored scholarly articles. Pursuant to the reasoning in *Kazarian*, 596 F.3d at 1122, however, the field’s response to these articles may be and will be considered in our final merits determination.

The Department of Labor’s Occupational Outlook Handbook, (OOH), available at <http://www.bls.gov/oco/ocos047.htm#training> (accessed February 3, 2011 and incorporated into the record of proceeding), provides that a solid record of published research is essential in obtaining a permanent position in basic biological research. As a researcher must demonstrate published research prior to even obtaining a permanent job in the petitioner’s field, published research alone cannot serve to set the petitioner apart from others in his field. While the petitioner did submit evidence that his articles have garnered low to moderate citation as of the date of filing, this citation falls far short of the higher levels of citation apparent in the record.

As discussed above, the petitioner’s research does not appear to rise to the level of a contribution of major significance. While the petitioner’s research is clearly novel, research work that is unoriginal would be unlikely to secure the beneficiary a master’s degree. The record lacks evidence that the petitioner’s research has had a major impact in the field as a whole rather than simply adding to the general pool of knowledge in the field.

The petitioner’s roles, discussed above, have been primarily academic or trainee in nature. The positions into which the petitioner has been hired are not at a level consistent with national or international acclaim or a status among the small percentage at the top of his field.

We acknowledge that the record contains some evidence not addressed above. Specifically, the petitioner submitted email correspondence that appears commensurate with the typical scientific discourse among colleagues. We are not persuaded that the correspondence is consistent with a finding that the petitioner is one of the small percentage at the top of his field. One email is from [REDACTED]. In the email, he advises that he had received a request to review a manuscript and inquiring as to whether the petitioner could “read it over and provide comments.” The petitioner responded with some “comments for author.” The record does not establish that the petitioner completed a formal manuscript review and turned that review into the journal considering the manuscript for publication. Rather, [REDACTED] may or may not have incorporated the petitioner’s comments into his own manuscript review. Even if the petitioner were the recipient of a specific request to review a manuscript from a journal, the petitioner would need to provide evidence that sets him apart from others in his field, such as evidence that he has reviewed manuscripts for a journal that credits a small, elite group of referees, received independent requests from a substantial number of journals, or served in an editorial position for a distinguished journal.

Ultimately, the evidence in the aggregate does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. The petitioner, a postdoctoral fellow, relies on his publication record, his patent, moderate citations, the praise of his immediate circle of peers and the willingness of distinguished institutions to hire him. While this may distinguish him from other postdoctoral researchers and research associates, we will not narrow his field to others with his level of training and experience. [REDACTED], as discussed above, is a Nobel Laureate. [REDACTED] are editorial board members for prestigious journals. [REDACTED] is also a [REDACTED] and previously served in what appears to be a leading position for an entire organization or establishment as [REDACTED] claims 40 national and international patent applications. Finally, as stated above, the record contains articles in the petitioner's field that have garnered 50, 114 and 238 citations. Thus, it appears that the highest level of the petitioner's field is far above the level he has attained.

The letters are consistent with our conclusion. We acknowledge [REDACTED] assertion that the petitioner "is certainly among the best researchers in the world in his field." In the previous paragraph, however, [REDACTED] asserts only that the petitioner "is among the most talented postdoctoral fellows that I have ever had in my laboratory." In an email thanking the petitioner for completing a draft of their "Preview" article, [REDACTED] states: "I foresee a bright future for you." We will not narrow the petitioner's field to postdoctoral trainees. Significantly, [REDACTED] characterizes the petitioner only as "an extremely capable scientist in the field of genomics." [REDACTED] characterizes the petitioner only as "a very worthwhile young scientist" with "unique skills in biological research."

In light of the above, the evidence is not indicative of or consistent with the petitioner's status as one of the small percentage at the top of his field or national or international acclaim.

III. Conclusion

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.

Review of the record, however, does not establish that the petitioner has distinguished himself as a researcher to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the petitioner shows talent as a postdoctoral fellow, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.


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The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.