

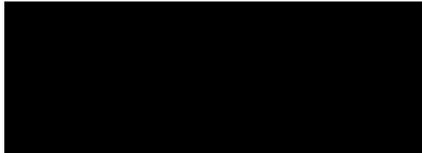
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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B₂

FILE:  Office: TEXAS SERVICE CENTER Date:

JAN 25 2011

IN RE: Petitioner: 
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, on August 15, 2009, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability. The director determined that the petitioner had not established the 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 “sustained national or international acclaim” and present “extensive documentation” of his or her achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement, specifically a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific evidence. 8 C.F.R. §§ 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

At the time of the original filing of the petition and in response to the director’s request for additional evidence, the petitioner claimed eligibility for six of the ten criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3). Specifically, the petitioner claimed eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi), the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), and the high salary criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). In his denial, the director addressed each of the petitioner’s claimed criteria and found that the petitioner failed to establish eligibility for any of the criteria.

On Form I-290B, counsel only addressed three of the criteria – judging criterion, scholarly articles criterion, and leading or critical role criterion. While counsel also indicated that “the appellant reserves the right to set forth additional arguments in the brief that will follow in 30 days,” as of this date, approximately 15 months later, the AAO has received nothing further. Accordingly, the record is considered complete as it now stands. As counsel failed to contest the decision of the director or offer additional arguments for the awards criterion, original contributions criterion, and high salary criterion, we will not further discuss these criteria on appeal. Accordingly, we consider that issue to be abandoned. *See Sepulveda v. U.S. Att’y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005).

I. Law

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

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

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

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

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

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

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

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

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

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

(iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is

sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;

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

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

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

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

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

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

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

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. §§ 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.*

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the 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:

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).

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

Id. at 1119.

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

II. Analysis

A. Evidentiary Criteria

This petition, filed on October 2, 2008, seeks to classify the petitioner as an alien with extraordinary ability as a medical director. On appeal, counsel addressed the following criteria pursuant to the regulation at 8 C.F.R. § 204.5(h)(3).

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.

In the director's decision, he stated that “[t]o satisfy this element, a petitioner must have been selected to judge, critique, review or evaluate the work of others in his/her field as a result of recognition *on at least a national level* [emphasis added].” On appeal, counsel argues:

The officer's decision with respect to this element relies on an ultra vires reading of this portion of the regulations. The regulation does not require that the judging activities take place as the result of having earned recognition on at least a national level, nor does the regulation disallow judging activities that are inherent to an applicant's position or employment. The office is therefore impermissibly adding to the eligibility requirements.

We agree with the arguments of counsel. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires “[e]vidence 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.” Pursuant to *Kazarian*, 596 F.3d at 1121-22, the petitioner is only required to demonstrate that he or she had judged the work of others, regardless of whether the judging occurred at the national or international level. We therefore withdraw the director’s finding and will review the record of proceeding to determine if the petitioner meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

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

[The petitioner] initiated and oversaw Phase II and III international clinical trials, which were the stages of testing closest to the actual regulatory authority approval and commercial release of the drug; hence the most important.

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

For 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, we respectfully refer you to section 5 of the original I-140 cover letter and the supporting exhibits cited therein. In particular, [REDACTED] letter (Exhibit E of the original submission), notes that [the petitioner] coordinated international trials leading to breakthroughs with a synthetic surfactant for the treatment of respiratory diseases in newborns. This coordination involved judgment of the work of other scientists contributing to the trials. Due to the critical functions that [the petitioner] performs within the field of [REDACTED] he is additionally responsible for judging the work of other scientists contributing to the international and scientific studies that he oversees.

As indicated above, [REDACTED] merely mentioned that the petitioner “initiated and oversaw Phase II and Phase III international clinical trials.” However, the petitioner failed to establish that initiating and overseeing clinical trials equates to being a “judge of the work of others.” Although counsel claimed that the coordination of the international trials “involved judgment of the work of other scientists contributing to the trials,” [REDACTED] letter contains no such details. Counsel failed to submit any other documentary evidence supporting her assertions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. 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). Unless specifically reflected by the documentary evidence, we will not assume or second-guess the implied meaning of [REDACTED] letter. The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

For the reasons set forth above, the petitioner failed to establish eligibility for the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

Accordingly, the petitioner failed to establish 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.

In the director's decision, although he found that the petitioner published articles in scientific journals, he found that the petitioner failed to establish eligibility for this criterion as the petitioner failed to demonstrate that "others in the field have cited the published works." The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires "[e]vidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media." Pursuant to *Kazarian*, 596 F.3d at 1122, the petitioner submitted sufficient documentation establishing that he meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). Therefore, we withdraw the findings of the director for this criterion.

Accordingly, the petitioner established that he meets the plain language of the regulation for this criterion.

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

In the director's decision, he stated:

[The petitioner] has not explicitly asserted that he meets this criterion; the [petitioner] did submit evidence relating to this criterion. [Several] of the [petitioner's] references [assert] that the invitations to present his work at different locations demonstrate his widespread notoriety. However, the record lacks any evidence that other clinicians have cited or otherwise relied on his research. Therefore, the evidence does not satisfy this element.

On appeal, counsel argues:

The officer claims that the applicant did not assert that he meets the element set forth at 8 CFR Section 204.5(h)(3)(viii) (critical role) and that the applicant did not submit evidence relating to this criterion. In fact, the applicant did assert this criterion both in the initial submission as well as in the response to the request for evidence. It should be noted that in the denial the officer refers to these relevant sections of the submissions at length.

A review of the record of proceeding reflects that the petitioner did, in fact, claim eligibility for this criterion at the time of the initial filing of the petition and in response to the director's request for additional evidence. Moreover, the plain language of the regulation at 8 C.F.R.

§ 204.5(h)(3)(viii) requires “[e]vidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.” As such, the director’s reference to the petitioner’s lack of “evidence that other clinicians have cited or otherwise relied on his research” is not consistent with the plain language of the regulation. We will, therefore, withdraw the director’s decision on this issue and review the record of proceeding to determine if the petitioner has performed in a leading or critical role pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The petitioner claimed eligibility for this criterion based on four reference letters. We cite representative examples here:

[REDACTED] of Illinois at Chicago, stated:

[The petitioner] was a [REDACTED] in [REDACTED] at [REDACTED] from 1995 to 1997. . . . Later upon returning to [REDACTED] his home country he lead an international cooperative effort, to carry out a multicenter multinational studies of neonatal surfactant treatment.

[The petitioner] also participated in a number of international research studies that have provided crucial new information that will benefit many pre-term infants in the U.S. and abroad. He has been designated as a Consultant for [REDACTED] Health Organization [REDACTED] Office in [REDACTED] project focused on improving prenatal care in [REDACTED] Then he became a regional coordinator of [REDACTED] [REDACTED] project, focused on monitoring care of the newborns below 32 weeks of gestational age in 10 [REDACTED] regions

* * *

Thanks to his international exposure [the petitioner] has also played a key role in the planning, coordination and performance of several multi-national collaborative trials evaluating the safety and efficacy of surfaxin, the new peptide-containing synthetic surfactant

[REDACTED] and the [REDACTED] Hospital, stated:

[The petitioner] has spent considerable time in very useful research ranging from basic science and molecular biology to clinical aspects of neonatal-perinatal care. He was consultant for [REDACTED] [REDACTED] Office where he worked on two projects; [REDACTED] and [REDACTED] which was the subject of his PhD Thesis. Both these research topics were aimed at developing tools allowing for continuous monitoring of perinatal and neonatal care outcomes. In 2003, he received a joint [REDACTED] Union grant within fifth framework programme called [REDACTED], and worked on this project as a regional coordinator. This project led to the first neonatal database covering ten different [REDACTED] perinatal centres including my own region in north of [REDACTED] This has led to many high quality scientific

presentations at international level and he was awarded for the best oral presentation during the [REDACTED] in 2001.

[REDACTED] of [REDACTED] stated:

[The petitioner] has been appointed to a consulting position at the [REDACTED], where he was involved in the development of an instrument, which allowed for monitoring of the quality of perinatal care. Later, he was a Regional Coordinator for [REDACTED] project in 10 [REDACTED] Regions.

For the last three years, [the petitioner] has successfully coordinated multicenter clinical trials in eight [REDACTED] countries proving his professionalism and dedication. He was responsible for training clinical teams in order to use both new therapeutic agents and protocols, where he was able to achieve a very high quality level.

I have also had the opportunity to work with [the petitioner] at a [REDACTED] Continuing [REDACTED] Education course in [REDACTED], which he co-organized. The program and content were cohesive, up to date, and clinically relevant. The course was well attended and well received by the physician attendees.

[REDACTED] stated:

In his previous role at [REDACTED] [the petitioner] initiated and oversaw Phase II and II international clinical trials, which were the stages of testing closest to the actual regulatory authority approval and commercial release of the drug; hence the most important. Currently, [the petitioner] fulfills a number of other important leading roles in his position, including drug and device development, liaising with the governing medical steering committees and advisory boards in the [REDACTED] and [REDACTED], as well as writing manuscripts for peer-reviewed scientific journals.

In this capacity, [the petitioner] was charged by [REDACTED] Labs with leadership of the clinical development of a new device designed for surfactant aerosolization. This new form of drug delivery will allow for a non-invasive route of administration avoiding such harmful procedure as intubation. Surfactant aerosolization can lead to significant reductions in complications related to prematurity and to lung immaturity and the use of mechanical ventilation such as: Respiratory Distress Syndrome, pneumonia, or chronic lung disease. [The petitioner] has filed two patent applications related to the aerosol delivery systems used for premature children as well as for adult patients requiring ventilator support. This invention might expand the use of aerosolized surfactants for other indications such as cystic fibrosis or acute lung injury. Recently, he has been

working on the submission of the clinical protocol to the U.S. Food & Drug Administration (FDA) for the Investigational New Drug (IND) application. This successful submission will initiate the Phase II clinical studies on aerosolized lucinactant.

Again, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires “[e]vidence that the alien has performed in a *leading or critical role* for organizations or establishments that have a distinguished reputation [emphasis added].” In general, a leading role is evidenced from the role itself, and a critical role is one in which the alien was responsible for the success or standing of the organization or establishment. Based on the reference letters cited above, we are not persuaded that the petitioner has performed in a leading or critical consistent with the plain language of the regulation. For example, while [REDACTED] indicated that the petitioner “lead an international cooperative effort,” “participated in a number of international research studies,” was “designated as a Consultant,” and “became a regional coordinator,” [REDACTED] failed to indicate how the petitioner’s positions were leading or critical. Merely stating the petitioner’s position and claiming that his role was leading or critical is insufficient to demonstrate eligibility for this criterion. Similarly, while [REDACTED] and [REDACTED] indicated that the petitioner consulted with the [REDACTED] and was a regional coordinator with [REDACTED] we are not persuaded that being “responsible for training clinical teams” establishes a leading or critical role without further documentary evidence. Finally, [REDACTED] states that the petitioner develops drugs and devices, liaisons with government committees, and writes manuscripts for journals. However, simply performing one’s job is not evidence of a leading or critical role. [REDACTED] failed to compare the responsibilities of the petitioner to the other employees of [REDACTED] Lab, so as to establish that his role is leading or critical. The petitioner failed to submit an organizational chart for the [REDACTED], or [REDACTED] Labs, Inc. to differentiate him from other consultants, coordinators, or researchers. Even when compared to [REDACTED], who is the Director of the Division of [REDACTED] in the Department of [REDACTED] at the [REDACTED] of [REDACTED], who is [REDACTED] of Medical Scientific Affairs and [REDACTED] at [REDACTED] Labs, Inc., and [REDACTED] who is [REDACTED] of Service in the Department of [REDACTED] it appears that the petitioner’s roles as a [REDACTED] and [REDACTED] are far less than those of his references. We note that the petitioner worked as a fellow under [REDACTED] at the [REDACTED] while obtaining his Ph.D.

USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner’s personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien’s eligibility. *See id.* at 795. We are not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the petitioner’s roles are leading or critical to organizations or establishments. Merely repeating the language of

the statute or regulations does not satisfy the petitioner's burden of proof.² The lack of supporting documentary evidence gives the AAO no basis to gauge the leading or critical role of the petitioner.

We note here that at the time of the original filing of the petition, counsel also claimed the petitioner's eligibility for this criterion based on the petitioner's participation and attendance at various conferences. We are not persuaded that attending and participating at conferences are reflective of a leading or critical role for an organization or establishment. The petitioner failed to demonstrate his responsibilities and accomplishments during the conferences so as to establish that he performed in a leading or critical role.

While the petitioner performed his routine duties, the record falls far short in establishing that the roles were leading or critical consistent with the meaning of the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(viii). Moreover, the regulation requires that the leading or critical roles be "for organizations or establishments that have a distinguished reputation." The petitioner failed to submit any documentary evidence establishing that [REDACTED], and [REDACTED] Labs Inc. have a distinguished reputation.

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

B. Final Merits Determination

In accordance with the *Kazarian* opinion, we must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2); and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." See section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). See also *Kazarian*, 596 F.3d at 1115. The petitioner established eligibility for only one of the criteria, in which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3). In this case, many of the deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

In evaluating our final merits determination, we must look at the totality of the evidence to conclude the petitioner's eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the petitioner has authored some scholarly articles and has performed routine duties in his field of endeavor. However, the accomplishments of the petitioner fall far short of establishing that he "is one of that small percentage who have risen to the very top of the field of endeavor" and that he "has sustained national or international acclaim and that his or her achievements have been

² *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

recognized in the field of expertise.” See 8 C.F.R. § 204.5(h)(2), section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3).

The regulation at 8 C.F.R. § 204.5(h)(3) provides that “[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” The petitioner’s evidence must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criterion at 8 C.F.R. § 204.5(h)(3), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien’s field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of “extraordinary ability” as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2).

We determined that the petitioner failed to establish eligibility for the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv). A review of the credentials of the individuals who submitted reference letters on the petitioner’s behalf confirms our findings and demonstrates that there is stark contrast between their experiences and the claimed experience of the petitioner. Specifically, the references have the following experiences as judges:

1. [REDACTED] – Served on an editorial board for at least 25 publications;
2. [REDACTED] – Served on an editorial board for at least eight publications, as well as serving as the [REDACTED] for *Seminars in [REDACTED]* and [REDACTED] for the [REDACTED];
3. [REDACTED] Served as a [REDACTED] for [REDACTED], [REDACTED] [REDACTED] Association, [REDACTED] Research Foundation, and [REDACTED]; Served as a reviewer for at least 28 publications including the [REDACTED] *of Medicine*; and
4. [REDACTED] – Served as a reviewer for the [REDACTED] from 1998 – 2002 and serves on the editorial board for [REDACTED] on [REDACTED] from 1999 to the present.

When compared to the petitioner, who has not demonstrated that he has participated as a judge of the work of others, the petitioner’s references have considerably distinguished themselves based on their editorial experience. Similarly, our finding that the petitioner failed to establish his leading or critical role for distinguished organizations is supported by a comparison of the petitioner’s roles with those of his references. For example, as stated previously, [REDACTED] is [REDACTED] of [REDACTED] and [REDACTED] at [REDACTED] Labs, Inc. Clearly, the petitioner was in a subordinate role as he was when he worked as a fellow for [REDACTED]. We note that none of the petitioner’s references appear to have been aware of the petitioner or his work prior to working with him. Moreover, while the petitioner

demonstrated that he meets the plain language of the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi), the record reflects that the petitioner submitted evidence of having authored nine articles. Again, however, when compared to the authorship of those in his field, the record reflects:

1. ██████████ – Authored 192 abstracts, 196 articles, 31 book chapters, and 16 books;
2. ██████████ – Authored 71 articles and 14 chapters;
3. ██████████ Authored 129 articles, 564 abstracts, 174 book chapters, and 15 books; and
4. ██████████ – Authored 12 articles and 34 abstracts.

Additionally, we note that the petitioner failed to submit any documentary evidence reflecting the citation of his scholarly articles by others. As authoring scholarly articles is inherent to scientific research, we evaluate a citation history or other evidence of the impact of the petitioner's articles when determining their significance to the field. For example, numerous independent citations for an article authored by the petitioner would provide solid evidence that other researchers have been influenced by his work and are familiar with it. Such an analysis at the final merits determination stage is appropriate pursuant to *Kazarian*, 596 F. 3d at 1122. On the other hand, few or no citations of an article authored by the petitioner may indicate that his work has gone largely unnoticed by his field. As the petitioner failed to submit any documentary evidence of his citation rate, the petitioner failed to demonstrate that his articles have attracted a level of interest in his field commensurate with sustained national or international acclaim.

While we also determined that the petitioner failed to establish eligibility for the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(xiii), his claim of eligibility for the criterion is based primarily on reference letters. It must be emphasized that the favorable opinions of experts in the field, while not without evidentiary weight, are not a solid basis for a successful extraordinary ability claim. Again, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. at 795. However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from individuals, especially when they are colleagues of the petitioner without any prior knowledge of the petitioner's work, 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).

Finally, we cannot ignore that the statute requires the petitioner to submit "extensive documentation" of the petitioner's sustained national or international acclaim. *See* section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provide that the "intent of Congress that a very high standard be set for

aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required” for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). The petitioner failed to submit evidence demonstrating that he “is one of that small percentage who have risen to the very top of the field.” As demonstrated by the accomplishments of those who submitted letters on his behalf, it appears that the highest level of the petitioner’s field is far above the level he has attained. In addition, the petitioner has not demonstrated his “career of acclaimed work in the field” as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990).

The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

III. O-1 Nonimmigrant Admission

We note that the petitioner submitted documentary evidence reflecting that he was last admitted to the United States as an O-1 nonimmigrant on April 13, 2008. However, while USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the petitioner, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased, standard. 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 petitioner’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. at 597. 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 at 1090.

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 had approved the nonimmigrant petitions on behalf of the beneficiary, 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).

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).

III. Conclusion

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

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.