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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

DATE: JUN 23 2011 Office: NEBRASKA SERVICE CENTER FILE:

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

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

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

On appeal, counsel argues that the petitioner meets at least three of the ten regulatory categories of evidence at 8 C.F.R. § 204.5(h)(3) and that he submitted comparable evidence of his extraordinary ability pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). For the reasons discussed below, the AAO will 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 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.* and 8 C.F.R. § 204.5(h)(2).

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

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

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

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

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

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

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

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

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

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

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

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *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).

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 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).

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[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).

II. Analysis

A. Evidentiary Criteria

This petition, filed on December 21, 2009, seeks to classify the petitioner as an alien with extraordinary ability in theoretical physics and the development of algorithms in the web-based services industry. In 2008, the petitioner received his Ph.D. in Physics from the University of Colorado under the direction of [redacted] Fellow of the Joint Institute for Laboratory Astrophysics (JILA) and an Associate Professor in the Department of Physics at the University of Colorado at Boulder.[2] At the time of filing, the petitioner was working in the position of "Member of Technical Staff" for [redacted] The petitioner has submitted documentation pertaining to the following categories of evidence under 8 C.F.R. § 204.5(h)(3).[3]

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

The petitioner submitted an August 12, 2003 letter from the [redacted] Scholarship Programme, International Relations Office, [redacted] University, to the petitioner stating:

> It is my pleasure to inform you that the selection committee of the [redacted] Scholarship Programme has decided to accept your application for a United Nations University/Van Ginkel scholarship.
>
> The scholarship includes a monthly living allowance . . . for six months and travel costs from and to your country (economy class).

Academic study is not a field of endeavor, but training for a future field of endeavor. As such, academic scholarships do not constitute prizes or awards for excellence in the petitioner's field of endeavor. Moreover, competition for university scholarships is limited to other students. Experienced physicists and researchers employed in the field who have already completed their education do not seek such scholarships. In this instance, there is no documentary evidence demonstrating that the petitioner's scholarship was recognized beyond the presenting university and therefore commensurate with a nationally or internationally recognized prize or award for excellence in the field.

The petitioner submitted a June 11, 2007 letter from the [redacted] of the American Association of Physics Teachers (AAPT) to the petitioner stating:

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[2] The petitioner also submitted his Master of Science degrees in Physics from the [redacted] (2008) and the [redacted] (2001).

[3] The petitioner does not claim to meet or submit evidence relating to the categories of evidence not discussed in this decision.

Congratulations on being selected as an [redacted] for 2007. Your achievements and dedication to excellence are a source of pride among your colleagues and an inspiration to the students whose lives you impact.

* * *

I am pleased to extend a complimentary, one year membership with the American Association of Physics Teachers. You will receive a subscription to the American *Journal of Physics Online* as well as *Physics Today* and our newest publication, *InterActions*. Your membership entitles you to attend meeting at reduced student rates and to receive special discounts on items and publications from our products catalog.

* * *

At the end of your current term, I hope you will maintain your membership at either the graduate student level or as a full member.

The AAO notes that competition for selection as an [redacted] Outstanding Teaching Assistant was limited to graduate students. Further, the petitioner did not submit evidence of the national or international *recognition* of his particular award, such as national or widespread local coverage of his award in professional or general media. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) specifically requires that the petitioner's awards be nationally or internationally *recognized* in the field of endeavor and it is his burden to establish every element of this criterion. In this instance, there is no documentary evidence demonstrating that the petitioner's teaching assistant award is recognized beyond the presenting organization and therefore commensurate with a nationally or internationally recognized prize or award for excellence in the field.

The petitioner submitted evidence of a National Science Foundation (NSF) "Continuing grant" awarded t[redacted] Colorado School of Mines. The preceding grant was awarded to [redacted] rather than the petitioner. The plain language of this regulatory criterion, however, requires documentation of "the alien's receipt" of nationally or internationally recognized prizes or awards, not his superior's receipt of the award. In regard to research grants for which the petitioner's research team applied and received funding, the AAO notes that research grants simply fund a scientist's work. Every successful scientist engaged in research, of which there are hundreds of thousands, receives funding from somewhere. Obviously the past achievements of the principal investigator are a factor in grant proposals. The funding institution has to be assured that the investigator is capable of performing the proposed research. Nevertheless, a research grant is principally designed to fund future research, and not to honor or recognize past achievement. Thus, the AAO cannot conclude that the preceding NSF continuing grant received by [redacted] constitutes the petitioner's receipt of a nationally or internationally recognized prize or award for excellence in the field of endeavor.

The petitioner submitted a December 4, 2009 letter from [redacted] one of the two co-founders of [redacted] Corporation, stating: "As a testimony of his potential, in the last year

that that he has spent here, [the petitioner] has received three company awards at [redacted] for his contributions." Rather than submitting primary evidence of his three company awards, the petitioner instead submitted a letter from his employer attesting to the petitioner's receipt of them. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). A 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 December 4, 2009 letter from [redacted] does not comply with the preceding regulatory requirements. Nevertheless, the petitioner's three company awards are internal institutional honors limited to [redacted] employees rather than nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

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

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

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

The petitioner submitted his membership card for the American Physical Society (APS) and general information about the organization, but there is no evidence (such as bylaws or rules of admission) showing that the APS requires outstanding achievements of its members, as judged by recognized national or international experts in the petitioner's field.

The petitioner submitted documentation indicating that he performed graduate research at the [redacted] while attending the University of Colorado. The petitioner also submitted general information about the [redacted] The record, however, does not include documentary evidence

identifying the petitioner as a "member" of the [redacted], its faculty or Active Fellows.[4] As previously discussed, 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. 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). The petitioner's work as a graduate student in [redacted] research group at the [redacted] does constitute his membership in an association in the field of physics. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires "[d]ocumentation of the alien's *membership* in associations in the field for which is classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields." [Emphasis added.] Merely submitting documentary evidence reflecting the petitioner's role as a graduate student without evidence demonstrating that the petitioner is a member of an association that requires outstanding achievements of its members, as judged by recognized national or international experts, is insufficient to meet the plain language of the regulation. Clearly, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ii) requires the petitioner to show "membership in associations" and not the petitioner's temporary work at the [redacted] as a graduate student. In this instance, based on the submitted reference letters, the petitioner worked at the [redacted] as part of his graduate studies program and was not nominated or elected to "membership" in the [redacted] based on his outstanding achievements, as judged by recognized national or international experts in the field.

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

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

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

The petitioner submitted citation evidence indicating that his work has been cited by other researchers in their publications. Articles which cite to the petitioner's work are primarily about

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[4] *See* http[redacted] accessed on June 6, 2011, copy incorporated into the record of proceedings.

[5] 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.

the authors' own work or recent developments in the field in general, and are not about the petitioner or even his work. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be "about the alien." With regard to this criterion, a footnoted reference to the alien's work without evaluation is of minimal probative value. The submitted documentation does not discuss the merits of the petitioner's work, his standing in the field, any significant impact that his work has had on the field, or any other information so as to be considered published material about the petitioner as required by this criterion. Moreover, the AAO notes that the articles citing to the petitioner's work similarly referenced numerous other authors. The research articles citing to the petitioner's work are more relevant to the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(v) and will be addressed there. Accordingly, the petitioner has not established that he meets this criterion.

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

The petitioner submitted a May 26, 2009 e-mail from the [redacted] of the Optical Engineering and Photonic Technology (OEPT) symposium inviting the petitioner "to consider the possibility of supporting the reviewing process of OEPT 2009. If you accept to support us in the reviewing process, please fill [sic] the electronic form . . . ." There is no documentary evidence demonstrating that the petitioner actually participated in the reviewing process for OEPT 2009. The plain language of this criterion requires "[e]vidence of the alien's participation . . . as a judge of the work of others." Receiving an invitation to support the review process is not tantamount to evidence of one's actual "participation" as a reviewer or judge.

The petitioner also submitted documentation from the APS Editorial Office indicating that the petitioner peer reviewed four manuscripts for *Physical Review A* and one manuscript for *Physical Review Letters* in [redacted] This documentation meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). However, certain deficiencies pertaining to this evidence will be addressed below in our final merits determination regarding whether the submitted evidence is commensurate with sustained national or international acclaim, or being among that small percentage at the very top of the field of endeavor.

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

The petitioner submitted several letters of support discussing his work.

[redacted] is a Nobel Prize recipient, a Senior Scientist at the [redacted] a Professor Adjoint in the Physics Department at the University of Colorado, and a Fellow of the [redacted], the NIST and the University of Colorado at Boulder. [redacted] states:

I interacted with [the petitioner] during his graduate studies at the University of Colorado at Boulder. His Ph.D. work was on the theory of [redacted] in rotating optical lattices. I was on his Ph.D. defense committee, which allowed me to get a close look at his work.

During his stay here, [the petitioner] worked on strongly correlated quantum mechanics and the appearance of fractional quantum hall physics in cold gases under the supervision of [redacted] He used analytical and numerical techniques to develop models to describe and predict behavior of quantum materials in this exotic regime. One of my groups also does experimental research in the same area. His work has been a significant contribution to this new emerging field and has resulted in the publication of four papers in leading physics journals such as the *Physical Review Letters* and *Physical Review A*. He has also presented his research at several domestic and international conferences.

With regard to the petitioner's published and presented work, the regulations contain a separate criterion regarding the authorship of scholarly articles. 8 C.F.R. § 204.5(h)(3)(vi). The AAO will not presume that evidence relating to or even meeting the scholarly articles criterion is presumptive evidence that the petitioner also meets this criterion. Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for authorship of scholarly articles and original contributions of major significance, USCIS clearly does not view the two as being interchangeable.[6] To hold otherwise would render meaningless the statutory requirement for extensive evidence or the regulatory requirement that a petitioner meet at least three separate criteria. Thus, there is no presumption that every published article or presentation is a contribution of major significance; rather, the petitioner must document the actual impact of his article or presentation. In this instance, [redacted] does not provide specific examples of how the petitioner's models are being applied by others in the field or that they otherwise equate to original contributions of major significance in the field.

[redacted] states:

[The petitioner] was a graduate student in my research group in atomic, molecular, and optical Physics and defended his Ph.D. thesis here in [redacted] The title of his thesis was [redacted] rotating optical lattices." [The petitioner] was a truly outstanding student who excelled at every project he was assigned.

* * *

His work has had significant impact. His most well known paper is entitled "[redacted]" and was published in *Physical Review Letters*.

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[6] 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.

> This journal is the most prestigious journal of the American Physical Society, and only publishes the most high profile work that will have the broadest impact in physics. [The petitioner's] work has already led to experimental pursuits of his predictions in several major laboratories around the world.

The petitioner submitted citation indices from GoogleScholar.com indicating that his published work has been moderately cited. For instance, the petitioner's two most frequently cited articles in *Physical Review Letters* and *Physical Review A* had been cited to 30 and 10 times respectively as of the petition's December 21, 2009 filing date. The petitioner has not established that this moderate level of citation is indicative of original 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. 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.

[redacted] University of Colorado and Fellow of the [redacted], states:

> [The petitioner] obtained his Ph.D. in Theoretical Physics under Professor [redacted] I have worked closely with [the petitioner] since 2004.
>
> * * *
>
> At Colorado he had a 4.0 grade point average and was the first to graduate with a Ph.D. from his class. As a member of both Physics and [redacted] I was delighted to observe his progress as a member of his research group. His publications are of the highest quality and of significant interest to the AMO [Atomic, Molecular, and Optical physics] community.
>
> In [redacted] amongst a group of truly outstanding students and postdoctorals, he stood out. He is quick to understand, exceptionally talented, and hard working. He is, as his resume shows, very practical and has both a flair and interest in the business world. He works well and patiently with colleagues and brings out the best in them.
>
> I could go on and give you detailed evaluation of his creativity in Physics, if that is required. I will just say that his research is outstanding and highly original.

Significantly, this office has held, in a precedent decision involving a lesser classification than the one sought in this matter, that academic performance, measured by such criteria as grade point average, is not a specific prior achievement that establishes the alien's ability to benefit the national interest. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 219, n.6

(Comm'r. 1998). While the petitioner's graduate research under the direction of [redacted] was 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 graduate 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 scientist 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] does not provide specific examples of how the petitioner's work has influenced others in the field or that it otherwise equates to original contributions of major significance in the field.

[redacted] states:

I have been closely interacting with [the petitioner] since September 2008 when he joined [redacted] He has been responsible for all analytics for [redacted] and has lately been instrumental in taking the lead on developing and applying advanced algorithms for increasing the advertising revenue o[redacted] In particular, his contributions include:

i. Revenue estimation at a keyword level in generalized second price auctions: [The petitioner] took the initiative in tackling an extremely difficult research problem to come up with an elegant algorithm. Early tests using the results of his research are already showing a 50-100% impact on [redacted] gross margins. When fully realized, his work will be worth several million additional dollars of additional revenue every year and will contribute substantially to our company's valuation, this is a significant research achievement given that this problem has been encountered several times but not entirely solved.

ii. Feedback loops for relevance and categorization: [the petitioner] has been responsible for collecting and channeling customer data from millions of users every day back into the product. This has helped [redacted] substantially in building a next generation information retrieval product.

iii. Analytics systems: [the petitioner] works on scalable large-scale analytics systems for retrieving, storing, processing and analyzing terabytes of data. He is responsible for creating, generating and maintaining hundreds of reports that range from user engagement reports to performance reports to product metrics.

* * *

He has demonstrated that he can bring his physics expertise to internet problems. His experience with similar problems in a different domain has allowed him to take on very difficult problems and persist until a solution is found. His background in Physics gives him a very strong analytical toolbox that he can apply creatively to any class of problems.

* * *

> His consulting experience at [redacted] (a prestigious strategy management consulting firm) gives him perspective into the business aspect of research problems frequently encountered at hi-tech startups such as [redacted]

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires that the petitioner's contributions be "of major significance in the field" rather than limited to a single research institution or employer such as [redacted] While the petitioner has helped to provided analytical solutions for problems encountered by his employer, there is no evidence showing that his level of contribution to the company's existing products or services constitutes original scientific or business-related contributions of "major significance" in the field. Further, the petitioner's physics background and consulting experience constitute, essentially, occupational training which can be articulated on an application for an alien employment certification. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 221.

[redacted] Vice President of Engineering at [redacted] states:

> [The petitioner's] strong analytical background rooted in Physics and Statistics, and his business background has helped us solve a long-standing, very difficult research problem a[redacted] [The petitioner] used his background (gained through his Ph.D. education) to come up with a breakthrough methodology that he helped apply in at least 2-3 solution areas at [redacted] for monetizing our Internet traffic, as well as real-time data mining to find high impact stories in massive data streams. Moreover, he also exercised his leadership skills in driving the execution of the first solution mentioned above, leading to our core business becoming profitable on a monthly basis for the last 2 months. This methodology has become a key competitive advantage for [redacted] and could become an industry standard in real-time information processing - this pioneering effort alone could help establish the case for his extraordinary ability to contribute to the United States as a citizen
>
> * * *
>
> [The petitioner's] unique combination of a strong analytical background in Physics, strong business background and strong software skills was exactly what we needed at [redacted] – this particular combination of skills is extremely scarce in the field - I have not met a single other person who has this unique skillset. . . . [The petitioner] brings all of the skill sets together – he has an extraordinary analytical background with Ph.D. Physics with a very strong business background stemming from his two years of experience at [redacted]
>
> * * *

> I've closely worked with [the petitioner] for the last year and a half in his capacity as the lead for analytics for [redacted] In particular, [the petitioner] has delivered extraordinary impact with his research work in the quantification of the monetary value of user search queries. He has also applied the same research to a completely different and challenging problem - real-time data mining to find high impact stories in massive data streams. His innovation to establish statistical significance on one domain set while using a different domain to measure the quantity of interest is path breaking and is likely to establish an industry standard for real-time information processing in the nest few years. Not only is the scientific theory behind this innovation very sound, it is also practical to implement in industrial strength applications. [redacted] hopes to leverage [the petitioner's] work strongly to become the next big player in the internet space.
>
> The other areas where [the petitioner] made a significant contribution is the development of our Metrics & Analysis system. Week over week, [the petitioner] used his Statistics and Business background, to come up with insights on our Internet users, what features on our site are working well, what could be improved, and backed up his conclusions with sound statistical analysis. [The petitioner's] amazing ability to analyze terabytes of data is unmatched and very unique.

[redacted] comments on the future significance of the petitioner's methodology for monetizing [redacted] internet traffic and real-time data mining rather than how his work has already impacted the field so as to be considered an original contribution of major significance. For instance, [redacted] opines that the petitioner's methodology "could become an industry standard in real-time information processing" and states that '[redacted] hopes to leverage [the petitioner's] work strongly to become the next big player in the internet space." In this instance, there is no evidence showing that the petitioner's work at the [redacted] had already significantly influenced the field as of the date of filing. As previously discussed, eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r. 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. [redacted] also focuses on the petitioner's "software skills" and his analytical background in physics, business, and statistics. In order to establish eligibility for this regulatory criterion, the petitioner must establish that his skills and expertise have already resulted in original contributions of major significance in the field. [redacted] does not provide specific examples of how the petitioner's original work at [redacted] has already significantly impacted the industry or otherwise equates to original contributions of major significance in the field.

[redacted], the other co-founder of [redacted], states:

> There was one specific breakthrough algorithm that [the petitioner] helped create, that we believe will be the basis of considerable competitive advantage for [redacted] For that reason, it is a trade secret and we cannot discuss it in detail. We believe this breakthrough

is very general and has impact across a wide spectrum of applications. We have proven it in one area, where it continues to generate significant financial returns for us. We are prototyping it in another entirely different arena, where too it appears to work amazingly well.

Interestingly, the algorithm he used has its origins in the work of another Physics Ph.D. The application of the algorithm is very original. The idea is especially elegant. Most importantly, it works amazingly well and produces valuable results over some very large and complex systems.

* * *

We believe this algorithm will be a key basis for [redacted] success in the future.

In this instance, there is no evidence showing that the petitioner's algorithm had already significantly influenced the field as of the date of filing. As previously discussed, eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. A petitioner cannot file a petition under this classification based solely on the expectation of future eligibility. *Id.* To satisfy the criterion relating to original contributions of major significance, the petitioner must demonstrate not only that his algorithm is novel and useful to [redacted] but also that it has already made a demonstrable impact on his field as a whole. 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 employer. There is no documentary evidence showing the widespread commercial implementation of the petitioner's work or that it otherwise equates to an original contribution of major significance in the field.

[redacted] states that he worked as a Director of Product Management at [redacted] from July 2006 to December 2009. He further states:

At [redacted] I saw [the petitioner] demonstrate extraordinary ability in using techniques he had learned in advanced Physics to solve extremely complex problems. One of his solutions has helped create an improved scheme of delivering targeted advertisements, which helped [redacted] grow its revenue substantially. Before [the petitioner's] solution, several other researchers, primarily from the field of computer science, at [redacted] had attempted to solve the same issues, and had been unable to solve it. [The petitioner] was able to craft his solution using techniques learnt from Physics, especially the techniques around modeling [redacted].

[The petitioner] was also able to extend his solutions to other problems, in the domain of providing a superior experience to users of [redacted] websites, especially [redacted].com, which creates a personalized newspaper. His methodology, which is being registered as a trade secret by [redacted] has the potential to revolutionize the way people consume news on the internet.

> [The petitioner's] skill set, of creating new algorithms relating to large data sets in the internet industry, is very rare. It is worth noting that the largest internet companies like Google often find it difficult to find this talent. At [redacted] I have conducted many interviews of candidates, where we were looking for this ability. Through that process I have developed an appreciation for the scarcity of this talent. It's also worth repeating that some of the solutions that [the petitioner] came up with had eluded other researchers from the field of Computer Science. His ability to apply ideas from other domains to solving these large data problems is a skill set that is exceptionally scarce.
>
> In addition to his research abilities, one of the reasons for [the petitioner's] extraordinary contributions at [redacted] has been his understanding of big picture business & consumer issues. He developed at [redacted] and has honed it since then. As an example, his solution around ad targeting could not have been developed without a deep understanding of the online advertising marketplace. Similarly, his solution around the personalized newspaper could not have been developed without a good understanding of how people consume news.
>
> Combined with his exceptional research abilities, his ability to grasp the big picture makes [the petitioner] a rare and invaluable asset. In the Internet services domain, all significant advances have come from the exceptionally few people who possess this combination of skills.

Assuming the petitioner's skills are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, whether or not there are skill shortages in a given field properly falls under the jurisdiction of the Department of Labor through the alien employment certification process. *See Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 221. Further, as previously discussed, 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 employer such as [redacted] While the petitioner devised methodologies for improving [redacted] delivery of targeted advertisements and for data mining news on the internet, there is no evidence showing that the petitioner's original work has significantly impacted the field beyond his immediate employer or otherwise constitutes an original scientific contribution of major significance in the field.

The opinions of experts in the field are not without weight and have been considered above. As previously discussed, 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 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. at 500, n.2 (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 petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of a physics researcher who has made original contributions of major significance.

Although the record includes numerous attestations of the potential impact of the petitioner's work, the submitted evidence does not show how the petitioner's work has significantly impacted the field beyond his workplace. While the reference letters demonstrate that the petitioner is a talented physics researcher with potential, they fall short of establishing that he has already made original contributions of major significance in the field. Accordingly, the petitioner has not established that he meets this criterion.

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

The petitioner has documented his co-authorship of four journal articles (with his supervisor Dr. [redacted] that were published as of the petition's filing date and, thus, he has submitted qualifying evidence pursuant to 8 C.F.R. § 204.5(h)(3)(vi).

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

The AAO withdraws the director's finding that the petitioner meets this regulatory criterion. The petitioner submitted evidence indicating that he receives an annual salary from [redacted] in the amount of $125,000. The petitioner also submitted O-Net OnLine reports for "Financial Quantitative Analysts" and "Business Intelligence Analysts" indicating that the median annual salary for those occupations is $57,150 and $75,150 respectively. The job descriptions for Financial Quantitative Analysts and Business Intelligence Analysts, however, do not appear relevant to the petitioner's occupation. The record is void of information regarding salaries for those who perform similar work in theoretical physics or analytics in the web-based services industry. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994) (considering professional golfer's earnings versus other PGA Tour golfers); *see also Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen). Moreover, the petitioner's reliance on "median" annual salary data is not a proper basis for comparison. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(ix) requires evidence of a "*high* salary or other *significantly high* remuneration for services, in relation to others in the field" [emphasis added], not simply a salary that places the petitioner in the top half of his field. For example, according to the Department of Labor's OOH, 2010-11 Edition, (accessed at www.bls.gov/oco on June 8, 2011 and incorporated into the record of proceedings), the "highest ten percent" of computer and information scientists "earned more than $151,250" in May 2008. *See* http://www.bls.gov/oco/ocos304.htm.

The petitioner's documentation also included "Foreign Labor Certification Data Center Online Wage Library" salary information for "Financial Specialists, All Other" and "Computer Specialists, All Other." The salary information shows that the Level 4 (fully competent) "prevailing wage" for Financial Specialists and Computer Specialists in the San Francisco region is $96,970 and $100,755 respectively. The petitioner has not established that these salary results are relevant to those who perform similar work in theoretical physics or analytics in the web-based services industry. Moreover, the petitioner's reliance on salary data limited to local "prevailing" wages is not an appropriate basis for comparison in demonstrating that his earnings constitute a "*high* salary or other *significantly high* remuneration for services, in relation to others in the field." In this case, the evidence submitted by the petitioner does not establish that he has received a high salary or other significantly high remuneration for services in relation to others in the field as of the petition's filing date.

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

Summary

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

B. Comparable Evidence Under 8 C.F.R. § 204.5(h)(4)

On appeal, counsel argues that the director erred in failing to consider the petitioner's [redacted] scholarship, his [redacted] teaching assistant award, and the reference letters as comparable evidence of his extraordinary ability. The deficiencies in the preceding documentation have already been addressed under the categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(i) and (v). Moreover, the regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten categories of evidence "do not readily apply to the beneficiary's occupation." The regulatory language precludes the consideration of comparable evidence in this case, as there is no evidence that eligibility for visa preference in the petitioner's occupation cannot be established by the categories of evidence specified by the regulation at 8 C.F.R. § 204.5(h)(3). For instance, there is no evidence indicating that prizes and awards do not readily apply to researchers in the field of physics. Specifically, the AAO notes that [redacted] is a recipient of the [redacted] in Physics, the [redacted] from the Optical Society of America, the [redacted] in Physics, and the [redacted] from the Royal Netherlands Academy of Arts and Sciences. Where an alien is simply unable to meet three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3), the plain language of the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence.

Nevertheless, there is no evidence showing that the documentation the petitioner requests reevaluation of as comparable evidence constitutes achievements and recognition consistent with sustained national or international acclaim at the very top of his field. The petitioner's teaching

assistant award and [redacted] scholarship were limited to graduate students. Such awards are not indicative of sustained national or international acclaim, or a level of expertise indicating that the petitioner is among that small percentage who have risen to the very top of the field of endeavor. Scholarships and awards limited to students do not compare the petitioner with the most experienced and renowned members of the field. Regarding the reference letters submitted by the petitioner, the AAO notes that they are all from the petitioner's current and former superiors. While such letters are important in providing details about the petitioner's role in various projects, they cannot by themselves establish the petitioner's acclaim beyond his immediate circle of colleagues. Moreover, reference letters are not comparable to extensive evidence of the alien's achievements and recognition as required by the statute and regulations. The nonexistence of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The classification sought requires "extensive documentation" of sustained national or international acclaim. *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). The commentary for the proposed regulations implementing the statute 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). Primary evidence of achievements and recognition is of far greater probative value than opinion statements from references selected by the petitioner. A final merits determination that considers all of the evidence follows.

C. Final Merits Determination

In accordance with the *Kazarian* opinion, the AAO 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, many of the deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. §§ 204.5(h)(3)(i) – (v) and (ix).

With regard to the evidence submitted for 8 C.F.R. § 204.5(h)(3)(i), this decision has already addressed why the submitted awards do not rise to the level of nationally or internationally recognized awards for excellence. The evidence discussed above is also not indicative of or consistent with sustained national acclaim or a level of expertise indicating that the petitioner is one of that small percentage who have risen to the very top of his field. The AAO notes that competition for the petitioner's teaching assistant award and [redacted] scholarship was limited to students. Thus, they cannot establish that a petitioner "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). 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

[redacted] Likewise, it does not follow that receiving a scholarship or award limited to students should necessarily qualify a physics researcher 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."

Regarding the documentation submitted for 8 C.F.R. § 204.5(h)(iv), the AAO cannot conclude that the petitioner's level and frequency of peer review (only five manuscripts for two journals in 2008) is commensurate with sustained national or international acclaim at the very top of the field of endeavor. The AAO notes that peer review of manuscripts 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 numerous professionals in the field who agree to review submitted papers. Thus, peer review is routine in the field; not every peer reviewer enjoys national or international acclaim. Moreover, the publication's editorial staff may accept or reject any reviewer's comments in determining whether to publish or reject submitted papers. For example, the petitioner's response to the director's request for evidence included a document entitled "Editorial Policies and Procedures of *Physical Review A*" stating:

> *Physical Review A* has an Editorial Board whose members are listed on the inside cover of the Journal. Board members are appointed for three-year terms by the Editor-in-Chief upon recommendation of the Editor after consultation with appropriate APS divisions.
>
> * * *
>
> *Referee reports are **advisory** to the Editor(s).* As a matter of practice, reports of referees are generally transmitted by the Editor(s) to the authors, but the Editor(s) may withhold or edit these reports for cause. If in the *judgment of the Editor(s)* a paper is clearly unsuitable for *Physical Review A*, it will be rejected without review . . . .

[Emphasis added.] Without evidence that sets the petitioner apart from others in his field, such as evidence that he has received and completed independent requests for review from a substantial number of journals or served in an editorial position for a distinguished journal, the

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[7] While a district court's decision is not binding precedent, the AAO notes 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 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)(3)(ix) is reasonable.

AAO cannot conclude that his level and frequency of peer review is commensurate with sustained national or international acclaim at the very top of the field of endeavor. For instance, [redacted] resume indicates that he has served as [redacted] for the *Journal of Quantitative Spectroscopy and Radiative Transfer* and on the Editorial Board of *Physical Review A*.

With regard to the petitioner's original research work submitted for 8 C.F.R. § 204.5(h)(3)(v), as stated above, it does not appear to rise to the level of contributions of "major significance" in the field. Demonstrating that the petitioner's work was "original" in that it did not merely duplicate prior research is not useful in setting the petitioner 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 petitioner a master's degree, let alone classification as a physics researcher of extraordinary ability. To argue that all original research is, by definition, "extraordinary" is to weaken that adjective beyond any useful meaning, and to presume that most research is "unoriginal." In this case, the record does not contain sufficient evidence that the petitioner's research findings and models had major significance in the field, let alone an impact consistent with being nationally or internationally acclaimed as extraordinary.

Regarding the evidence submitted for 8 C.F.R. § 204.5(h)(3)(vi), the AAO acknowledges that the petitioner coauthored journal articles (4) and conferences papers with his superiors at the [redacted] as a part of his graduate studies at the University of Colorado. The Department of Labor's (OOH), 2010-11 Edition (accessed at www.bls.gov/oco on June 9, 2011 and incorporated into the record of proceedings), provides information about the nature of employment as a postsecondary teacher (professor) 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. Further, there is no documentary evidence showing that the petitioner has published any journal articles or conference papers subsequent to [redacted]. The statute and regulations, however, require the petitioner to demonstrate that his national or international acclaim as a researcher has been *sustained.* *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). The documentation submitted for 8 C.F.R. § 204.5(h)(3)(vi) is not commensurate with *sustained* national or international acclaim as of the filing date of the petition.

Moreover, the petitioner's citation history is a relevant consideration as to whether the evidence is indicative of the petitioner'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 his body of work has been moderately cited as of the petitioner's filing date. This level of citation is not sufficient to demonstrate that the petitioner's articles have attracted a level

of interest in his field commensurate with sustained national or international acclaim at the very top of the field.

Regarding the documentation submitted for 8 C.F.R. § 204.5(h)(3)(ix), there is no evidence demonstrating that petitioner's salary is "high" in relation to others performing similar work or that his level of compensation places him among that small percentage who have risen to the very top of the field.

Ultimately, the evidence in the aggregate does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. The petitioner relies on undocumented internal recognition by his immediate employer, a scholarship and a teaching assistant award limited to students, his association memberships which have not been shown to require outstanding achievements, publications and conference presentations resulting from his supervised graduate research at the JILA, citation evidence showing that his work has been moderately cited, median salary and prevailing wage data for unrelated occupations, and letters of praise limited to his current and former superiors.

The AAO notes that the petitioner's references' credentials are far more impressive. For example, the biography submitted by the petitioner for [redacted] states:

> [redacted] is a Web and technology entrepreneur. He is the co-founder of [redacted] He also co-founded former[redacted] and played a significant role at Amazon.com in the late 1990s.
>
> While at Stanford where he prepared for his Ph.D., [redacted] co-wrote a paper with [redacted] and [redacted] which is among the top 600 most cited computer science articles over the last 20 years. Together with four other engineers, [redacted] founded [redacted] pioneered Internet comparison shopping. [redacted] was acquired by Amazon.com Inc. in August 1998 for 1.6 million shares of stock valued at $250 million. [redacted] went on to become [redacted] Technology at Amazon.com, where he was responsible for technology strategy. He helped launch the transformation of Amazon.com from a retailer into a retail platform, enabling third-party retailers to sell on Amazon.com's website. Third-party transactions now account for almost 25% of all U.S. transactions, and represent Amazon's fastest-growing and most profitable business segment. [redacted] also was an inventor of the concept underlying Amazon.com's [redacted]
>
> [redacted] and his business partner, [redacted] co-founded [redacted] an early stage VC [Venture Capital] fund, in 2000. Cambrian went on to back several companies later acquired by Google. Cambrian has funded companies like [redacted] In 2005, the business partners co-founded [redacted] In addition to acting as a consulting assistant professor in the Computer Science Department at Stanford University, [redacted] also has a blog called

[redacted] on which he discusses data mining techniques in search, social media, and advertising.

According to [redacted] resume, he is a Fellow of the APS and a Fellow of the American Association for the Advancement of Science. [redacted] academic appointments include Professor and Chairman of the Department of Physics at the University of Colorado. His research appointments include Research Fellow and Chairman at the [redacted] and visiting professorships at University of British Columbia, Oxford University, University of Newcastle, University of Otago, and University of Oregon. [redacted] also served as [redacted] for the *Journal of Quantitative Spectroscopy and Radiative Transfer* and on the Editorial Board of *Physical Review A*.

[redacted] is a Nobel Prize recipient, a Senior Scientist at the [redacted] a Professor Adjoint in the Physics Department at the University of Colorado, and a Fellow of the [redacted], the NIST and the University of Colorado at Boulder. [redacted] also a Member of the U.S. National Academy of Sciences and a Fellow of both the Optical Society of America and the APS. Further, he received the 2000 [redacted] from the Optical Society of America, the Benjamin Franklin Medal in Physics in 1999, and the [redacted] from the Royal Netherlands Academy of Arts and Sciences in 1998.

Mr. [redacted] is Vice [redacted]. He states:

> At eBay, I led a team of 70 engineers who developed the entire Shopping Search experience. I have also worked at Sun, and a number of startup companies in the Internet and Enterprise space. I have more than 6-7 patents and several publications in areas ranging from 3-D graphics to Search technology. I have also managed teams of up to 71 engineers . . . .

[redacted] states:

> I co-founded a company right after Stanford called [redacted] that was the first Shopping Search Engine. [redacted] was acquired by Amazon.com in 1998 for $250 Million. At Amnazon.com, I was instrumental in Amazon.com entering the Marketplace business – [redacted] today accounts for 30% of all orders at Amazon.com. After Amazon.com, in 2000, I co-founded a venture fund, Cambrian Ventures, that focused on early stage investments. In 2004 I co-founded [redacted]

Finally, the AAO notes that [redacted] is a Fellow of the [redacted] and an [redacted] in the Department of Physics at the University of Colorado in Boulder. In his letter of support, Dr. [redacted] who supervised the petitioner's graduate research, states: "I look forward to the development of [the petitioner's] career with great anticipation." The petitioner, however, seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time.

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

III. Conclusion

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

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.