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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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[Redacted]

FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 07 2011

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

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

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

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, on September 15, 2009. On motion, the director affirmed his decision on November 18, 2009. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability. The director determined that the petitioner had not established the beneficiary's requisite extraordinary ability and failed to submit extensive documentation of his sustained national or international acclaim.

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

On appeal, counsel claims that the beneficiary meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

## **I. Law**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
- (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
- (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

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

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.

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

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

*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 March 2, 2009, seeks to classify the beneficiary as an alien with extraordinary ability as a physicist. The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).<sup>2</sup>

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

At the time of the original filing of the petition, the petitioner claimed the beneficiary's eligibility for this criterion based on a long-term grant from the International Science Foundation in 1994. In the director's initial decision on September 15, 2009, he found that the beneficiary's research grant failed to establish eligibility for this criterion. On motion and on appeal, counsel did not contest the decision of the director or offer additional arguments for this criterion. As such, we deem this issue to be abandoned. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005).

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

*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 the director's decision, he found that the petitioner failed to establish the beneficiary's eligibility for this criterion. A review of the record of proceeding reflects that the petitioner claimed the beneficiary's eligibility based on an article entitled, [REDACTED] [REDACTED] was published by *EE Times UK* in [REDACTED] 2001, and on [REDACTED] on [REDACTED], 2001.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires "[p]ublished material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought." In order for published material to meet this criterion, it must be primarily about the alien 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

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

the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.<sup>3</sup>

A review of the article fails to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii). Specifically, the article is about [REDACTED] developing [REDACTED]

[REDACTED] While the article quotes the beneficiary, the article is not *about* the beneficiary relating to his work. Compare 8 C.F.R. § 204.5(i)(3)(i)(C) relating to outstanding researchers or professors pursuant to section 203(b)(1)(B) of the Act, which only requires published material about the alien's work. In this case, the article is primarily about [REDACTED] developing a new technique and does not discuss the beneficiary. Articles that are not about the beneficiary do not meet this regulatory criterion. See, e.g., *Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor).

Moreover, as evidence to establish that *Electronics Times* or [www.eetimes.eu/uk](http://www.eetimes.eu/uk) is a professional or major trade publication or other major media, the petitioner submitted background information from TechInsights, the publisher of *Electronic Times* and [www.eetimes.eu/uk](http://www.eetimes.eu/uk), and an e-mail from [REDACTED] who stated that "60,000 hard printed copies per issue and 70,000 in digital PDF format" are circulated and "over a million unique visitors every month around the world" are reached online. However, the petitioner failed to submit any independent, objective evidence regarding *Electronic Times* or [www.eetimes.eu/uk](http://www.eetimes.eu/uk). Further, we are not persuaded that 130,000 printed and digital copies are reflective of a major trade publication. Regarding [www.eetimes.eu/uk](http://www.eetimes.eu/uk), we are also not persuaded that the fact that the article was posted on the Internet from a printed publication is automatically considered major media. The petitioner failed to submit independent, supporting evidence establishing that the website is considered major media. In today's world, many publications, regardless of size and distribution, post at least some of their stories on the Internet. To ignore this reality would be to render the "major media" requirement meaningless. However, we are not persuaded that international accessibility by itself is a realistic indicator of whether a given website is "major media."

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

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

The director determined that the petitioner failed to establish the beneficiary's eligibility for this criterion. Specifically, on motion, the director stated:

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

The petitioner again makes the assertion that the alien has performed reviews of other scientists' research. However the Service found no documentation of the actual peer reviews. Instead, the Service notes that the articles which were submitted to corroborate this claim are more applicable to the "authorship" criterion below, as these published articles are about the beneficiary's review research and findings.

On appeal, counsel argues:

The Service errs in its contentions as sufficiently detailed evidence was provided in the RFE Response to corroborate that [the beneficiary] has reviewed the works of others. The articles that were submitted as evidence for this criterion were Review articles, in which [the beneficiary] reviewed others' work in his field.

A review of the record of proceeding reflects that the petitioner submitted five of the beneficiary's authored scholarly articles:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. [REDACTED]

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." In this case, the petitioner claims the beneficiary's eligibility based on the beneficiary's authorship of scholarly articles in which he cites or references the works of others in his own authored articles. The regulations contain a separate criteria for authorship of scholarly articles found in 8 C.F.R. § 204.5(h)(3)(vi). We will not presume that evidence relating to or even meeting the authorship of scholarly articles criterion is presumptive evidence that the beneficiary also meets this criterion. Because the regulatory criteria under the regulation 8 C.F.R. § 204.5(h)(3) are separate and distinct from one another, USCIS clearly does not view these criteria as being interchangeable. If evidence sufficient to meet one

criterion mandated a finding that an alien met another criterion, the requirement that an alien meet at least three criteria would be meaningless.

Moreover, a review of the beneficiary's articles listed above do not reflect that the beneficiary reviewed or judged the work of others. Instead, the articles reflect the authorships and publications of the beneficiary's own findings and research. Merely submitting articles authored by the beneficiary that cite, reference, or credit the work of others is insufficient to demonstrate that the beneficiary has served "as a judge of the work of others" pursuant to the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi). The petitioner failed to establish that the beneficiary has judged the work of other physicists' scholarly articles or work, such as serving on a peer review panel determining whether the manuscripts should be published in a professional journal.

We note here that in response to the director's request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), the petitioner also claimed the beneficiary's eligibility for this criterion based on the beneficiary's participation as a grant reviewer for the National Science and Engineering Research Council of Canada (NSERC). We also note that the director did not address this issue in either of his decisions, nor did counsel address this issue or offer additional arguments on motion or on appeal.

The petitioner submitted an e-mail, dated *July 23, 2009*, from [REDACTED] who thanked the beneficiary "for the review of the grant application that [he] provided for the 2008 Strategic Projects competition [emphasis added]." The petitioner failed to submit any primary evidence of the beneficiary's participation as a grant reviewer for NSERC in 2008, or evidence that primary or secondary evidence does not exist or cannot be obtained pursuant to the regulation at 8 C.F.R. § 103.2(b)(2). Given that the e-mail was dated and sent a year after the beneficiary allegedly performed the review, the lack of sufficient information contained in the e-mail, and the failure to submit primary evidence, there is insufficient evidence reflecting that the beneficiary performed as a grant reviewer for NSERC in 2008.

The petitioner also submitted a letter, dated August 25, 2009, from [REDACTED] who thanked the beneficiary for "providing [his] expertise in evaluating [REDACTED] research application for the 2009 Strategic Projects competition." However, the petition was filed on March 2, 2009. The beneficiary's evaluation for the 2009 Strategic Projects competition occurred after the filing of the petition. Eligibility must be established at the time of filing. Therefore, we will not consider this item as evidence to establish the beneficiary's eligibility. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r. 1998). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

As the petitioner failed to establish that the beneficiary has participated as a judge of the work of others, the petitioner failed to demonstrate the beneficiary meets the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

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

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

The director found that the petitioner failed to establish the beneficiary's eligibility for this criterion. A review of the record of proceeding reflects that the petitioner claimed the beneficiary's eligibility based on patents, the citation of the beneficiary's work by others, and recommendation letters.

The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field." In compliance with *Kazarian*, the AAO must focus on the plain language of the regulatory criteria. 596 F.3d at 1121. Here, the evidence must be reviewed to see whether it rises to the level of original scientific-related contributions "of major significance in the field."

Regarding the patents, at the time of the original filing of the petition, counsel claimed that the beneficiary "has over 7 patents and 20 patents pending," "another 20 patents which have not been applied for," and "European patents that have been applied for." Although the petitioner submitted copies of the pending patents, 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. at 175. That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. at 114, that we cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. Therefore, merely submitting evidence that the beneficiary has applied for numerous patents is insufficient to demonstrate that the pending patents are original contributions of major significance in the field.

In addition, on motion and on appeal, counsel claimed that "[t]he 27 patents and patents pending represent approximately 10% of [the beneficiary's] innovations" and "[a]pproximately 90% of [the beneficiary's] inventions are company secrets and cannot be disclosed." Counsel failed to submit any documentary evidence supporting the assertions. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). The burden is on the petitioner to establish that he or she is eligible for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); section 291 of the Act, 8 U.S.C. § 1361.

Moreover, this office has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 n. 7, (Commr. 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* A patent recognizes the originality of the idea, but it does not state that the beneficiary made a

contribution of major significance in the field through his development of this idea. The petitioner failed to establish that the beneficiary's patents, including the beneficiary's pending patents, have been of major significance in the field and not limited to the petitioner or [REDACTED] with whom the beneficiary has worked. In other words, the petitioner failed to demonstrate that the beneficiary's patents have influenced or impacted the field beyond his employers.

Regarding the beneficiary's work cited by others, at the time of the original filing of the petition, the petitioner submitted screenshots from *Google Scholar* reflecting that 11 of the beneficiary's articles were cited approximately 36 times. In response to the director's request for additional evidence, the petitioner submitted screenshots from *Google Scholar* reflecting that the beneficiary's article entitled, [REDACTED] was cited 64 times. In addition, the petitioner submitted samples of published articles that cited the beneficiary's work. We note here that the petitioner submitted only a few full articles that the beneficiary authored. A review of those articles reflects that the beneficiary cited himself numerous times. For example, the articles cited below contain the following self-citations:

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
4. [REDACTED]
5. [REDACTED]

While the number of total citations is a factor, it is not the only factor to be considered in determining the beneficiary's eligibility for this criterion. Generally, the number of citations is reflective of the beneficiary's original findings and that the field has taken some interest in the beneficiary's work. However, it is not an automatic indicator that the beneficiary's work has been of *major significance in the field*. In this case, we are not persuaded that the documentary evidence submitted by the petitioner regarding the beneficiary's work cited by others, as well as the beneficiary citing his own work, is reflective that the beneficiary's work has been of major significance in the field. Furthermore, a review of the petitioner's documentary evidence fails to reflect that the beneficiary's work has been unusually influential. For example, the petitioner has

not submitted evidence such as articles that discuss in-depth the beneficiary's findings or credit the beneficiary with influencing or impacting the field. In this case, the petitioner's documentary evidence is not reflective of the beneficiary having a significant impact on the field. Merely submitting documentation reflecting that the beneficiary's work has been cited by others in their published material is insufficient to establish eligibility for this criterion without documentary evidence reflecting that the beneficiary's work has been of major significance in the field. We are not persuaded that the citations of the beneficiary's articles are reflective of the significance of his work in the field. The petitioner failed to establish how those findings or citations of the beneficiary's work by others have significantly contributed to his field as a whole. In fact, the petitioner failed to demonstrate how many times the beneficiary's work has been *independently* cited by others, so as to demonstrate that the beneficiary's work has been of major significance in the field and not limited to the beneficiary's own work.

Finally, the petitioner submitted recommendation letters from two individuals. While the recommendation letters praise the beneficiary for his work as a physicist and indicate his original findings, they fail to indicate that his contributions are of *major significance* in the field. The letters provide only general statements without offering any specific information to establish how the beneficiary's work has been of major significance in the field. For example, [REDACTED] University of Florida, stated that the beneficiary's "approach has been used by many followers and eventually led to the incorporation of contrast-enhancing layers in a number of display solutions." However, [REDACTED] failed to specifically identify the "many followers" and the "number of display solutions," so as to establish that the beneficiary's work has impacted or influenced the field. Similarly, [REDACTED] Oregon State University, stated that the beneficiary "greatly contributed to a better understanding of [REDACTED] displays and made a significant impact on the entire process of device characterization and testing at [REDACTED]" Again, [REDACTED] failed to provide specific information demonstrating that the beneficiary has made original contributions of major significance in the field and failed to indicate the petitioner's impact beyond [REDACTED]

The petitioner also submitted three self-serving letters crediting the beneficiary for his contributions in developing [REDACTED], [REDACTED], and [REDACTED]. Although the beneficiary's work may have contributed to financial and sales success of the petitioner, the letters fail to reflect the significant impact or influence of the beneficiary's work beyond the petitioner. In other words, the petitioner failed to establish that the beneficiary's work in developing products has been of major significance in the field and that the impact of his work is not limited to his employer. Assuming that the beneficiary's skills and talents are unique to his occupation, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue 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. The letters of recommendation fail to indicate any original contributions of major significance in the field made by the beneficiary.

While those familiar with the beneficiary's work generally describe it as "trailblazing" "world-class," and "groundbreaking," the letters contain general statements that lack specific details to

demonstrate that the beneficiary's work is of major significance. This regulatory criterion not only requires the beneficiary to make original contributions, but also requires those contributions to be of major significance in the field. We are not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the beneficiary's contributions have already influenced the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.<sup>4</sup> The lack of supporting documentary evidence gives the AAO no basis to gauge the significance of the beneficiary's contributions as of the filing date of the petition.

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 beneficiary'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. Thus, the content of the writers' statements and how they became aware of the beneficiary's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance.

We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. Without additional, specific evidence showing that the beneficiary's work has been original, unusually influential, or has otherwise risen to the level of contributions of major significance, we cannot conclude that he meets this criterion.

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

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

In the director's decision, although he found that the beneficiary published articles in scientific journals, he found that the petitioner failed to establish the beneficiary's eligibility for this criterion as the beneficiary's work was not cited extensively by others. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires "[e]vidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media." Pursuant to *Kazarian*, 596 F.3d at 1122, the petitioner submitted sufficient documentation establishing that the beneficiary 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.

The petitioner established that the beneficiary meets the plain language of the regulation for this criterion.

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<sup>4</sup> *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); *Avyvr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

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

The director found that the petitioner failed to establish the beneficiary's eligibility for this criterion. 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. A review of the record of proceeding reflects that the petitioner claimed the beneficiary's eligibility based on his employment with [REDACTED] and with the petitioner.

Regarding [REDACTED] the petitioner submitted a termination letter that reflected that the beneficiary was employed as a "Principal Scientist." Besides the submission of six patents that list the beneficiary as the inventor, the petitioner failed to submit any other documentary evidence reflecting the beneficiary's job responsibilities or duties, so as to demonstrate that he performed in a leading or critical role. Simply submitting documentary evidence demonstrating that the beneficiary was employed with [REDACTED] is insufficient to establish that he performed in a leading or critical role. The petitioner failed to submit, for example, an organizational chart or other similar documentation that compared his position or role with the other employees at [REDACTED]. Moreover, the petitioner failed to establish that [REDACTED] has a distinguished reputation. The petitioner submitted screenshots from [REDACTED] website and a press release issued by [REDACTED]. However, the petitioner failed to submit any objective, independent evidence demonstrating that [REDACTED] has a distinguished reputation.

Regarding the beneficiary's role with the petitioner, the petitioner submitted the previously referenced recommendation letters. [REDACTED] stated that the beneficiary is a "member of the [REDACTED]" and "executes program plans." In addition, the petitioner submitted a letter from [REDACTED], [REDACTED] who stated that the beneficiary "has been critical to the development and commercialization of Thin Films/Optical Filters at [the petitioner]." Moreover, the petitioner submitted a letter from [REDACTED] who stated that the beneficiary "has reported to [him] for the past 2 ½ years" and that [REDACTED] is the "Director of the group developing vacuum coatings for solar energy and electronics." Again, besides copies of approved and pending patents developed by the beneficiary for the petitioner, the petitioner failed to submit any other documentary evidence establishing that the beneficiary has performed in a leading or critical role for the petitioner. While the petitioner established that the beneficiary is employed with the petitioner as a physicist, the petitioner failed to submit sufficient documentary evidence reflecting that the beneficiary's role is leading or critical. In fact, we are not persuaded that being a "member" within a section of the company is reflective of a leading or critical role within the company as a whole. Again, the petitioner failed to submit an organizational chart or similar documentary evidence comparing the role of the beneficiary with other employees of the

company. Clearly, the beneficiary is in a subordinate position to [REDACTED] or [REDACTED]. Finally, besides the brief self-serving statements contained in the reference letters, the petitioner failed to submit any other documentary evidence establishing that the petitioner has a distinguished reputation pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

As discussed above, the petitioner failed to demonstrate that the beneficiary has performed in a leading or critical role with organizations or establishments with a distinguished reputation pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii).

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

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

At the time of the original filing of the petition, the petitioner claimed the beneficiary's eligibility for this criterion. In the director's initial decision on September 15, 2009, he found that the petitioner failed to establish that the beneficiary has commanded a high salary in relation to others in his field. On motion and on appeal, counsel did not contest the decision of the director or offer additional arguments for this criterion. As such, we deem this issue to be abandoned. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d at 1228 n. 2.

Accordingly, the petitioner failed to establish that the beneficiary 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 that the beneficiary met the plain language of the regulation for one of the criteria, of which at least three are required under the regulation at 8 C.F.R. § 204.5(h)(3). In this case, many of the deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

In evaluating our final merits determination, we must look at the totality of the evidence to conclude the beneficiary's eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the beneficiary is employed as a physicist, has authored some scholarly articles, has pending and approved patents of his work, and has garnered some attention by others. However, the accomplishments of the beneficiary fall far short of establishing that he "is one of that small percentage who have risen to the very top of the field of endeavor" and that he "has sustained national or international acclaim and that his or her achievements have been recognized in the

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

The regulation at 8 C.F.R. § 204.5(h)(3) provides that "[a] petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." The petitioner's evidence must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). Although the beneficiary failed to meet the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the petitioner claimed the beneficiary's eligibility based on a single article that was published approximately eight years prior to the filing of the petition. We do not find evidence that a single article published eight years prior to the filing of the petition is sufficient to establish the level of sustained national or international acclaim required for this highly restrictive classification.

While we determined that the beneficiary failed to meet the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), an evaluation of the significance of the beneficiary's judging experience is sanctioned under *Kazarian*, 596 F. 3d at 1121-11. Although the record of proceeding fails to reflect that the beneficiary served, or claimed to serve, as a manuscript reviewer, we note that peer review is a routine element of the process by which articles are selected for publication in literary or scholarly journals or for presentation at literary conferences. Occasional participation in the peer review process does not automatically demonstrate that an individual has sustained national or international acclaim at the very top of his field. Reviewing manuscripts is recognized as a professional obligation of scientists or scholars who publish themselves in journals or who present their work at professional conferences. Normally a journal's editorial staff or a conference technical committee will enlist the assistance of numerous professionals in the field who agree to review submitted papers. It is common for a publication or technical committee to ask multiple reviewers to review a manuscript and to offer comments. The publication's editorial staff or the technical committee may accept or reject any reviewer's comments in determining whether to publish, present, or reject submitted papers. In this case, while the beneficiary has authored scholarly and scientific papers for professional journals, he failed to perform as a reviewer for journals in his field. Without evidence pre-dating the filing of the petition that sets the beneficiary 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 conferences, served in an editorial position for a distinguished journal, or chaired a technical committee for a reputable conference, we cannot conclude that the beneficiary is among that small percentage who have risen to the very top of the field of endeavor. See 8 C.F.R. § 204.5(h)(2).

Nonetheless, while the record of proceeding contains a claim of performing as a grant reviewer, there is no evidence reflecting that the beneficiary reviewed grant applications for acclaimed physicists and scientists who are at the top of the field. *Cf.*, *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899 (USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard). We cannot conclude that the beneficiary's claimed minimal participation as a reviewer of research grant applications demonstrates a level of expertise indicating that he is among that small percentage who have risen to the very top of the field of endeavor. *See* 8 C.F.R. § 204.5(h)(2). Even when compared to [REDACTED] who has edited six books and is editor-in-chief of [REDACTED] has considerably distinguished himself based on his editorial and review experience.

We determined that the beneficiary met the authorship of scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi). However, the petitioner has not established that the beneficiary's moderate publication of such articles demonstrates a level of expertise indicating that he is among that small percentage who have risen to the very top of the field of endeavor. *See* 8 C.F.R. § 204.5(h)(2). As authoring scholarly articles is inherent to scholars, we will evaluate a citation history or other evidence of the impact of the beneficiary's articles to determine the impact and recognition his work has had on the field and whether such influence has been sustained. For example, numerous independent citations for an article authored by the beneficiary would provide solid evidence that his work has been recognized and that other physicists or researchers have been influenced by his work. 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 beneficiary may indicate that his work has gone largely unnoticed by his field. As previously discussed, the petitioner submitted documentary evidence on two different occasions that his work was cited approximately 36 times, and his most cited article was cited 64 times. We again note that based on a review of the complete articles submitted by petitioner of the beneficiary's own articles, the beneficiary cited himself numerous times. Nevertheless, while the citations demonstrate some interest in his published work, they are not sufficient to demonstrate that his articles have attracted a level of interest in his field commensurate with sustained national or international acclaim at the very top of his field. Again, when compared to [REDACTED] who stated that he has authored "more than 360 publications in national and international journals and proceedings," the beneficiary has fallen far short in establishing that he "is one of that small percentage who have risen to the very top of the field of endeavor." We also note that the last authored article by the beneficiary was in 2004

[REDACTED] approximately five years prior to the filing of the petition.

Although the beneficiary failed to meet the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v) and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii), the petitioner submitted recommendation letters and self-serving letters praising the beneficiary. However, such letters cannot form the cornerstone of a successful extraordinary ability claim. Further, USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*,

19 I&N Dec. at 795. 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 beneficiary'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. The submission of letters from individuals 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 beneficiary's sustained national or international acclaim. *See* section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provide that the "intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required" for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). The petitioner failed to submit evidence demonstrating that the beneficiary "is one of that small percentage who have risen to the very top of the field." In addition, the petitioner has not demonstrated the beneficiary's "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). The truth is to be determined not by the quantity of evidence alone but by its quality. *Matter of Chawathe*, 25 I&N Dec. at 376 citing *Matter of E-M-* 20 I&N Dec. 77, 80 (Comm'r. 1989).

The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the beneficiary as one of the small percentage who have 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 have risen to the very top of the field of endeavor.

### **III. Conclusion**

Review of the record does not establish that the beneficiary has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of his field. The evidence is not persuasive that the 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 the beneficiary's 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.