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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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DATE: **JAN 11 2012** Office: TEXAS 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the sciences. 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 the petitioner has submitted comparable evidence of his extraordinary ability pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). Counsel asserts in his brief that the director failed to consider the petitioner's comparable evidence for the nationally or internationally recognized prizes or awards criterion at 8 C.F.R. § 204.5(h)(3)(i). As discussed above, the regulation at 8 C.F.R. § 204.5(h)(3) provides that evidence of sustained national or international acclaim shall include evidence of a one-time achievement or documentation meeting at least three categories of specific objective evidence. The AAO notes that the ten categories in the regulations are designed to cover different areas; not every criterion will apply to every occupation. For example, the criterion at 8 C.F.R. § 204.5(h)(3)(vii) implicitly applies to the visual arts, and the criterion at 8 C.F.R. § 204.5(h)(3)(x) expressly applies to the performing arts. The regulation at 8 C.F.R. § 204.5(h)(4) provides "[i]f the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." Thus, it is the petitioner's burden to explain why the regulatory criteria at 8 C.F.R. § 204.5(h)(3) are not readily applicable to the alien's occupation and how the evidence submitted is "comparable" to the specific objective evidence required at 8 C.F.R. §§ 204.5(h)(3)(i) – (x).

In counsel's brief, he does not explain why the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) is not applicable to the petitioner's occupation of physician. Instead, counsel simply argues that comparable evidence was submitted for the category of evidence at 8 C.F.R. § 204.5(h)(3)(i). The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the beneficiary's occupation as a physician cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, the petitioner submitted an August 12, 2009

letter [REDACTED] that specifically addresses five categories of evidence at 8 C.F.R. § 204.5(h)(3) which relate to the petitioner's occupation. The letter from [REDACTED] asserts that the petitioner "is a member of various societies which restrict membership to those who have made outstanding contributions in the field," that the petitioner's service as a "Scientific Supervisor" for theses in his specialty constitutes "judging the work" of others, that the petitioner has "made substantial contribution to fields of medicine in general and orthopedics and orthopedic surgery in particular," that the petitioner has authored five articles and a book chapter, and that the petitioner has performed in a critical role for various medical centers. The preceding claims by [REDACTED] specifically relate to the categories of evidence at 8 C.F.R. §§ (ii), (iv), (v), (vi), and (viii). Where an alien is simply unable to satisfy the plain language requirements of at least three categories of evidence at 8 C.F.R. § 204.5(h)(3), the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. Moreover, the AAO finds that a physician could also be the subject of published material in professional publications or other major media pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii) and command a high salary pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ix). The petitioner has failed to provide an explanation and supporting documentation as to why the regulatory criteria at 8 C.F.R. §§ 204.5(h)(3)(i), (iii), and (ix) would not apply to the profession of physician or orthopedic surgeon.

In the AAO's analysis of the categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(i) and (iii) below when comparable evidence is claimed, the AAO will determine whether or not the documentary evidence submitted by the petitioner is comparable to the preceding regulatory criteria and whether or not the evidence meets the plain language requirements of the criteria.

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).

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 September 3, 2009, seeks to classify the petitioner as an alien with extraordinary ability as a physician. At the time of filing, the petitioner was working as an orthopaedic resident in the [REDACTED]

The petitioner submitted an August 6, 2009 letter from [REDACTED] stating that the petitioner “became a fully-accredited orthopaedic resident in our ACGME [Accreditation Council for Graduate Medical Education] accredited program at the PGY3 [post-graduate year three] level in 2007.” The petitioner has submitted documentation pertaining to the following categories of evidence under 8 C.F.R. § 204.5(h)(3).²

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

The petitioner did not initially claim eligibility for this regulatory criterion. In response to the director’s request evidence, counsel states:

8 C.F.R. § 204.5(h)(4) provides that petitioner can submit “comparable evidence” to establish eligibility. [The petitioner’s] works have been selected for presentation at medical conferences and meetings, as well as published in medical journals, is equivalent to receiving awards or prizes of national and international significance.

Selection of the petitioner’s work for publication or presentation does not constitute evidence of his receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor. The director’s decision noted that the regulations include a separate criterion for authorship of scholarly articles at 8 C.F.R. § 204.5(h)(3)(vi). Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for nationally or internationally recognized prizes or awards for excellence and authorship of scholarly articles, USCIS clearly does not view these criteria as being interchangeable. 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. The AAO will fully address the petitioner’s authorship of scholarly articles under the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(vi).

On appeal, counsel repeats his assertion that the petitioner’s selection to present his “findings at annual medical conferences, and also having his work published in prestigious professional journals are comparable to his receipt of national or international awards.” The petitioner, however, failed to submit any documentation establishing that nationally or internationally recognized prizes or awards for excellence do not exist in the fields of medicine and

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

orthopaedics. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO cannot ignore that the American Academy of Orthopaedic Surgeons offers multiple annual awards for excellence in the field such as the Diversity Award, the Humanitarian Award, and the Tipton Leadership Award.³ Moreover, the petitioner submitted the curriculum vitae for [REDACTED] stating that he received two [REDACTED] (1982 and 1994) and two [REDACTED] (1989 and 1995). As such, there is no indication that the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) does not readily apply to the petitioner's occupation as a physician or orthopedic surgeon. As previously discussed, an inability to the plain language requirements of a regulatory criterion is not evidence that the criterion does not apply to the petitioner's occupation.

Even if the petitioner were to establish that the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(i) does not readily apply to his occupation, which he clearly did not, the petitioner failed to establish that coauthoring five scholarly articles, a book chapter, and three conference presentations is *comparable* to the regulation at 8 C.F.R. § 204.5(h)(3)(i) that requires "[d]ocumentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor." Under the awards criterion, the petitioner must demonstrate that he received nationally or internationally recognized *prizes or awards for excellence* in the field. Merely participating at national or international meetings such as a medical conference is insufficient to meet the plain language of this criterion unless prizes or awards for excellence were garnered as a result of the petitioner's participation. For example, a tennis player who simply competes at Wimbledon or the U.S. Open Tennis Championships would not meet this criterion unless the tennis player received an award or a prize. In the fields of science and medicine, national or international recognition for excellence is not established by the mere act of publishing one's work in a journal or presenting one's work at a medical conference along with numerous other participants. The petitioner failed to submit any documentary evidence, for example, that distinguished him from the other physicians who published or presented their work, so as to establish that his participation was comparable pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). Nothing in the record indicates that publication or presentation of one's work is unusual in the petitioner's field or that invitation to present at conferences where the petitioner's work appeared was a privilege extended to only a few top physicians. Many professional fields regularly hold conferences and symposia to present new work, discuss new findings, and network with other professionals. These conferences are promoted and sponsored by professional associations, businesses, educational institutions, and government agencies. Participation in such events, however, does not elevate the petitioner to the level of national or international recognition for excellence in his field of endeavor. The documentation submitted by the petitioner fails to demonstrate that his publications and presentations garnered a level of recognition comparable to the regulation at 8 C.F.R. § 204.5(h)(3)(i).

³ See <http://www6.aaos.org/member/pemr/award/index.cfm>, accessed on December 27, 2011, copy incorporated into the record of proceedings.

In light of the above, the petitioner has not established that he meets this regulatory 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 an August 12, 2009 letter from [REDACTED] asserting that the petitioner "is a member of various societies which restrict membership to those who have made outstanding contributions in the field." Rather than submitting primary evidence of his membership credentials originating from the societies themselves, the petitioner instead submitted a letter of support from his employer attesting to the existence of the unidentified memberships. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 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 letter of support from the petitioner's employer does not comply with the preceding regulatory requirements.

The director found that the petitioner failed to submit documentary evidence showing that he holds membership in associations requiring outstanding achievements of their members, as judged by recognized national or international experts in his field. On appeal, the petitioner does not contest the director's finding for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). Accordingly, the petitioner has not established that he meets this regulatory 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.⁴

The petitioner did not initially claim eligibility for this regulatory criterion. In response to the director's request for evidence, counsel states:

The inclusion of [the petitioner's] works for presentation at annual medical conventions and meetings in the U.S. and abroad is tantamount to publication about the alien's extraordinary achievements as well as recognition of extraordinary achievements.

The same is true of [the petitioner's] scholarly articles in major professional publications. Publication of one's work in medical journals and textbooks is equivalent to publication about the alien. Instead of another individual writing about a colleague's significant contributions, it is the medical societies' practice to select only the best and most noteworthy works to be published in their journals.

Selection of the petitioner's work for publication or presentation does not constitute evidence of published material about him in professional or major trade publications or other major media. The AAO again notes that the regulations include a separate criterion for authorship of scholarly articles at 8 C.F.R. § 204.5(h)(3)(vi). Because separate criteria exist for published material about the alien and authorship of scholarly articles, USCIS clearly does not view these criteria as being interchangeable. 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. The AAO will fully address the petitioner's authorship of scholarly articles under the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(vi).

Regardless, the petitioner failed to submit any documentation establishing that published material about him in professional or other major media does not readily apply to his occupation of physician and orthopedic surgeon. 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.

⁴ 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.

Even if the petitioner were to establish that the regulatory criterion at 8 C.F.R. § 204.5(h)(3)(iii) does not readily apply to his occupation, which he clearly did not, the petitioner failed to establish that coauthoring five scholarly articles, a book chapter, and three conference presentations is *comparable* to the regulation at 8 C.F.R. § 204.5(h)(3)(iii) that requires “published material *about the alien* in professional or major trade publications or other major media.” [Emphasis added.] Research findings and medical case studies written and presented by the petitioner do not constitute material about him. For instance, while a nationally televised news segment on a major television network about a physician whose research advanced his medical specialty may constitute comparable evidence for this regulatory criterion, material authored or prepared by the petitioner himself about his own work is not comparable to the level of achievement required by the criterion at 8 C.F.R. § 204.5(h)(3)(iii). As previously discussed, the regulation at 8 C.F.R. § 204.5(h)(4) is not a provision to simply allow an alien to circumvent the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x) when an alien is unable to submit documentary evidence satisfying the plain language requirements of at least three categories of evidence. In this matter, instead of submitting evidence that is comparable to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), counsel attempts to alter or diminish the plain language of this criterion by allowing the petitioner to use material coauthored by the petitioner which is not about him. The regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be “about the alien” relating to his work rather than simply about the petitioner’s work.

The director found that the petitioner failed to submit documentary evidence of published material about him in professional or major trade publications or other major media. On appeal, the petitioner does not contest the director’s findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885, at *9. Accordingly, the petitioner has not established that he meets this regulatory 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 an August 12, 2009 letter from [REDACTED] asserting that the petitioner “has served as the Scientific Supervisor on two theses in the areas of his specialty, judging the work of the presenters of the theses.” Rather than submitting primary evidence of his participation as a judge of the work of the presenters, the petitioner instead submitted a letter of support from his employer attesting to his service. [REDACTED] asserts that the petitioner has judged the work of others, but merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, No. 95 civ 10729, 1997 WL 188942 at *1, *5 (S.D.N.Y.). In this instance, there is no documentary evidence showing the specific work judged by the petitioner, the dates of his participation, the names of those he evaluated, or documentation of his assessments. 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). 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 letter of support from the petitioner's employer does not comply with the preceding regulatory requirements.

The director found that the petitioner failed to submit documentary evidence showing that he participated, either individually or on a panel, as a judge of the work of others in his field. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885, at *9. Accordingly, the petitioner has not established that he meets this regulatory criterion.

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

The petitioner submitted letters of support from his superiors at [REDACTED] and the [REDACTED] where the petitioner trained in his specialty. The letters of support discuss the petitioner's educational qualifications, residency training, surgical abilities, research projects, publications, and presentations, but they fail to provide specific examples of original work done by the petitioner that rise to the level of contributions of major significance in the field. Assuming the petitioner's skills, medical training, and surgical experience are unique, 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. 215, 221 (Comm'r 1998). It is not enough to be skillful and knowledgeable and to have others attest to those talents. An alien must have demonstrably impacted his field in order to meet this regulatory criterion.

[REDACTED] states:

[The petitioner] is well-respected by peers as an orthopedic surgeon and preeminent physician in sports medicine. He is an outstanding clinician and scientist of exceptional caliber, who has already made invaluable contributions to orthopedic and sport medicine. [The petitioner's] textbook chapter contribution is proof positive of the immense significance of his work in orthopaedic surgery, including non-invasive treatment procedures for shoulder injuries. Additionally, [the petitioner] has made a number of scientific and video presentations and has authored a number of publications in professional, peer-reviewed journals. One significant publication was in . . . *The Journal*

of Arthroscopy and Related Surgery, which is considered one of the leading journals in orthopaedic surgery.

█ comments that the petitioner has authored journal articles and a textbook chapter, but the record does not include a copy of the chapter in █ written by the petitioner. 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. The nonexistence or other unavailability of primary evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Nevertheless, 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. 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. 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. Thus, there is no presumption that every published article or presentation is an original contribution of major significance in the field; rather, the petitioner must document the actual impact of his article or presentation. In the present matter, the petitioner failed to submitted citation evidence or other supporting documentation showing that his published and presented work is majorly significant to his 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” in the field. The phrase “major significance” is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003). To be considered a contribution of major significance in the fields of science and medicine, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the impact of the petitioner’s work.

█ states:

I have known [the petitioner] for the past 6 years in the course of his work at █

[The petitioner] is recognized in the medical community as an individual with extraordinary ability in the field of arthroscopic surgery. His pioneering works on arthroscopic reconstruction and Glenoid revision have greatly contributed in the field of sports medicine. [The petitioner] has co-authored a chapter of the highly prestigious textbook, █, providing expert guidance to practitioners on the latest treatment approaches to shoulder injury, including minimally invasive treatments as an alternative to surgery.

[The petitioner] is renowned for innovative treatments of muscular skeletal pathology. His Glenoid revision studies focused on the variety of options available for the revision of a failed total shoulder Arthroplasty. [The petitioner's] research on Equine Model for Cartilage Repair has provided incredible advances in the basic science of orthopedic medicine, creating new opportunities to further study and understand the normal reparative processes of cartilage and potentially diminish the burden of osteoarthritis in our country.

There is no evidence showing that the petitioner's research studies on arthroscopic reconstruction, Glenoid revision, the Equine Model of Cartilage Repair are frequently cited by independent researchers, that his original treatment methodologies are being widely utilized by other orthopedic surgeons throughout the field, or that his work otherwise constitutes contributions of major significance to the field at large. While the petitioner's surgical and medical research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication, presentation, or funding, must offer new and useful information to the pool of knowledge. It does not follow that every physician or surgeon 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.

and the

, states:

[The petitioner] is an outstanding clinician and scientist of exceptional caliber who has already made and continues to make valuable contributions to orthopedics and sports medicine, including some non-invasive treatment procedures for shoulder injuries. These include, [sic] a significant publication was in *The Journal of Arthroscopy and Related Surgery*, which is considered one of the leading journals in Orthopedic Sports Medicine.

states that the petitioner has developed "some non-invasive treatment procedures for shoulder injuries," but he does not specifically identify the medical centers that have adopted the petitioner's treatment procedures. 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 the hospitals where he has worked. Further, there is no evidence showing that the petitioner's work in *The Journal of Arthroscopy and Related Surgery* is frequently cited by independent researchers or that his work otherwise equates to a contribution of major significance in the field.

The AAO notes that all of the reference letters submitted by the petitioner are from physicians who are affiliated with hospitals where the petitioner has trained. While such letters are important in providing details about the petitioner's work on various projects, they cannot by themselves establish that his work is recognized beyond his supervisors and coworkers. The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See

Matter of Caron International, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). Thus, the content of the experts' statements and how they became aware of the 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 physician or orthopedic surgeon who has made original contributions of major significance. Without supporting evidence showing that the petitioner's work equates to original contributions of major significance in his field, the AAO cannot conclude that he meets this criterion.

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

The petitioner has documented his co-authorship of scholarly articles and, thus, has submitted qualifying evidence pursuant to 8 C.F.R. § 204.5(h)(3)(vi). Accordingly, the petitioner has established that he meets this criterion.

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

The AAO withdraws the director's finding that the petitioner meets this regulatory criterion. The petitioner submitted an August 10, 2009 letter from [REDACTED] stating that the petitioner "became a fully-accredited orthopaedic resident" in [REDACTED] accredited program at the third-year postgraduate level in 2007. The petitioner also submitted a letter from [REDACTED] stating:

[The petitioner] attended medical school in Venezuela where he rotated as a medical student After medical school, he was a research fellow at the Hospital for Special Surgery and then completed a year of general surgery training at [REDACTED] [REDACTED] and is currently a resident in [REDACTED] [REDACTED]

At issue is whether the petitioner performed a critical role for the above hospitals. Hospitals require competent surgical residents and fellows. A conclusion that the petitioner played a critical role for the preceding hospitals simply by competently working in a position that needed to be filled would render this criterion meaningless. Specifically, it can be presumed that employers do not typically hire individuals to fill roles that serve no purpose for the employer; yet not every employee for a distinguished organization meets this criterion. In determining whether the petitioner's role was critical, the AAO looks at his performance in that role and how it contributed to the hospitals' activities beyond what is normally expected of their orthopaedic residents and research fellows in training.

In addition to the letters of support from [REDACTED] the petitioner submitted letters from [REDACTED] discussing the petitioner's research work and orthopaedic surgery activities. The documentary evidence submitted by the petitioner fails to demonstrate that his roles as an orthopaedic resident and research fellow in training were leading or critical to hospitals where he worked. There is no organizational chart or other evidence documenting where the petitioner's positions fell within the general hierarchy of the [REDACTED]. Further, the petitioner's evidence does not demonstrate how his training positions differentiated him from the other physicians and surgeons employed by the preceding hospitals, let alone their attending orthopaedic surgeons, program directors, and department chairmen. The record lacks evidence the petitioner contributed significantly to the activities of any hospital beyond the normal expectations of the numerous residents and research fellows who rotate through these hospitals annually. The evidence submitted by the petitioner does not show that he was responsible for the success or standing of the [REDACTED] to a degree consistent with the meaning of "leading or critical role." Accordingly, the AAO withdraws the director's finding that the petitioner meets this regulatory criterion.

Summary

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. Final Merits Determination

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 1119-20. 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 categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(i) – (v) and (viii.)

With regard to the documentation submitted for the category of evidence at 8 C.F.R. § 204.5(h)(3)(i), this decision has already addressed why selection of the petitioner's work for publication and presentation does not constitute comparable evidence of his receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor. The petitioner's evidence is also not indicative of or consistent with sustained national acclaim or a level of expertise indicating that he is one of that small percentage who have risen to the very top of his field of endeavor. Mere publication and presentation of the petitioner's work does not elevate him above almost all others in his field at a national or international level.

Regarding the documentation submitted for the category of evidence at 8 C.F.R. § 204.5(h)(3)(ii), as previously discussed, there is no evidence showing the petitioner holds membership in associations that require outstanding achievements of their members, as judged by recognized national or international experts in his field. The petitioner has not established that his memberships are indicative of or consistent with sustained national acclaim or a level of expertise indicating that he is one of that small percentage who have risen to the very top of his field.

In regard to the documentation submitted for the category of evidence at 8 C.F.R. § 204.5(h)(3)(iii), this decision has already addressed why selection of the petitioner's work for publication and presentation does not constitute comparable evidence of published material about him in professional or major trade publications or other major media. The petitioner's evidence is also not indicative of or consistent with sustained national acclaim or a level of expertise indicating that he is one of that small percentage who have risen to the very top of his field of endeavor. Mere publication and presentation of the petitioner's work does not elevate him above almost all others in his field at a national or international level.

With regard to the documentation submitted for the category of evidence at 8 C.F.R. § 204.5(h)(3)(iv), the nature of the petitioner's judging experience is a relevant consideration as to whether the evidence is indicative of his recognition beyond his own circle of collaborators. *See Kazarian*, 596 F. 3d at 1122. The petitioner submitted an August 12, 2009 letter from ██████████ asserting that the petitioner "has served as the Scientific Supervisor on two theses in the areas of his specialty, judging the work of the presenters of the theses." As previously discussed, there is no documentary evidence showing the specific work judged by the petitioner, the dates of his participation, the names of those he evaluated, or documentation of his assessments. Further, there is no evidence showing that the petitioner's service as a Scientific Supervisor for his employer is indicative of national or international acclaim at the very top of his field. The petitioner failed to submit evidence demonstrating that he judged experienced physicians or surgeons rather than students in the early stages of their medical career. *Cf.*, *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994); 56 Fed. Reg. at 60899 (USCIS has long held that even athletes performing at the major league level do not automatically meet the statutory standards for immigrant classification as an alien of "extraordinary ability"). The documentation submitted by the petitioner fails to establish that his level of judging is commensurate with sustained national or international acclaim at the very top of the field.

Regarding the petitioner's original research work submitted for the category of evidence at 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 an advanced degree, let alone

classification as a physician or orthopaedic surgeon 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 present matter, the record does not contain sufficient evidence that the petitioner’s research findings had major significance in the field, let alone an impact consistent with being nationally or internationally acclaimed as extraordinary.

In regard to the documentation submitted for the category of evidence 8 C.F.R. § 204.5(h)(3)(vi), the AAO acknowledges that the petitioner has coauthored a few scholarly articles as of the petition’s filing date. The Department of Labor’s (OOH), 2010-11 Edition (accessed at www.bls.gov/oco on December 29, 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.* Further, the OOH states specifically with respect to the biological sciences that a “solid record of published research is essential in obtaining a permanent position performing basic research, especially for those seeking a permanent college or university faculty position.” See <http://www.bls.gov/oco/pdf/ocos047.pdf>. This information reveals that original published research, whether arising from research at a university or private employer, does not set the researcher apart from faculty in that researcher’s field.

Moreover, the citation history of the petitioner’s published and presented work 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. The petitioner failed to submit citation indices or other documentary evidence demonstrating that his articles have attracted a level of interest in his field commensurate with sustained national or international acclaim at the very top of the field.

With regard to the documentation submitted for the category of evidence at 8 C.F.R. § 204.5(h)(3)(viii), as previously discussed, there is no evidence showing that the petitioner has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. The petitioner has not established that his training positions as an orthopaedic resident and research fellow are indicative of or consistent with sustained national acclaim or a level of expertise indicating that he is one of that small percentage who have risen to the very top of his 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, a post-graduate third-year orthopaedic resident, relies on undocumented professional memberships, his purported involvement in judging two student thesis presentations, less than ten scholarly articles and conference presentations, his training positions at various medical centers, and the praise of his superiors.

The AAO notes that the petitioner's superiors' credentials are far more impressive. For example, the petitioner submitted the curriculum vitae for [REDACTED] stating that he is the [REDACTED] [REDACTED] that he received two [REDACTED] [REDACTED] and two [REDACTED] that he has authored numerous journal articles, and that he has served as president of both the [REDACTED] [REDACTED] and the [REDACTED] [REDACTED] is the [REDACTED] the [REDACTED] and an author of more than sixty published articles and textbook chapters. [REDACTED] [REDACTED] an Assistant Professor of Orthopedic Surgery at [REDACTED] and an author of 36 publications and presentations.

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 above the level he has attained. In this matter, the petitioner has not established that his achievements at the time of filing were commensurate with sustained national or international acclaim as a physician or orthopedic surgeon, and 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.