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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: **JAN 17 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 Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an “alien of extraordinary ability” in the sciences, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the 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 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); *see also* H.R. 723 101st Cong., 2d Sess. 59 (1990). 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, the petitioner submits a brief with supporting documentation. For the reasons discussed below, the AAO upholds the director’s ultimate determination that the petitioner has not established his eligibility for the classification sought.

I. Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

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

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. On appeal, counsel focuses on the first "antecedent procedural question" of counting evidence, *id.* at 1121, without acknowledging that the *Kazarian* court expressly provided for an evaluation of the counted evidence in a final merits determination. In reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. *See* 8 C.F.R. 103.3(a)(1)(iv); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Spencer Enterprises*,

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).

Inc. v. United States, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) (recognizing the AAO's *de novo* authority).

II. Analysis

A. Evidentiary Criteria²

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

The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish his eligibility. 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 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 submitted qualifying evidence under this criterion.

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

The director discussed the evidence submitted for this criterion and found that the petitioner failed to establish his eligibility. 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 submitted qualifying evidence under 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 order to meet the requirements of this criterion, the published material must primarily be about the petitioner and the contents must relate to the petitioner's work in the field under which he seeks classification as an immigrant. The published material must also appear in professional or major trade publications or other major media (in the plural). Professional or major trade publications are intended for experts in the field or in the industry. To qualify as major media, the publication should have significant national distribution and be published in a predominant national language. The final requirement is that the petitioner provide each published item's title, date, and author and if the

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

published item is in a foreign language, the petitioner must provide a translation that complies with the requirements found at 8 C.F.R. § 103.2(b)(3).

The petitioner submits numerous articles that cite to the petitioner or his work and two articles published in *SYNFACTS*. The director determined that the petitioner failed to meet the requirements of this criterion.

The editors of *SYNFACTS* reprinted two articles authored by the petitioner with brief commentary. The petitioner provides the abstracts of these articles. The regulation at 8 C.F.R. § 204.5(h)(3)(vi) provides a separate criterion for articles *by* the petitioner. Consistent with the statutory requirement for extensive evidence, USCIS will not also consider articles by the petitioner to fall under this criterion as well. This evidence is insufficient to establish the petitioner meets the plain language requirements of this criterion.

The director properly addressed the numerous articles that cite to the petitioner's work within his decision by stating, "While the attorney of record may be referring to publications authored by the petitioner and citations to the petitioner's articles, these are not published materials about the petitioner." On appeal, counsel asserts that the director's interpretation of 8 C.F.R. § 204.5(h)(3)(iii) will produce the absurd result that articles about the petitioner but unrelated to his work will qualify while citations within the field will not. Counsel ignores that the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires both that the articles be about the petitioner and that they relate to his work in the field. *Compare* 8 C.F.R. § 204.5(i)(3)(i)(C) (relating to outstanding professors and researchers pursuant to section 203(b)(1)(B) of the Act and requiring only that the published material be about the alien's work in the academic field).³ The inclusion of the phrase "about the alien" is not superfluous and, thus, it must have 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). According to the plain language at 8 C.F.R. § 204.5(h)(3)(iii), the relevant criterion in this matter, the published material must be both about the petitioner *and* relate to his work in the field.

A review of the citing articles reveals that the petitioner is not a primary topic within the text. Instead, the first reference to him consistently falls within one of dozens of footnotes in the article. Passing references within a footnote hardly establishes the articles are about the petitioner relating to his work in the field. Instead, articles which cite the petitioner's work are primarily about the authors' own work or, in the case of review articles, recent trends in the field. They are not about the petitioner or even about his work.

As stated above, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be "about the alien." A footnoted reference to the alien's work without evaluation does not meet the plain language requirements set forth in that criterion. The submitted documentation does not discuss the merits of the petitioner's work, his standing in the field, any significant impact that his work has had on the field, or any other information so as to be considered published material about

³ Even under this standard, the material must still be "about" the alien's work in the academic field.

the petitioner as required by this criterion. Moreover, the AAO notes that the articles citing to the petitioner's work similarly referenced numerous other authors, and the AAO is not persuaded that all the authors cited may claim the article is about them. The research articles citing to the petitioner's work are more relevant to the original contributions criterion at 8 C.F.R. § 204.5(h)(3)(v) and will be addressed there. As such, they cannot serve as qualifying evidence under this criterion.

Therefore, the petitioner has not submitted qualifying evidence that meets the plain language requirements of 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.

This criterion requires not only that the petitioner was selected to serve as a judge, but also that the petitioner is able to produce evidence that he actually participated as a judge. The phrase "a judge" implies a formal designation in a judging capacity, either on a panel or individually as specified at 8 C.F.R. § 204.5(h)(3)(iv). Additionally, these duties must have been directly judging the work of others in the same field in which the petitioner seeks an immigrant classification within the present petition.

The petitioner submits four emails from representatives of two scientific journals as evidence under this criterion. The director determined the petitioner failed to meet the requirements of this criterion.

The record contains two emails from [REDACTED]. The first email is from [REDACTED]. [REDACTED] email is in response to the petitioner's request to referee articles for this publication and informs the petitioner of the steps he must take to be able to use the journal's database. [REDACTED] states, "Once we have recorded your information from the survey, the Editors will be able to ask you to review manuscripts in your areas of interest and expertise." This email contains no evidence that the petitioner has participated as a judge for this publication and it is apparent from [REDACTED] statement that the petitioner has not yet even gained access to the journal's database to perform any refereeing duties. The second email from this journal merely informs the petitioner that his account has been updated and provides the petitioner with his user ID and his primary email address. The petitioner fails to provide any additional evidence related to [REDACTED] which establishes that he was invited to serve as a judge or that he has participated as a judge for this publication.

The first email from [REDACTED] informs the petitioner that the publication has created an account for him on their database. It fails to indicate that the petitioner has performed the duties as a referee on behalf of this publication. The second email from [REDACTED] indicates the petitioner is a "member of [the journal's] referee database" and requests that he update his expertise information. While this email does indicate that the petitioner's name is included in the journal's database, the record lacks evidence that the

petitioner was invited to serve as a judge or that he has participated as a judge or as a referee for this publication as opposed to simply holding the title or the position of a referee.

Consequently, the petitioner has not submitted qualifying evidence that meets this criterion's plain language requirements.

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

Counsel's brief in response to the RFE indicates that under this criterion the petitioner is submitting his 16 authored articles in the field, ten presentations, "almost 300 citations," nine expert letters, "and considerable ancillary material some already referred to above and some not." Counsel fails to specify the "ancillary material some already referred to above and some not," and as a result, the AAO is unable to identify this potential evidence within this decision. Within the appellate brief, counsel also identifies the petitioner's pending patent as applicable to this criterion. The director determined that the petitioner failed to meet the requirements of this criterion.

The petitioner's field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in the field. According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be not only original but of major significance. The AAO must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. *Silverman*, 51 F. 3d at 31 *quoted in APWU*, 343 F.3d at 626. To be considered a contribution of major significance in the field of science, it can be expected that the results of the petitioner's research would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the impact of the petitioner's work.

The regulations contain a separate criterion regarding the authorship of scholarly articles. 8 C.F.R. § 204.5(h)(3)(vi). The AAO will not presume that evidence relating to, or even meeting the scholarly articles criterion is presumptive evidence that the petitioner also meets this criterion. Here it should be emphasized that the regulatory criteria are separate and distinct from one another. Because separate criteria exist for authorship of scholarly articles and original contributions of major significance, USCIS clearly does not view the two as being interchangeable.⁴ To hold otherwise would render the statutory requirement for extensive evidence or the regulatory requirement that a petitioner meet at least three separate criteria meaningless. Thus, there is no presumption that every published article or presentation is a contribution of major significance in the field; rather, the petitioner must document the actual impact of his article or presentation.

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

Counsel claims “almost 300 citations” to the petitioner’s work within the appeal brief. Within the response to the RFE, counsel claims 267 citations, excluding those related to the petitioner’s presentations. The petitioner relies on three forms of evidence to establish his scholarly articles have garnered 267 citations. The first form of evidence is a list of the petitioner’s scholarly articles accompanied by a statement that appears to represent his citation record for each article using the phrase: “Citing paper number.” At the conclusion of this self-serving list of the petitioner’s published articles, the petitioner tallies his citations using the phrase, “Total Citing paper number: 267 (until Feb 18th, 2010).” The petitioner has not provided an explanation of this phrase and fails to establish that this “Citing paper number” is the actual number of citations to each of the petitioner’s own works. 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)). Further, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The director identified this evidentiary shortcoming in his decision, which counsel’s appeal brief fails to sufficiently address. Specifically, within his decision, the director stated:

Again it has not been established that this “Citing paper number” represents the number of times each of the petitioner’s publication [*sic*] has been cited. There is no independent list of citations which corroborates the number of citations to the petitioner’s publications and the difference between the “Citing paper number” and the actual citation may be considerable. For example, the petitioner’s article “[REDACTED]” has the number 46 as the “Citing paper number” but www.google.scholar only indicates 18 citations to the article...While independent research has confirmed approximately 68 citations to the petitioner’s publications, 68 citations does not establish the petitioner’s work has sustained national or international acclaim. The petitioner has not provided sufficient evidence to establish the number of independent citations to the petitioner’s publications is above 68.

On appeal, counsel states, “Here the examiner stated that we had provided only evidence of 68 citations...the examiner’s claim as to what evidence was presented is not even true.” The director utilized the number of 68 citations based on his own independent research, rather than claiming that the petitioner only provided 68 citations. The AAO acknowledges that GoogleScholar may not always include every citation to a given article. That said, it remains the petitioner’s burden to document his claims, including, in this case, his claim of a high level of citation in the aggregate.

Counsel continues: “Copies of some of the citing articles were in fact sent in along with search engine lists, which have been accepted in other cases in the past.” The self-serving list of purported

citations, however, bears no indicia of being downloaded or photocopied from a “search engine” or citation index. Counsel’s implication that self-serving lists purportedly derived from an unidentified “search engine” have been accepted in past cases is not persuasive that this form of evidence is sufficient. The AAO is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm’r. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). The director identified a deficiency within the record and counsel failed to rectify the deficiency, even on appeal.

Following this list, the petitioner provides the second form of evidence, copies of his published scholarly articles, which are each accompanied by at least one document containing the phrase [REDACTED] and the date of February 18, 2010, in the header. According to the [REDACTED] [REDACTED] is a research discovery tool that allows the user to explore the CAS databases that contain literature from many scientific disciplines including biomedical sciences, chemistry, engineering, materials science, agricultural science, and more.”⁵ Each document purported to be a [REDACTED] printout provides separate entries reflecting the number of “answers” that apparently correspond with citations of an unidentified article. This evidence, purported to be from [REDACTED] bears no Internet address that the AAO may verify, and of the utmost importance, none of the purported SciFinder documents state the name of the article for which “answers” or citations are listed. The petitioner provides no evidence which might connect each of the purported SciFinder documents to a specific scholarly article.

The director articulated concerns about the evidence of citations to the petitioner’s published articles within the RFE as well as within his final decision. In response to the RFE, counsel provides an unresponsive reply, acknowledging the director’s concern with the previously submitted evidence but providing purportedly updated information from SciFinder with the same deficiencies identified above. Even on appeal, the petitioner fails to provide an alternative form of evidence to establish the number of citations to his scholarly articles. He merely provides the same purported SciFinder documents with a different date in the page header. Consequently, these purported SciFinder documents are insufficient to establish that the number of citations is equal to the petitioner’s figure of 267. It remains the petitioner’s burden to document the actual impact of his articles.

The third form of evidence includes copies of the citing articles themselves. This evidence reflects that two of the petitioner’s articles have received a moderate amount of citations. While a moderate amount of citations may demonstrate an awareness of the petitioner’s work and its value, not every researcher who performs moderately valuable research has inherently made a contribution of major significance to the field as a whole. Viewed individually, the petitioner’s articles have not garnered widespread citation. It remains the petitioner’s burden to document the actual impact of his articles. While the

⁵ *See* <http://www.cas.org/products/scifindr/sfweb/>, [accessed on November 15, 2011, a copy of which is incorporated into the record of proceeding.]

AAO takes into consideration the citations and ranking of the journals in which the petitioner's articles appear, it is not persuasive that the moderate citations of the petitioner's articles are indicative of a contribution of major significance in his field. The petitioner failed to demonstrate how those findings or citations of his work have significantly contributed to his field as required by this regulatory criterion.

At the time of the initial filing, counsel referenced the petitioner's pending patent and on appeal counsel references "patents" in the plural. The petitioner submits an email from [REDACTED]. The email states: "This is to confirm that you are a named inventor on the U.S. Provisional Patent Application." This evidence is insufficient to establish the petitioner has a patent granted by the U.S. Patent and Trade Office. Furthermore, patent applications and grants do not by themselves serve as the measure of an individual's ability to qualify for this classification. Even a patent grant merely provides the patentee "the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States, and, if the invention is a process, of the right to exclude others from using, offering for sale or selling throughout the United States, or importing into the United States, products made by that process." See 35 U.S.C. § 154. The AAO has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. See *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 n. 7, (Comm'r 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* The petitioner failed to provide evidence to indicate that the patent has been licensed, marketed, or that it has affected the field of chemistry research. Therefore, the AAO cannot conclude that the patent application has produced any measureable impact on the petitioner's field. As the petitioner has failed to demonstrate he has a patent application pending or that this alleged patent has had a significant influence on his field, the final merits determination will not include a discussion of this evidence.

[REDACTED] Research Foundation provides that the petitioner's postdoctoral work at two American universities appeared in the [REDACTED] and was subsequently highlighted in [REDACTED]. [REDACTED] contends that not every published paper "will be commented in [*sic*] such a prestigious and internationally circulated forum" like [REDACTED]. [REDACTED] also lists the petitioner's pending patent as an original contribution to his field. As noted above, the petitioner has not demonstrated that he has a patent granted, nor that any alleged patent has had a measurable impact on his field. Therefore, [REDACTED] claim of the petitioner's pending patent is insufficient as a contribution of major significance.

[REDACTED] states:

It is readily apparent that [REDACTED] research accomplishments and expertise will have a significant impact on medical chemistry research. He is currently carrying out research that will likely enhance vaccine potency and efficacy against foreign pathogens.

These are speculative benefits of a futuristic nature; the classification the petitioner seeks, however, requires the achievements that have already come to fruition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998). [REDACTED] letter fails to explain how the petitioner's achievements have already impacted the field as a whole, as of the petition's priority date.

[REDACTED] who previously collaborated with the petitioner, discusses the petitioner's work at the [REDACTED]. [REDACTED] provides that the petitioner's work focused on synthesizing new drugs to treat drug-resistant strains of malaria. [REDACTED] opines that the petitioner's preparation of 10 alkaloids was a "tremendous accomplishment for a graduate student." An accomplishment does not become a contribution of major significance to the field simply by being impressive for the stage of the innovator's education and training.

According to [REDACTED] the petitioner's methodology and findings can be applied to the synthesis of other elements "that exhibit antitumor activities." While [REDACTED] identifies a potential benefit from the petitioner's work at the [REDACTED] he fails to specify that the petitioner's work has already come to fruition. A petitioner must establish the elements for the approval of the petition at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12). A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *See Matter of Katigbak*, 14 I&N Dec. at 49. [REDACTED] identifies three of the petitioner's successes in the professor's own laboratory. The first being that the petitioner was able to resolve a problem within his laboratory that other researchers were not able to resolve. [REDACTED] states:

The approach of combining a change in ligand has succeeded, and [the petitioner's] manuscript on this topic has just been accepted to the [REDACTED] [REDACTED] the premier journal in the field of chemistry. These results were also a key feature of my recent NIH renewal that received outstanding reviews.

While [REDACTED] claims that he uses the petitioner's results in his own work, he fails to identify the title of the petitioner's manuscript that he references. [REDACTED] does not identify any independent laboratory that has utilized the petitioner's work as would be expected of a contribution of major significance.

[REDACTED] lists two of the petitioner's additional achievements in his laboratory, using innovative techniques resulting in either a more useful end result or as a possible future benefit to the field of chemistry. Again, [REDACTED] claims the petitioner's results were published or that he anticipates the results will be published. The petitioner's listed accomplishments may further the work of his

collaborators; however, [REDACTED] fails to identify how these accomplishments have already impacted the petitioner's field as a whole. Given that [REDACTED] descriptions are in terms of a future benefit to the petitioner's field, it appears that the petitioner's research, while original, is still ongoing and that the findings he has made are not currently being implemented in his field. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. 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. 45, 49 (Reg'l Comm'r 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).

[REDACTED] affirms that he is primarily aware of the petitioner through his published works. [REDACTED] fails to describe any original contributions that can be attributed to the petitioner. Instead, he focuses on the difficulty of the petitioner's field and the petitioner's apparent abilities and potential based on being a member of [REDACTED] research groups. This letter fails to pinpoint any specific contributions the petitioner has made to his field. USCIS will not infer the nature of the petitioner's contributions from the status of the petitioner's collaborators.

[REDACTED] explains that he became familiar with the petitioner from the findings the petitioner reported in his articles. [REDACTED] lists three of the petitioner's accomplishments in his letter as examples of the significant impact the petitioner has had on his field. Each example lists a procedure the petitioner developed that a chemistry journal subsequently published. One journal published the petitioner's work and highlighted his work on the publication's cover in 2006. However, [REDACTED] fails to provide a sufficient explanation of how these procedures have impacted the petitioner's field or that his findings are being used within the field. For example, [REDACTED] does not identify any independent research laboratories using the petitioner's procedures. Instead, he refers to the "potentials" of the petitioner's findings.

The remaining letters generally describe the petitioner's research and reference his education, his abilities, published work, and citations to his published work and how his findings will affect his field in the future. However, each letter lacks any specific description of how his achievements have already impacted the field as a whole.

It is important to note that none of the letters establishes how the author relies on the petitioner's findings within their own work, nor do they explain how the petitioner's work is being utilized and applied in the field. Most identify how the petitioner's findings can or will affect the field, but all lack examples of how his findings have already had an effect on the field.

The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought.

Id. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as this decision has done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

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." (emphasis added). Without additional, specific evidence showing that the petitioner's work has been unusually influential, widely applied by the field, or has otherwise risen to the level of contributions of major significance, the petitioner cannot establish that he meets this criterion.

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

The petitioner provides 16 articles in which he is either the primary or a secondary author and he claims ten presentations as evidence under this criterion. The director determined that the petitioner failed to meet the requirements of this criterion. The AAO will withdraw the director's determination related to this regulatory criterion.

The AAO recognizes the petitioner's 16 articles as scholarly in nature, which also appear in qualifying publications. The petitioner's articles establish that he submitted qualifying evidence that meets the plain language requirements of this criterion.

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

This criterion anticipates that a leading role should be apparent by its position in the overall organizational hierarchy and that it be accompanied by the role's matching duties. A critical role should be apparent from the petitioner's impact on the organization or the establishment's activities. The petitioner's performance in this role should establish whether the role was critical for organizations or establishments as a whole. As evidence under this criterion, the petitioner submits several letters from experts in the field. The director determined that the petitioner failed to meet the requirements of this criterion.

With the exception of the letter from [REDACTED] counsel's brief fails to specifically identify which evidence the petitioner wishes to be considered under this criterion. It is not the director's nor the AAO's responsibility to infer or second-guess which evidence the petitioner submits to meet this criterion, or how such evidence establishes eligibility for this criterion. The petitioner's response to the director's request for evidence (RFE) merely states, "[A]gain, ample material was submitted

including a letter from the petitioners [sic] PI [Principal Investigator]. Additionally we are submitting another letter from his PI with this RFE." It is important to note that counsel's initial filing brief lists all the letters from experts in the field, and [REDACTED] is not listed as a contributing party. Additionally, the evidence accompanying the initial filing did not contain a letter from [REDACTED] as counsel's quote asserts. The only letter from [REDACTED] within the record was submitted in response to the RFE. [REDACTED]

[REDACTED] states, "[The petitioner] is an expert in many areas of organic chemistry which give him a unique background and make him a highly qualified investigator at [REDACTED] where he plays a leading role in his project." Simply 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*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756. Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990). Additionally, the plain language of the regulation requires the petitioner to perform in a leading or critical role for organizations or establishments. [REDACTED] states the petitioner plays a leading role "in his project" rather than for [REDACTED] as a whole. Consequently, [REDACTED] has not demonstrated that the petitioner has performed in a leading role for an organization or establishment.

[REDACTED] asserts the petitioner has played a vital role in his organization through his research into immunity pathogens. However, [REDACTED] can only state that the petitioner and the team on which the petitioner works, "are making excellent progress." [REDACTED] fails to identify what impact the petitioner has had on the organization or the establishment's activities as a Research Investigator I. [REDACTED] does not establish the petitioner was responsible for the success or standing of the [REDACTED] to a degree that is consistent with the meaning of a leading or critical role.

Accordingly, the petitioner has not submitted qualifying evidence that meets the plain language requirements of 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.

The petitioner provides a letter from the [REDACTED] the petitioner's current employer and an Internet-based salary assessment. The director determined the petitioner failed to meet the requirements of this criterion.

The petitioner's letter from his employer states that the petitioner is a Research Investigator I, his annual salary is \$92,000, he received a bonus of \$14,298 on March 15, 2010, and he is eligible to participate in the company's stock option plan. The Internet-based salary assessment is from Indeed.com and provides that the average salary for [REDACTED] area on April 23, 2010 was \$65,000 and \$76,000 for a Ph.D. Chemist. An average, local salary provided by Indeed.com

is not a proper basis for comparison. The petitioner must submit evidence showing that he has earned a *high salary* or other *significantly high* remuneration in relation to others in his field (chemistry research), not simply a salary that is above the average level for research chemists or limited to the San Diego area. The petitioner's attempt to use average, local salary levels does not allow for an appropriate basis for comparison in determining a high salary "in relation to others in the field." *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering a professional golfer's earnings versus those of the top earners in the United States Professional Golfers' Association Tour). As others in the petitioner's field are not limited to working in the San Diego area, the petitioner must submit documentary evidence of the earnings of those in his occupation performing similar work at the national level and at the top level of the field.⁷ In this instance, the record is void of information regarding the top salaries for Research Investigators that perform similar work.

The letter from the petitioner's employer also identifies a bonus he received in the amount of \$14,298. The regulation requires that remuneration outside of the petitioner's salary must be significantly high in relation to others in his field. The petitioner failed to provide evidence of other bonuses of those in his occupation performing similar work at the top of the field in which to compare. As a result, the petitioner's bonus cannot contribute to establishing that he has commanded a significantly high remuneration.

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

Summary

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

B. Final Merits Determination

In accordance with the *Kazarian* opinion, the next step is 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

⁷ While we acknowledge that a district court's decision is not binding precedent, we note that in *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated, "[T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99."

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

The sole award the petitioner submits is an American Chemical Society Graduate Student Travel Award. This does not rise to the level of a nationally or internationally recognized award for excellence. This travel award is also not indicative of or consistent with sustained acclaim or a level of expertise indicating that the petitioner is one of that small percentage who have risen to the very top of their field of endeavor. A travel award limited to graduate students does not compare the petitioner with the most experienced and renowned members of his field.

The petitioner initially submitted membership in Sigma Xi as evidence under the membership criterion. The record contains no evidence to establish membership in Sigma Xi requires outstanding achievements of their members. Additionally, the record lacks evidence that establishes admittance to Sigma Xi is judged by recognized national or international experts in the petitioner’s field. These shortcomings reveal that this membership is not indicative of or consistent with sustained national or international acclaim or the status as one of that small percentage who have risen to the very top of their field of endeavor. By contrast, [REDACTED] is an elected member of the National Academy of Sciences.

Published material that, while making brief reference to the petitioner, clearly is not about the petitioner and his work in the field suffers from a fundamental inadequacy as it relates to achieving sustained acclaim or being one of that small percentage who have risen to the very top of their field of endeavor.

The record reflects that the petitioner has been invited to referee articles for, and has been granted access to the online databases of [REDACTED]

[REDACTED] Of additional importance is that the evidence on record indicates the petitioner requested to perform refereeing duties for the [REDACTED] and the record is absent of evidence that [REDACTED] made an independent request for the petitioner to referee their articles. The nature of the beneficiary’s judging experience is a relevant consideration as to whether the evidence is indicative of the beneficiary’s national or international acclaim. *See Kazarian*, 596 F.3d at 1122. As the petitioner has provided no evidence that he has actually participated as a judge, he cannot establish this invitation is indicative of or consistent with sustained acclaim or a level of expertise indicating that the petitioner is one of that small percentage who have risen to the very top of their field of endeavor.

Moreover, scientific journals are peer reviewed and rely on many scientists to review submitted articles. Thus, peer review is routine in the field and not every peer reviewer enjoys recognition on the national or international level. First, the petitioner must establish he has participated as a judge or referee. Subsequent to establishing this participation, without evidence that sets the petitioner apart from others in his field, such as evidence that he has reviewed manuscripts for a journal that credits a small, elite group of referees, received independent requests from a substantial number of journals, or served in an editorial position for a distinguished journal, the petitioner cannot establish that his judging experience is indicative of or consistent with national or international recognition.

Regarding the petitioner's original contributions to his field, he has authored 16 scholarly articles, two of which appeared with commentary in [REDACTED] and he has made three presentations at scientific conferences. In a quantifiable comparison, several of the those who submit supporting expert letters on the petitioner's behalf have published between 100 or more scientific papers, one reports his position on the editorial advisory board of nine scientific journals, one has received up to 30 awards, two report 80 or more patents awarded, and one has given 370 presentations. This information is only gleaned from the letters themselves. The petitioner failed to provide the curriculum vitae for each of the experts, even though one expert refers USCIS to his CV [curriculum vitae] for additional achievements. However, this decision has also discussed how these same experts in the field are unable to identify any of the petitioner's achievements that have already had an impact on his field. Most of these experts outlined some future benefit that will occur due to the petitioner's work. The above listed achievements are not commensurate with sustained acclaim or a level of expertise indicating that the petitioner is one of that small percentage who have risen to the very top of their field of endeavor.

As stated above, the petitioner has authored 16 scholarly articles in leading scientific journals such as [REDACTED] and *Organic letters*. Simply publishing in established scientific journals, however, is an insufficient indication of the petitioner's acclaim. Pursuant to the reasoning in *Kazarian*, 596 F.3d at 1122, the field's response to these articles may be and will be considered in the final merits determination. The petitioner's documented citations, as opposed to the number claimed in self-serving lists or SciFinder lists that fail to identify the cited article, are not indicative of sustained acclaim. Only two of the petitioner's published articles have garnered a moderate amount of citations as of the priority date. Amassing a moderate amount of citations for two articles, and a minimal amount of citations dispersed among his remaining 14 articles does not support the finding that the petitioner is among the small percent who have risen to the top of the field. The petitioner's field has not responded to his work in a manner consistent with sustained national or international acclaim or status as one of that small percentage who have risen to the very top of their field of endeavor.

Although the petitioner demonstrates selected achievements on various projects in which he worked, he failed to demonstrate he performed in a leading or critical role for any organization or establishment. The petitioner's performance on individual projects is not indicative of or consistent with the status as one of that small percentage who have risen to the very top of their field of endeavor.

The petitioner failed to establish that he has commanded a high salary or other significantly high remuneration for services, in relation to others in the field. Average salary information for an occupation is not a proper basis for comparison. The petitioner must demonstrate the high-end earnings nationally of those in his occupation performing similar work at the top level of the field. Without such evidence, he cannot establish that his remuneration confirms that he enjoys the status as one of that small percentage who have risen to the very top of their field of endeavor.

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 Research Investigator I, relies on (1) a single award limited to students, membership in a single organization, (2) two reprinted articles with commentary in [REDACTED] inclusion in two databases as a potential article reviewer, (4) a moderate number of published articles with a modest citation record each, and (5) performing in a leading or critical role on projects rather than for organizations. The petitioner seeks a highly restrictive visa classification, intended for individuals at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. In this case, the petitioner has not established that his achievements at the time of filing the petition were commensurate with sustained national or international acclaim, or that he was among that small percentage at the very top of the field of endeavor.

III. Conclusion

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.