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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 25 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, on May 27, 2009, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

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

In the director’s decision, he determined that the petitioner failed to establish eligibility for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the scholarly articles criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vi), the display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). However, in counsel’s brief on appeal, counsel did not contest the findings of the director or offer additional arguments for the awards criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(i), the published material criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iii), the display criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(vii), and the leading or critical role criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(viii). The AAO, therefore, considers these issues to be abandoned. See *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).

Counsel also claims:

The appellant was approved in the EB-2 NIW category without even been sent a Request for Evidence. The NIW criteria overlap those for Extraordinary Researcher but with greater emphasis that the work performed fits within the parameters set for being in the national interests of the U.S. as set forth in the regulations and authoritative interpretations thereof. It is so unreasonable to conclude that the

appellant does not satisfy even one of criteria for Extraordinary Researcher that it has to be concluded that the appellee's finding was arbitrary and capricious.

Contrary to counsel's assertions, Congress clearly distinguished the two classifications as demonstrated by creating separate immigrant visa classifications. *See* sections 203(b)(1)(A) and 203(b)(2) of the Act. Therefore, the corresponding regulations set forth under the regulation at 8 C.F.R. § 204.5(h) for an alien of extraordinary ability are separate and distinct to the regulation at 8 C.F.R. § 204.5(k) for a national interest waiver as a member of the professions holding an advanced degree or an alien of exceptional ability. Moreover, the regulations governing an alien of extraordinary ability do not "overlap," as asserted by counsel, the regulations governing an alien seeking a national interest waiver as an alien who is a member of the professions holding an advanced degree or an alien of exceptional ability. *See* 8 C.F.R. §§ 204.5(h) and 204.5(k). In addition, counsel implies that the requirements for a national interest waiver are more restrictive than for an alien of extraordinary ability. Significantly, as opposed to an alien applying for a national interest waiver, an alien of extraordinary ability must demonstrate "sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise" and "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." *See* 8 C.F.R. §§ 204.5(h)(2) and 204.5(h)(3). Conversely, "[e]xceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or businesses." *See* 8 C.F.R. § 204.5(k)(2). Furthermore, if the AAO were to accept counsel's assertion that approval of a national waiver petition demonstrates eligibility for an alien of extraordinary petition, which the AAO clearly does not, it would render meaningless that separate statutory and regulatory requirements exist for each immigrant visa classification. For these reasons, the AAO is not persuaded by the assertions of counsel for this issue.

I. Law

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

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

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

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

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

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

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

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

- (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- (iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
- (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;
- (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;

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

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

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

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

Id. at 1119.

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

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).

see also Soltane v. DOJ, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

II. Analysis

A. Evidentiary Criteria

This petition, filed on September 18, 2008, seeks to classify the petitioner as an alien with extraordinary ability as a research scientist. The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).²

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

The director determined that the petitioner failed to establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv) requires “[e]vidence of the alien’s participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.” A review of the record of proceeding reflects that the petitioner claimed eligibility for this criterion based on the following documentation:

1. An email, dated August 3, 2007, from ██████████ sent to several individuals including the petitioner stating “I would appreciate any comments!” and attached a document entitled “██████████”;
2. An email, dated April 6, 2006, from ██████████ for *Oncogene*, to ██████████ requesting a review of a manuscript for the publication that was then forwarded from ██████████ to the petitioner and ██████████ requesting a discussion;
3. An email, dated April 7, 2006, from the petitioner to ██████████ reflecting comments regarding the email in item 2 and indicated that further discussion would be required;
4. An email, dated June 3, 2004, from ██████████ to ██████████ requesting a review of a manuscript that was then forwarded from ██████████ to several individuals including the petitioner;
5. An email, dated June 1, 2004, from ██████████ for ██████████ requesting a review of a manuscript for the publication that was then forwarded to several individuals including the petitioner; and

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

6. An email, dated April 27, 2009, from [REDACTED] to the petitioner requesting her to review a manuscript.

As indicated above, the petitioner based her eligibility for this criterion entirely on emails. The AAO notes that the email requests from [REDACTED] instruct the recipients to conduct the reviews via Internet-based systems. The regulation at 8 C.F.R. § 103.2(b)(2) provides in pertinent part:

- (i) The non-existence or other unavailability or required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the fact at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

The regulation at 8 C.F.R. § 103.2(b)(2)(i) provides that the non-existence or unavailability of required evidence creates a presumption of ineligibility. 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. While the emails do not demonstrate the petitioner's eligibility for this criterion, which will be discussed further below, the petitioner failed to submit primary evidence of her participation as a judge of the work of others. Clearly, primary evidence does exist as the emails indicated that reviews are completed online. The petitioner could have submitted primary evidence from the respective websites demonstrating that she actually completed the reviews instead of submitting secondary evidence in the form of emails requesting the review of manuscripts. As such, the petitioner failed to comply with the regulation at 8 C.F.R. § 103.2(b)(2).

Nevertheless, regarding item 1, the vague email contains insufficient information to establish that the petitioner participated "as a judge of the work of others" consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). There is no indication, for example, the nature of the activity requested for comments, whose work was being requested for comments, if the petitioner actually provided comments, and if providing comments equate to serving as a judge of the work of others. The phrase "a judge" implies a formal designation in a judging capacity, either on a panel or individually as specified pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv). The regulation cannot be read to include every informal instance of simply providing "comments" to an unidentified attached document to an email.

Regarding items 2 and 3, there is no indication that the manuscript review was completed by the petitioner and forwarded to [REDACTED]. Based on the documentation submitted by the petitioner, the petitioner indicated that further discussion would be required without any evidence reflecting that the review was completed. Again, the petitioner failed to submit primary evidence from [REDACTED] such as screenshots evidencing that the petitioner reviewed the manuscript.

Regarding items 4 and 5, the documentation reflects email requests to [REDACTED] who forwarded the emails to several individuals. As the plain language of this regulatory criterion specifically requires “the alien’s participation . . . as the judge of the work of others,” the mere request to review manuscripts without evidence of actually reviewing the manuscripts is insufficient to meet the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv). The petitioner failed to establish that she actually reviewed the manuscripts.

Regarding item 6, which was submitted in response to the director’s request for additional evidence pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), the email request occurred after the filing of the petition. Eligibility must be established at the time of filing. Therefore, the AAO will not consider this item as evidence to establish the petitioner’s eligibility. 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). That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981), that USCIS cannot “consider facts that come into being only subsequent to the filing of a petition.” *Id.* at 176. Nonetheless, the email reflects a request to review a manuscript rather than evidence that she actually reviewed the manuscript.

For the reasons discussed above, the petitioner failed to demonstrate that she served as a judge of the work of others in the same or an allied field of specification for which classification is sought consistent with the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iv).

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

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

In the director’s decision, he determined that the petitioner failed to establish eligibility for this criterion. 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.” Here, the evidence must be reviewed to see whether it rises to the level of original scientific or scholarly-related contributions “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).

A review of the record of proceeding reflects that the petitioner submitted screenshots from *Google Scholar* reflecting that the petitioner's work was cited 73 times by others. Specifically:

1. [REDACTED] (*The Journal of Biological Chemistry*) – 55 citations;
2. [REDACTED] – 10 citations; and
3. [REDACTED] (*Journal of Proteome Research*) – 8 citations.

While the number of total citations is a factor, it is not the only factor to be considered in determining the petitioner's eligibility for this criterion. Generally, the number of citations is reflective of the petitioner's original findings and that the field has taken some interest to the petitioner's work. However, it is not an automatic indicator that the petitioner's work has been of *major significance in the field*. The AAO is not persuaded that the modest citation of the petitioner's work by others is reflective that her work has been of major significance in the field. While the petitioner submitted some articles that cited her work, a review of those articles failed to reflect that her work has been unusually influential, such as articles that discuss in-depth the petitioner's findings or credit the petitioner with influencing or impacting the field. In this case, the petitioner's documentary evidence is not reflective of having a significant impact on the field. Merely submitting documentation reflecting that the petitioner's work has been cited by others in their published material is insufficient to establish eligibility for this criterion without documentary evidence reflecting that the petitioner's work has been of a major significance in the field. The AAO is not persuaded that the modest citations of the petitioner's articles are reflective of the significance of her work in the field. The petitioner failed to establish how those findings or citations of her work by others have significantly contributed to her field as a whole. The AAO notes here that the petitioner also submitted some emails that were addressed to [REDACTED] from other researchers and postgraduate students requesting additional information or samples. There is insufficient information contained in the emails that the requests were made, in fact, for the petitioner's work, such as the three articles that were published. Regardless, as with the citations, the fact that the field has taken some interest to the petitioner's work is insufficient to establish that the petitioner's work has been of major significance to the field. The emails reflect only inquiries into her work rather than that the petitioner's work has been widely applied throughout her field, so as to demonstrate original contributions of *major significance* in the field.

The petitioner's evidence also includes documentation that she has presented her findings at four scientific conferences, such as the 95th American Association for Cancer Research (AACR) in March 2004. Many professional fields regularly hold conferences and symposia to present new work, discuss new findings, and to 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 equate to an original contribution of major significance in the field. Although the petitioner submitted a screenshot from www.medicexchange.com that briefly mentioned the petitioner as presenting at an AACR conference in November 1999, the screenshot simply summarizes various poster presentations without reflecting any impact of the petitioner's presentation. There is no evidence showing that any of the petitioner's conference presentations have been frequently cited by independent researchers or have otherwise significantly impacted the field.

Again, while the presentation of the petitioner's posters demonstrate that the petitioner's work was shared with others and may be acknowledged as original contributions based on the selection of them to be presented, the AAO is not persuaded that presentations of the petitioner's work at a couple of venues are sufficient evidence establishing that the petitioner's work is of major significance to the field as a whole and not limited to the engagements in which they were presented. The petitioner failed to establish, for example, that the presentations were of major significance so as to establish their impact or influence beyond the audience at the conferences.

Furthermore, the petitioner submitted documentation from the University of Medicine and Dentistry of New Jersey reflecting that the petitioner was listed on the financial and other personal interest disclosure forms as one of the investigators for five research projects. However, the petitioner failed to submit any documentation to establish that any of the research projects resulted in any original contributions of major significance in the field. Simply submitting documentation reflecting the petitioner's participation in research projects is insufficient to establish eligibility for this criterion without documentary evidence reflecting that the research projects resulted in any contributions of major significance in the field.

Moreover, a review of the record of proceeding reflects that the petitioner submitted recommendation letters. In this case, while the recommendation letters praise the petitioner for her work and research, they fail to indicate that her contributions are of *major significance* in the field. The letters provide only general statements without offering any specific information to establish how the petitioner's work has been of major significance. For example, [REDACTED] briefly indicated that the petitioner "[REDACTED]

[REDACTED] However, [REDACTED] failed to indicate how these discoveries are of significance in the field, let alone of major significance in the field, beyond being published in professional journals. Similarly, [REDACTED] discussed the petitioner's original findings regarding the [REDACTED]. While [REDACTED] indicated that "[t]his is important in determining the mechanisms by which cells turn cancerous as well as finding a way to treat cancers," [REDACTED] failed to provide any additional information or examples to show how the petitioner's research has been actually applied in her field, so as to demonstrate that her contributions have been of major significance. Likewise, [REDACTED] stated that the petitioner's "application of laboratory investigations to clinical investigations is designed to generate new clinical treatments." Again, [REDACTED] failed to

explain or discuss any “new clinical treatments” that have been developed based on the petitioner’s research, so as to demonstrate that the petitioner’s work has been of major significance in the field.

In addition, a petitioner cannot file a petition under this classification based on the expectation of future eligibility. For example, ██████████ stated that “[a]nswers to questions . . . *would* certainly help in calculating the risk of individual patients [emphasis added].” Further, ██████████ Kang stated that the petitioner “*is now* establishing the genetic polymorphism criteria for making [the appropriate preventive treatment plan] [emphasis added].” Finally, ██████████ stated that “I have every expectation that [the petitioner] *will* emerge as one of the leading researchers in this field and *will* make major contributions to this important area of research [emphasis added].” Given the descriptions in terms of future applicability and determinations that may occur at a later date, it appears that the petitioner’s research, while original, is still ongoing and that the findings she has made are not currently being implemented in his field. Again, while the AAO acknowledges the originality of the petitioner’s findings, the letters do not indicate that anyone is currently applying the petitioner’s research findings, so as to establish that these findings have already impacted the field in a significant manner. Accordingly, while the AAO does not dispute the originality of the petitioner’s research and findings, as well as the fact that the field has taken some notice of her work, the actual present impact of the petitioner’s work has not been established. Rather, the petitioner’s references appear to speculate about how the petitioner’s findings may affect the field at some point in the future. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. at 175. That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. at 114, that USCIS cannot “consider facts that come into being only subsequent to the filing of a petition.” *Id.* at 176. Many of the letters proffered do in fact discuss far more persuasively the future promise of the petitioner’s research and the impact that may result from her work, rather than how her past research already qualifies as a contribution of major significance in the field. The assertion that the petitioner’s research results are likely to be influential is not adequate to establish that her findings are already recognized as major contributions in the field. While the experts praise the petitioner’s research and work, the fact remains that any measurable impact that results from the petitioner’s research will likely occur in the future.

Further, several of the recommendation letters refer to the petitioner’s “unique” skills, experience, and background. For example, ██████████ referred to the petitioner’s “unique insights combined with her relentless diligence are uniquely informed by her singular background.” Moreover, ██████████ stated that “[b]ecause of [the petitioner’s] experience as a primary care physician, she is in a unique position to recognize the results of her basic laboratory research that can improve the care of patients in the clinic.” In addition, ██████████ stated that the petitioner’s “stature in the field is singular because her work bridges the gap between laboratory investigations and their applications in clinical settings.” Finally, ██████████ stated that the petitioner is “in the unique position of investigating genetic polymorphisms in the laboratory and then to find out clinically how they are predictors of the

recurrence of breast cancer.” However, none of the letters indicated how the petitioner’s skills or experience are original contributions of major significance to the field. Merely having a diverse skill set is not a contribution of major significance in and of itself. Rather, the record must be supported by evidence that the petitioner has already used those unique skills to impact the field at a significant level in an original way. Furthermore, assuming the petitioner’s skills 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 labor certification process. *See Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 (Comm’r 1998).

While those familiar with the petitioner’s work generally describe it as “extraordinary,” there is insufficient documentary evidence demonstrating that the petitioner’s work is of major significance. This regulatory criterion not only requires the petitioner to make original contributions, the regulatory criterion also requires those contributions to be of major significance. The AAO is not persuaded by vague, solicited letters that simply repeat the regulatory language but do not explain how the petitioner’s contributions have already influenced the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *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.). The lack of supporting evidence gives the AAO no basis to gauge the significance of the petitioner’s present contributions.

USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (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 of support from the petitioner’s personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien’s eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008). Thus, the content of the writers’ 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 of original contributions of major significance.

Again, 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 throughout her field, or has otherwise risen to the level of contributions of major significance, the AAO cannot conclude that she meets this criterion.

Accordingly, the petitioner failed to establish that she 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 director determined that the petitioner failed to establish eligibility for this criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(vi) requires “[e]vidence of the alien’s authorship of scholarly articles in the field, in professional or major trade publications or other major media.” The petitioner has submitted sufficient documentary evidence demonstrating that she meets the plain language of the regulation. Therefore, the AAO withdraws the findings of the director for this criterion.

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

B. Final Merits Determination

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

In evaluating the final merits determination, the AAO must look at the totality of the evidence to determine the petitioner’s eligibility pursuant to section 203(b)(1)(A) of the Act. In this case, the petitioner has published scholarly articles, has had some of her work cited by others, and has performed research in laboratories. However, the accomplishments of the petitioner fall far short of establishing that she “is one of that small percentage who have risen to the very top of the field of endeavor” and that she “has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.” See 8 C.F.R. § 204.5(h)(2), section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3).

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

Regarding the documentation submitted for 8 C.F.R. § 204.5(h)(vi), the petitioner submitted five copies of articles that she authored in professional publications. The AAO notes here that the petitioner's reference letters indicated several more articles that were authored by the petitioner; however the petitioner failed to submit primary evidence of her authorship of these articles pursuant to the regulation at 8 C.F.R. § 103.2(b)(2). Regardless, the petitioner has not established that her publication record sets her apart through a "career of acclaimed work." H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). Published research does not necessarily set an individual apart from other medical scientists employed in that researcher's field.

As authoring scholarly articles is inherent to research scientists, the AAO will also evaluate a citation history or other evidence of the impact of the petitioner's articles to determine the impact and recognition his work has had on the field and whether such influence has been sustained. For example, numerous independent citations for an article authored by the petitioner would provide solid evidence that her work has been recognized and that other researchers have been influenced by her work. Such an analysis at the final merits determination stage is appropriate pursuant to *Kazarian*, 596 F. 3d at 1122. On the other hand, few or no citations of an article authored by the petitioner may indicate that her work has gone largely unnoticed by his field. As previously discussed, the petitioner submitted documentary evidence reflecting that her work has been cited 73 times with the highest article cited 55 times. As these citations demonstrate moderate interest in her published work, they are not sufficient to demonstrate that her articles have attracted a level of interest in her field commensurate with sustained national or international acclaim at the very top of her field. Many of the petitioner's references' credentials, such as [REDACTED] are far more impressive than those of the petitioner and appear to have risen to a level far above her own accomplishments. Although the petitioner met the plain language of the regulation through her co-authorship of scholarly articles, she has not established that the publication of such articles demonstrates a level of expertise indicating that she is among that small percentage who have risen to the very top of the field of endeavor. See 8 C.F.R. § 204.5(h)(2).

While the AAO found that the petitioner failed to meet the original contributions criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(v), the petitioner based her claim of eligibility mainly on recommendation letters. It must be emphasized that the favorable opinions of experts in the field, while not without evidentiary weight, are not a solid basis for a successful extraordinary ability claim. Again, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. at 795. However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from individuals, especially when they are colleagues of the petitioner without any prior knowledge of the petitioner's work, supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. See *id.* at 795-796; see also *Matter of V-K-*, 24 I&N Dec. at 500, n.2. It is again noted that the authors of the recommendation letters speculated on the significance of the petitioner's work at some point in the future. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12);

Matter of Katigbak, 14 I&N Dec. at 49. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi*, 22 I&N Dec. at 175. That decision further provides, citing *Matter of Bardouille*, 18 I&N Dec. at 114, that USCIS cannot “consider facts that come into being only subsequent to the filing of a petition.” *Id.* at 176.

Regarding the petitioner’s original research findings discussed under the regulation at 8 C.F.R. § 204.5(h)(3)(v), as stated above, they do 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. That report also says that “an alien must (1) demonstrate sustained national or international acclaim in the sciences, arts, education, business or athletics (as shown through extensive documentation)...” Research work that is unoriginal would be unlikely to secure the petitioner a master’s degree, let alone classification as a scientific researcher of extraordinary ability. To argue that all original research is, by definition, “extraordinary” is to weaken that adjective beyond any useful meaning, and to presume that most research is “unoriginal.”

Although the AAO determined that the petitioner’s documentary evidence failed to meet the judging criterion pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(iv), the petitioner’s documentary evidence reflected requests to review three manuscripts. However, the record of proceeding is absent evidence demonstrating that the petitioner actually served as a “judge” of the work of others. An evaluation of the significance of an alien’s judging experience is sanctioned under *Kazarian*, 596 F. 3d at 1121-11. In the petitioner’s profession, peer review is a routine element of the process by which articles are selected for publication in literary or scholarly journals or for presentation at literary conferences. Occasional participation in the peer review process does not automatically demonstrate that an individual has sustained national or international acclaim at the very top of his field. Reviewing manuscripts is recognized as a professional obligation of scientists and researchers who publish themselves in journals or who present their work at professional conferences. Normally a journal’s editorial staff or a conference technical committee will enlist the assistance of numerous professionals in the field who agree to review submitted papers. It is common for a publication or technical committee to ask multiple reviewers to review a manuscript and to offer comments. The publication’s editorial staff or the technical committee may accept or reject any reviewer’s comments in determining whether to publish, present, or reject submitted papers. Without evidence pre-dating the filing of the petition that sets the petitioner apart from others in her field, such as evidence that she has received and completed independent requests for review from a substantial number of journals or conferences, or chaired a technical committee for a reputable conference, the AAO cannot conclude that the petitioner is among that small percentage who has risen to the very top of the field of endeavor. *See* 8 C.F.R. § 204.5(h)(2). The AAO again notes that [REDACTED] requested [REDACTED] who forwarded the request to several individuals including the petitioner, to review the manuscripts rather than the petitioner that is not reflective that “her achievements have been recognized in the field of expertise.” *See* 8 C.F.R. § 204.5(h)(3). Further, it appears that the petitioner’s references have significantly

distinguished themselves based on their editorial experience. For example, [REDACTED] is the [REDACTED] and [REDACTED] *Drugs*.

Finally, the AAO cannot ignore that the statute requires the petitioner to submit “extensive documentation” of her sustained national or international acclaim. See section 203(b)(1)(A) of the Act. The commentary for the proposed regulations implementing section 203(b)(1)(A)(i) of the Act provide that the “intent of Congress that a very high standard be set for aliens of extraordinary ability is reflected in this regulation by requiring the petitioner to present more extensive documentation than that required” for lesser classifications. 56 Fed. Reg. 30703, 30704 (July 5, 1991). The petitioner failed to submit evidence demonstrating that she “is one of that small percentage who have risen to the very top of the field.” In addition, the petitioner has not demonstrated his “career of acclaimed work in the field” as contemplated by Congress. H.R. Rep. No. 101-723, 59.

While the petitioner need not demonstrate that there is no one more accomplished than she to qualify for the classification sought, it appears that the very top of her field of endeavor is far above the level she has attained. The petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top at some unspecified future time. USCIS has long held that even athletes performing at the major league level do not automatically meet the “extraordinary ability” standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm’r. 1994); 56 Fed. Reg. at 60899. While the AAO acknowledges that a district court’s decision is not binding precedent, the AAO notes that in *Matter of Racine*, 1995 WL 153319 at *1, *4 (N.D. Ill. Feb. 16, 1995), the court stated:

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

Although the present case arose within the jurisdiction of another federal judicial district and circuit, the court’s reasoning indicates that USCIS’ interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable.

In this case, the petitioner has not established that her achievements at the time of filing the petition were commensurate with sustained national or international acclaim, or that she was 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 herself to such an extent that she may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of her field. The evidence is not persuasive that the petitioner's achievements set her significantly above almost all others in her 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.