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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **AUG 03 2010**
SRC 09 082 51449

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as Outstanding Professor or Researcher Pursuant to
Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. 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 is an applied scientific computing research firm. It seeks to classify the beneficiary as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). The petitioner seeks to employ the beneficiary permanently in the United States as a research scientist. The director determined that the petitioner had not established that the beneficiary had attained the outstanding level of achievement required for classification as an outstanding researcher.

On appeal, counsel submits additional evidence and several unpublished decisions by this office. We will consider the new evidence below. Regarding the unpublished decisions, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all U.S. Citizenship and Immigration Services (USCIS) employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, as will be discussed below, these unpublished decisions predate a recent circuit court decision that impacts our evaluation process. For the reasons discussed below, we uphold the director's ultimate conclusion that the petitioner has not established the beneficiary's eligibility for the benefit sought. Moreover, beyond the decision of the director, the petitioner has not established that it employs at least three persons full-time in research activities. 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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

For the reasons discussed below, when we simply "count" the evidence submitted, the petitioner has submitted qualifying evidence under only one regulatory criterion, scholarly articles pursuant to 8 C.F.R. §§ 204.5(i)(3)(i)(F).¹ The submission of qualifying evidence under at least two of the criteria is required. 8 C.F.R. § 204.5(i)(3)(i). Moreover, as explained in our final merits determination, the evidence that technically qualifies under this criterion (as well as the evidence submitted to meet the criterion at 8 C.F.R. § 204.5(i)(3)(i)(D)) reflects routine duties or accomplishments in the field that do not, as of the date of filing, set the beneficiary apart in the academic community through eminence and distinction based on international recognition.² *Employment-Based Immigrants*, 56 Fed. Reg. 30703, 30705 (proposed July 5, 1991) (enacted 56 Fed. Reg. 60897 (Nov. 29, 1991)).

I. Law

¹ As will be explained in detail below, while the petitioner submits qualifying evidence of the beneficiary's participation as a judge of the work of others, the evidence is ambiguous as to whether he did so as of the date of filing, the date as of which the petitioner must establish the beneficiary's eligibility. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

² The legal authority for this two-step analysis will be discussed at length below.

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):

* * *

(B) Outstanding professors and researchers. -- An alien is described in this subparagraph if --

(i) the alien is recognized internationally as outstanding in a specific academic area,

(ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

(iii) the alien seeks to enter the United States --

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

The regulation at 8 C.F.R. § 204.5(i)(3) states that a petition for an outstanding professor or researcher must be accompanied by:

(ii) Evidence that the alien has at least three years of experience in teaching and/or research in the academic field. Experience in teaching or research while working on an advanced degree will only be acceptable if the alien has acquired the degree, and if the teaching duties were such that he or she had full responsibility for the class taught or if the research conducted toward the degree has been recognized within the academic field as outstanding. Evidence of teaching and/or research experience shall be in the form of

letter(s) from current or former employer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien.

This petition was filed on January 20, 2009 to classify the beneficiary as an outstanding researcher in the field of computational fluid dynamics. Therefore, the petitioner must establish that the beneficiary had at least three years of research experience in the field as of that date, and that the beneficiary's work has been recognized internationally within the field as outstanding.

The regulation at 8 C.F.R. § 204.5(i)(3)(i) states that a petition for an outstanding professor or researcher must be accompanied by "[e]vidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition." The regulation lists the following six criteria, of which the beneficiary must submit evidence qualifying under at least two.

- (A) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;
- (B) Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;
- (C) Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;
- (D) Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;
- (E) Evidence of the alien's original scientific or scholarly research contributions to the academic field; or
- (F) Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under a similar classification set forth at section 203(b)(1)(A) of the Act. *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. 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.³ 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.⁴ While involving a different classification than the one at issue in this matter, the similarity of the two classifications makes the court's reasoning persuasive to the classification sought in this matter. 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, 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 Criteria⁵

³ 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) (comparable to 8 C.F.R. § 204.5(i)(3)(i)(D)) and 8 C.F.R. § 204.5(h)(3)(vi) (comparable to 8 C.F.R. § 204.5(i)(3)(i)(F)).

⁴ The classification at issue in *Kazarian*, section 203(b)(1)(A) of the Act, requires qualifying evidence under three criteria whereas the classification at issue in this matter, section 203(b)(1)(B) of the Act, requires qualifying evidence under only two criteria.

⁵ The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members

On appeal, counsel does not challenge the director's conclusion that the beneficiary's membership in the American Physical Society (APS) cannot serve as qualifying evidence under 8 C.F.R. § 204.5(i)(3)(i)(B). We concur with the director.

Initially, counsel acknowledged that APS does not restrict its membership but notes that the petitioner has been invited to present his work at APS conferences. In response to the director's request for additional evidence, counsel discusses the overall reputation of APS. USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5(i)(3)(i)(B). *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008) cited in *Kazarian*, 596 F.3d at 1121. While APS may enjoy a distinguished reputation and while the beneficiary may have presented his work at APS conferences, at issue, according to the plain language of the regulation at 8 C.F.R. § 204.5(i)(3)(i)(B), are the requirements for membership in APS. The record, which establishes that APS has 46,000 members, contains no evidence that APS limits its members to those able to demonstrate outstanding achievements.

Moreover, the plain language of the regulation at 8 C.F.R. § 204.5(i)(3)(i)(B) uses the word "associations" in the plural. The petitioner has not documented the beneficiary's membership in a second association or provided evidence that this second association requires outstanding achievements of its members.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements at 8 C.F.R. § 204.5(i)(3)(i)(B).

Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field

On appeal, counsel does not specifically contest the director's conclusion that the petitioner did not submit qualifying evidence under 8 C.F.R. § 204.5(i)(3)(i)(D) although counsel does submit unpublished decisions by this office that address this regulation. As stated above, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Regardless, counsel does not explain how the beneficiary's employment as a teaching assistant for an introductory course is comparable to the participation as a judge discussed in the unpublished decision submitted.

Initially, counsel asserted that an attestation as to the beneficiary's teaching skills serves as qualifying evidence under 8 C.F.R. § 204.5(i)(3)(i)(D). The petitioner submitted a letter from [REDACTED] a member of the beneficiary's Ph.D. committee, asserting that the beneficiary is "an excellent teacher and a skilled communicator to the students." In response to the director's request for additional evidence, the petitioner submitted a letter from [REDACTED] a professor who

taught the beneficiary at The Pennsylvania State University. [REDACTED] asserts that he selected the beneficiary as a teaching assistant for a course based on the beneficiary's excellence as a student and explains the beneficiary's duties for an introductory fluid dynamics course as follows:

As a teaching assistant for this course, he was responsible for the grading of exam papers, a task which required a sound understanding of fluid dynamics and heat transfer fundamentals and the skills to judge students' abilities to solve problems.

The regulation at 8 C.F.R. § 204.5(i)(3)(i)(D), by using "judge" as a noun, does not merely require incidental judging experience, but evidence of participation as a "judge," not a "teacher" or an "advisor." A teacher is primarily a teacher, not a judge. As such, a teaching assistant position is not a position as a "judge."

As such, the director correctly determined that, based on the record at the time of the denial, the petitioner had not submitted qualifying evidence that met the plain language of the criterion set forth at 8 C.F.R. § 204.5(i)(3)(D).

On appeal, however, the petitioner submits a new letter from [REDACTED] the beneficiary's Ph.D. advisor at [REDACTED] asserting that while the beneficiary was a postdoctoral researcher at [REDACTED] he advised one of [REDACTED] graduate students and now serves on the student's "external" Ph.D. committee.

Simply advising a student on an informal level cannot constitute evidence of participating as a judge of the work of others. [REDACTED] does not state whether the beneficiary already served as an official member of the student's Ph.D. committee as of January 20, 2009, the date the petition was filed. The petitioner must establish the beneficiary's eligibility as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). Significantly, this claim is raised for the first time on appeal.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements of the regulation at 8 C.F.R. § 204.5(i)(3)(i)(D) as of the date of filing.

Evidence of the alien's original scientific or scholarly research contributions to the academic field.

The plain language of the regulation at 8 C.F.R. § 204.5(i)(3)(i)(E) does not require that the beneficiary's contributions themselves be internationally recognized as outstanding. That said, the plain language of the regulation does not simply require original research, but an original "research contribution." Had the regulation contemplated merely the submission of original research, it would have said so, and not have included the extra word "contribution." Moreover, the plain language of the regulation requires that the contribution be "to the academic field" rather than an individual laboratory or institution. We simply note that the regulations include a separate criterion for scholarly articles at

8 C.F.R. § 204.5(i)(3)(i)(F). If the regulations are to be interpreted with any logic, it must be presumed that the regulation views contributions as a separate evidentiary requirement from scholarly articles.

As evidence of the significance of the beneficiary's articles, counsel relies on the total number of citations of those articles in the aggregate. On appeal, counsel submits unpublished decisions by this office, most of which discuss citations. As stated above, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. That said, the decisions submitted by counsel, with the exception of one decision where the alien was only minimally cited in the aggregate, discuss the citation level for individual articles rather than in the aggregate.

The petitioner submitted evidence from the Web of Knowledge website reflecting that four of the beneficiary's articles have been cited. Two of these articles were minimally cited and all of the citations are from the beneficiary, his coauthor or a former colleague at Cornell University. The two other cited articles were cited seven and 12 times. As the petitioner only provided three of the citations for each article, we cannot determine how many of the citations are independent. For the article cited seven times, all three citations listed are from independent sources. For the article cited 12 times, two of the three known citations are from the beneficiary and his coauthor.

The record does not establish that the above citation record is consistent with a contribution to the field as a whole. Without information about the origin of the independent research teams citing the beneficiary, it is unknown how widely the beneficiary is cited. Further, the petitioner has not documented the context of the citations. Finally, the record does not establish that the number of citations alone is significant. The petitioner submitted an article under consideration for publication in the [REDACTED]. The article includes a table documenting the mean number of citations per paper and citations per year per paper for articles published in the journal in 2000. The mean number of citations per paper per year is 1.91 and the mean number of citations over five years per paper is 9.55. The beneficiary's two articles in this journal were cited once in one year and seven times over six years, below the mean rate for the journal. Even assuming the citation rate for this journal is consistent with other journals in the field, the 12 citations over five and a half years of the beneficiary's article in the [REDACTED] is not significantly above the mean.

Finally, we acknowledge that the petitioner submitted several reference letters supporting the petition. We will address these letters in depth. At the outset, however, as stated by the director, the letters, while not identical, all use very similar language consistent with a common source. We acknowledge that the authors all signed their letters, affirming the contents. Nevertheless, the use of slightly modified boilerplate language somewhat reduces the evidentiary weight of these letters.

The letters all affirm that the beneficiary works in an area of importance to U.S. national security and his ability to address problems of national interest. Whether the beneficiary has the potential to benefit the national interest is not at issue in this proceeding. While the Act does include a lesser classification for advanced degree professionals seeking a waiver of the alien employment certification process in the

“national interest,” section 203(b)(2) of the Act, the petitioner is not seeking to classify the beneficiary under that provision. At issue for the classification sought is whether the beneficiary enjoys international recognition as outstanding and at issue under this criterion is whether or not the beneficiary has contributed to the field as a whole.

██████████ the beneficiary’s Ph.D. advisor at ██████████ who is currently at ██████████ asserts that he and the beneficiary “co-invented a unique multi-scale mixing model for combustion simulation using the probability density function formulation.” According to ██████████ this model extended classical mixing models to account for molecular processes that are important to combustion applications. ██████████ further asserts that the beneficiary validated their model by comparing the results from direct numerical simulations (DMS). ██████████ notes that the work was published. As stated above, however, the publication of scholarly articles is a separate, independent regulatory criterion set forth at 8 C.F.R. § 204.5(i)(3)(i)(F). ██████████ asserts that this work is critical to U.S. national security because it “will” more accurately predict mixing in combustion applications including the dispersion of toxins and bioagents in the atmosphere. ██████████ does not, however, provide examples of government agencies or other laboratories using the beneficiary’s model for this purpose.

██████████ then discusses the beneficiary’s work as a postdoctoral researcher in ██████████ laboratory at ██████████ According to ██████████ the beneficiary developed a new class of numerical methods for simulating polymer drag reduction phenomena that eliminates well known numerical instabilities found in other simulations without altering the interaction. ██████████ concludes that these methods, for which the beneficiary was the “key driver,” are more efficient and accurate than previous methods. While ██████████ asserts that this work “relates to the development of drag reducing technology that can be deployed on ships and submarines,” he does not identify any laboratory pursuing such technology based on the beneficiary’s simulation methods.

██████████ a professor at ██████████ provides similar information, adding that the beneficiary’s work on altering flow structures to reduce friction and increase lift has contributed to improved designs for actuators and is currently being implemented in underwater sensor probes to reduce jitters in the signal. ██████████ does not identify the designer or laboratory utilizing the beneficiary’s models to design improved actuators or where the underwater sensor probes based on the beneficiary’s work are being implemented. The record contains no letters from industry, the Department of Defense or defense contractors explaining their reliance on the beneficiary’s models.

Regarding the beneficiary’s work on mixing models, ██████████ speculates that this work “is directed at predicting dispersion of particulate matter” and predicts that this work is applicable to the dispersion of green-house gases and radioactive particles released into urban environments. Such speculation as to the future use of the beneficiary’s work is not evidence that he has already contributed to the field as a whole.

██████████ who previously collaborated with the beneficiary resulting in a coauthored publication, asserts that the beneficiary's mixing models "have led to a much deeper understanding of the complex, non-linear interactions between different length scales (i.e., mixing at large scales and chemical reactions at small scales)." ██████████ reiterates that this work has applications for dispersion of pollution and bio-warfare substances without providing examples of how this work is already contributing to these applications. ██████████ also reiterates that the beneficiary's work on flow control technology is being implemented in underwater sensor probes without identifying who is doing so and where. ██████████ also repeats this assertion in his own letter without providing any additional specifics.

██████████ formerly a fellow postdoctoral researcher of the beneficiary's at ██████████ provides similar information to that discussed above, speculating that the beneficiary's work on drag reduction "could be beneficial to [the] US Navy." The record contains no letters from high level officials (or anyone else) with the U.S. Navy confirming their use or intended use of the beneficiary's work.

All of the above authors provide minimal discussion of the beneficiary's current work for the petitioner. Specifically, they note that his work is funded by the Department of Defense and concludes that the significance of his project demonstrates his ability to solve problems in the national interest. This boilerplate language does not address how the beneficiary has already contributed to the field through his work for the petitioner.

██████████ professor at the University of California, Los Angeles (UCLA), discusses a joint project between UCLA and the petitioner on which ██████████ and the beneficiary collaborated. Specifically the project involved the development of "control systems that delay separation and transition and reduce oscillations in the lift force exerted on aircraft wings and missile canards and fins." Such control enables high angle-of-attack maneuvers and rapid responses for next-generation aircraft. ██████████ explains that the beneficiary was responsible for the fluid dynamic computations that simulated the operation and demonstrated the effectiveness of the flow control systems that the collaboration developed. ██████████ concludes that the beneficiary's work was "instrumental in meeting the project goals." As stated above, however, contributing to a single project commissioned by a client is not necessarily a contribution to the field as a whole. The record contains no evidence establishing that this collaboration was influential in the field, such as but not limited to published material in the trade or general media remarking on the significance of the simulation models being used at the petitioning company. Ultimately, ██████████ speculates that the beneficiary's work "will contribute to our competitive standing in science and engineering, our ability to remain a world leader in technology, and our strong national defense."

██████████ an assistant professor at the University of Texas at Austin, appears to be an independent reference although the petitioner did not include the curriculum vitae referenced by ██████████ letter is very similar to those from ██████████

Raman provides no examples of the beneficiary's work being applied at specific institutions or defense contractors and does not claim to use the beneficiary's models himself.

On appeal, the petitioner submits new letters. [REDACTED], a professor at Imperial College, London, asserts that one of his Ph.D. students extended the beneficiary's algorithm to "allow for walls as in channel flows." [REDACTED] asserts that the beneficiary was very helpful and "a great support" for the development of the code "now being used in London." [REDACTED] does not, however, assert that the student's work was published or otherwise reported in the field. Moreover, the record does not establish the beneficiary's influence on this doctoral research as of the date of filing in January 2009, the date as of which the petitioner must establish the beneficiary's eligibility. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

In addition, the petitioner submits a letter from [REDACTED] a research scientist at the U.S. Air Force Research Laboratory until March 2008 who does not list his current employment on his curriculum vitae. [REDACTED] asserts that he had oversight of the beneficiary's project for the Air Force Research Laboratory. [REDACTED] concludes that the beneficiary's work was "integral to the project's success, resulting in the design of systems to improve aircraft performance by delaying or eliminating flow separation and controlling transition to turbulence." Phase II of this project was projected to continue through April 4, 2010. Once again, this letter is not evidence of the beneficiary's influence beyond his collaborators as would be expected of a contribution to the field as a whole.

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 we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. 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 letters considered above primarily contain bare assertions of widespread recognition and vague claims of contributions without specifically identifying contributions and providing specific examples of how those contributions have influenced the field. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.⁶ The beneficiary's contribution to the project on which he works and the expansion on his work by a single Ph.D.

⁶ *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); *Ayvr 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).

candidate, as established by the letters, is not evidence of the beneficiary's contribution to the field as a whole. The petitioner also failed to submit corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirement of the regulation at 8 C.F.R. § 204.5(i)(3)(i)(E).

Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

As stated above, the petitioner submitted several articles authored by the beneficiary. Thus, the beneficiary has submitted evidence that qualifies under 8 C.F.R. § 204.5(i)(3)(F).

In light of the above, the petitioner has submitted evidence that meets only one of the criteria, two of which must be satisfied to establish the minimum eligibility requirements for this classification. Specifically the petitioner submitted evidence to meet the criterion set forth at 8 C.F.R. §§ 204.5(i)(3)(i)(F). Nevertheless, we will conduct a final merits determination that considers whether the evidence is consistent with the statutory standard in this matter, international recognition as outstanding. Section 203(b)(1)(B)(i) of the Act.

B. Final Merits Determination

It is important to note at the outset that the controlling purpose of the regulation is to establish international recognition, and any evidence submitted to meet these criteria must therefore be to some extent indicative of international recognition. More specifically, outstanding professors and researchers should stand apart in the academic community through eminence and distinction based on international recognition. The regulation at issue provides criteria to be used in evaluating whether a professor or researcher is deemed outstanding. *Employment-Based Immigrants*, 56 Fed. Reg. 30703, 30705 (proposed July 5, 1991) (enacted 56 Fed. Reg. 60897 (Nov. 29, 1991)).

The nature of the beneficiary's judging experience is a relevant consideration as to whether the evidence is indicative of the beneficiary's recognition beyond his own circle of collaborators. See *Kazarian*, 596 F. 3d at 1122. Even if we concluded that the beneficiary's work as a teaching assistant met the plain language requirements of 8 C.F.R. § 204.5(i)(3)(i)(D), we cannot ignore that the classification includes outstanding professors. It cannot be logically asserted that every professor, all of whom judge their students to some degree, has judging experience consistent with international recognition.

On a related note, the regulation at 8 C.F.R. § 204.5(i)(3)(ii) provides that teaching experience while a graduate student can only count towards the beneficiary's three years of experience if the beneficiary has full responsibility for the class taught. Dr. Vrentas does not state that the beneficiary had full responsibility for the class. Even if the beneficiary did have full responsibility for the class,

nothing in the pertinent regulations suggests that qualifying experience is also evidence of international recognition.

Even assuming that the beneficiary served as a member of a Ph.D. committee as of the date of filing, that experience is not indicative of or consistent with international recognition. While [REDACTED] asserts that the beneficiary served as an "external" reviewer, we cannot ignore that the beneficiary served in this capacity at the request of his Ph.D. advisor. Similar to the internal dissertation review noted by the court in *Kazarian*, 596 F. 3d at 1122, this request is not indicative of any recognition beyond the beneficiary's own Ph.D. advisor. This is a fair consideration at the final merits stage. *Id.*

Regarding the beneficiary's original research, as stated above, it does not appear to rise to the level of a contribution to the academic field as a whole. Demonstrating that the beneficiary's work was "original" in that it did not merely duplicate prior research is not useful in setting the beneficiary apart in the academic community through eminence and distinction based on international recognition. 56 Fed. Reg. at 30705. Research work that is unoriginal would be unlikely to secure the beneficiary a master's degree, let alone classification as an outstanding researcher. To argue that all original research is, by definition, "outstanding" is to weaken that adjective beyond any useful meaning, and to presume that most research is "unoriginal."

While the beneficiary has published articles, the Department of Labor's Occupational Outlook Handbook, 2008-2009 (accessed at www.bls.gov/oco on July 29, 2010 and incorporated into the record of proceedings), provides information about the nature of employment as a postsecondary teacher (professor) and the requirements for such a position. See www.bls.gov/oco/ocos066.htm. The handbook expressly states that faculty members are pressured to perform research and publish their work and that the professor's research record is a consideration for tenure. Moreover, the doctoral programs training students for faculty positions require a dissertation, or written report on original research. *Id.* This information reveals that original published research, whether arising from research at a university or private employer, does not set the researcher apart from faculty in that researcher's field.

The beneficiary's citation history is a relevant consideration as to whether the evidence is indicative of the beneficiary's recognition beyond his own circle of collaborators. See *Kazarian*, 596 F. 3d at 1122. The record contains no evidence that any of the beneficiary's articles has been individually cited at a level consistent with international recognition or other comparable evidence.

In light of the above, our final merits determination reveals that the beneficiary's qualifying evidence, serving as a teacher's assistant and Ph.D. committee member pursuant to a request from a former professor and publishing articles that have not garnered significant citations or other response in the academic field, does not set the beneficiary apart in the academic community through eminence and distinction based on international recognition. 56 Fed. Reg. at 30705.

III. Conclusion

The petitioner has shown that the beneficiary is a talented researcher, who has won the respect of his collaborators, employers, and mentors. The record, however, stops short of elevating the beneficiary to the level of an alien who is internationally recognized as an outstanding researcher or professor. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

IV. Requisite Number of Persons Employed in Full-time Research Activities

Section 203(b)(1)(B)(iii)(III) of the Act, 8 U.S.C. § 1153(b)(1)(B)(iii)(III), states that an alien may qualify as for the classification sought based on an offer of employment from a private research department, division, or institute, only “if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.” The requirement of three full-time research employees is also set forth in 8 C.F.R. § 204.5(i)(3)(C)(iii). The petitioner contends that it has met this requirement, with the President of the petitioning company qualifying as one of the full-time research employees, a research scientist qualifying as the second and the alien beneficiary qualifying as the third. The alien beneficiary is currently employed in a nonimmigrant classification.

First, the president’s job description includes managing the development of computational algorithms, coordinating work with university partners, interfacing with clients and customers, ensuring that all contractual obligations are met and managing new business acquisitions. Thus, the president is not employed “full-time in research activities” as required under section 203(b)(1)(B)(iii)(III) of the Act. As such, the petitioner only employs the beneficiary and one other researcher in full-time research activities and, thus, is not a qualifying employer.

Second, even if we were to consider the president to be employed full-time in research activities, the inclusion of the beneficiary as the third research employee is problematic. Neither the statute nor the legislative history clearly indicates whether the alien beneficiary can himself be the third full-time research employee for purposes of a private entity’s eligibility to file a visa petition under § 203(b)(1)(B). Similarly, the issue is not addressed in the legislative history set forth at H. Rep. 101-723 (Sept. 19, 1990), which indicates only that a private employer is eligible to file this petition “if there are at least three persons employed full-time in research.” Finally, the issue did not arise during the rulemaking process. *See* 56 Fed. Reg. 30,703 (July 5, 1991) (proposed rule); 56 Fed. Reg. 60,897 (Nov. 29, 1991) (final rule).

That said, it is worth noting that section 203(b)(1)(B)(iii)(III) of the Act requires that “the alien seeks to enter the United States” to work for “a department, division, or institute of a private employer” that “employs at least 3 persons full-time in research activities.” The phrases “seeks to enter” and “employs at least 3 persons” are both in the present tense. If an alien researcher is currently outside the United States, and intends to enter the United States with an immigrant visa, then the prospective employer must already employ at least three full-time researchers in the relevant department, division, or institute. In such a case, the three researchers obviously do not include the alien. Thus,

the statutory construction demonstrates that the alien must seek to become the fourth researcher in a company that already employs three *other* researchers. In instances where the alien is already in the United States as a nonimmigrant, and the alien has joined *two* other researchers to become the *third* researcher, then the employer does not satisfy the statutory construction.

There is no regulatory or statutory justification for the arbitrary assumption that a company too small to petition for a worker who is still overseas can, nevertheless, petition for that same worker if the worker is already in the United States as a nonimmigrant. Therefore, we find that the position held by the alien beneficiary shall not be counted as one of the three persons involved full-time in research activities. The AAO concludes that, even if the alien beneficiary is lawfully employed in a nonimmigrant classification, the petitioner may not count the alien beneficiary toward the requirement of "3 persons [employed] full-time in research activities." The apparent purpose of 203(b)(1)(B)(iii)(III) is to limit this immigrant visa classification to well-established research institutes. If the employment of a nonimmigrant alien, which is by definition temporary, can be counted toward this requirement then it would appear that hiring three nonimmigrant aliens could make all three of them eligible. This result would, with little effort, render the three employees requirement meaningless.⁷

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

⁷ Granted, for at least some nonimmigrant classifications, the position itself need not be temporary, but the alien must be coming temporarily to the United States.