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



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **AUG 03 2010**
SRC 09 077 51994

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 a biotechnology and drug discovery 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 issued a request for evidence on March 19, 2009, affording thirty days in which to respond. On April 15, 2009, counsel requested an additional 15 days in which to respond. A response that does not include all of the requested evidence is considered a request for a decision on the evidence submitted. 8 C.F.R. § 103.2(b)(11). Nothing in the regulations would allow a petitioner to request additional time to respond to a request for evidence. The director determined that the petitioner had not established that the beneficiary had attained the outstanding level of achievement and international recognition required for classification as an outstanding researcher. The director also determined that the petitioner had not documented a job offer for a tenured or tenure-track position or its ability to pay the proffered wage.

On appeal, counsel submits a brief and additional evidence. Counsel asserts that the director failed to fully consider the initial evidence submitted. Upon review of the record, the AAO determined that the evidence submitted to show that the beneficiary's articles have been cited was self-serving and ambiguous. As such, on June 23, 2010, the AAO requested the first page, page on which the beneficiary's work was cited, and the reference pages of the articles citing the beneficiary's work. The petitioner provided the requested evidence, which contradicts counsel's assertion that a specific review article "highlights" the beneficiary's work. Rather, as will be discussed below, the beneficiary's work is mostly cited along with several other articles as examples of other work in the field. We will consider all of the evidence of record in detail below. For the reasons discussed below, we uphold the director's ultimate conclusion that the petitioner has not established that the beneficiary has attained the outstanding level of achievement and international recognition required for the classification sought. Moreover, for the reasons discussed below, we will not consider the beneficiary's employment contract and the financial documentation submitted on appeal as this evidence was specifically requested by the director previously and not submitted. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988).

At the outset, while U.S. Citizenship and Immigration Services (USCIS) approved at least one O-1 nonimmigrant visa petition filed on behalf of the beneficiary, the prior approval does not preclude USCIS from denying an immigrant visa petition based on a different, if similarly phrased standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M*

Univ. v. Upchurch, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of beneficiary's qualifications).

Moreover, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. Due to the lack of required initial evidence in the present record, the AAO finds that the director was justified in departing from the previous nonimmigrant approval by denying the present immigrant visa petition.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Ultimately, as will be explained in detail below, when we simply "count" the evidence submitted, the petitioner has submitted qualifying evidence under two of the regulatory criteria as required, judging the work of others and scholarly articles pursuant to 8 C.F.R. §§ 204.5(i)(3)(i)(D) and (F). As explained in our final merits determination, however, much of the evidence that technically qualifies under these criteria 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.¹ *Employment-Based Immigrants*, 56 Fed. Reg. 30703, 30705 (proposed July 5, 1991) (enacted 56 Fed. Reg. 60897 (Nov. 29, 1991)).

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):

* * *

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

¹ The legal authority for this two-step analysis will be discussed at length below.

- (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 12, 2009 to classify the beneficiary as an outstanding researcher in the field of organic chemistry. 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. As the beneficiary only received her Ph.D. in December 2006, she must demonstrate that her Ph.D. research has been recognized as outstanding if she is to count that research towards the necessary three years of experience.

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*, 2010 WL 725317 (9th Cir. March 4, 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.*

The court stated that the AAO’s evaluation rested on an improper understanding of the regulations.² 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 *6 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the “final merits determination” as the corollary to this procedure:

² 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)).

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 *3.

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.³ 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); 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); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (recognizing the AAO’s *de novo* authority).

II. Analysis

A. Evidentiary Criteria⁴

Documentation of the alien’s receipt of major prizes or awards for outstanding achievement in the academic field

Initially, the petitioner asserted that the beneficiary’s postdoctoral appointment at [REDACTED] University serves as qualifying evidence under 8 C.F.R. § 204.5(i)(3)(i)(A). As supporting evidence, the petitioner references letters from the beneficiary’s postdoctoral supervisor, [REDACTED] and a letter from [REDACTED] a professor at [REDACTED]. While both letters reference the beneficiary’s postdoctoral appointment, neither letter suggests that this appointment constitutes a prize or award. We note that postdoctoral appointments are inherently entry-level positions that precede a postsecondary faculty appointment. See <http://www.bls.gov/oco/ocos066.htm#training> (accessed July 29, 2010 and incorporated into the record of proceeding). The petitioner also submitted evidence that the [REDACTED] awarded the beneficiary [REDACTED] “for outstanding achievement in research and exemplary presentation at the

³ 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.

⁴ The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

██████████ a professor at the ██████████ asserts that the award is “the most honorable and competitive award in [the] ██████████”

Counsel does not address this regulatory category of evidence on appeal. It is significant that the *proposed* regulation relating to this classification would have required evidence of a major *international* award. The final rule removed the requirement that the award be “international,” but left the word “major.” The commentary states: “The word “international” has been removed in order to accommodate the *possibility* that an alien might be recognized internationally as outstanding for having received a major award that is not international.” (Emphasis added.) 56 Fed. Reg. 60897-01, 60899 (Nov. 29, 1991.)

Thus, the standard for this criterion is very high. The rule recognizes only the “possibility” that a *major* award that is not international would qualify. Significantly, even lesser international awards cannot serve to meet this criterion given the continued use of the word “major” in the final rule. *Compare* 8 C.F.R. § 204.5(h)(3)(i) (allowing for “lesser” nationally or internationally recognized awards for a separate classification than the one sought in this matter).

A postdoctoral appointment, even if competitive for recent graduates, is a job offer and not a prize or award for outstanding achievement in the field. The record lacks evidence that a student prize at the ██████████ is a major prize or award in the field of organic chemistry. Specifically, the record contains no evidence that independent institutions internationally or even nationally publish, comment upon or otherwise take notice of the announcement of the awardees.

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)(A).

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

The petitioner submitted evidence that the beneficiary is a member of the American Chemical Society (ACS). The petitioner submitted evidence that ACS regular membership is open to anyone with a degree in a chemical science, a certificate as a teacher of a chemical science or relevant work experience. The petitioner asserted that membership also requires sponsorship from two senior ACS members and discusses the distinguished reputation of ACS as an association. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l. Comm’r. 1972)).

Counsel does not address this regulatory category of evidence on appeal. We are not persuaded that a degree or experience in the field is an outstanding achievement. Even assuming that an application for membership must be supported by two current members, we are not persuaded that sponsorship is an outstanding achievement. Thus, the beneficiary’s membership in ACS is not qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(i)(3)(i)(B).

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

The petitioner initially asserted that three review articles that cite the beneficiary's work as well as additional articles citing the beneficiary's work serve as qualifying evidence under 8 C.F.R. § 204.5(i)(3)(i)(C). The petitioner, however, submitted only the title pages of the review articles as they appear on the Internet. As the title pages do not reference the beneficiary's work, they cannot establish that the review articles are "about" the beneficiary's work or even that the review articles cite the beneficiary's work. The petitioner also submitted what appears to be a self-serving list of "answers" that purport to be articles citing the beneficiary's work. The list contains no indication that it is from an official citation index or other reliable source of citations. Regardless, research articles that merely cite the beneficiary's work are primarily about the author's own work, not the beneficiary's work. As such, they cannot be considered published material about the beneficiary's work.

On appeal, the petitioner submits two of the review articles. In the first article, the beneficiary's work is one of 204 cited articles and is cited in support of a single sentence of this 54 page article. This review article cannot be credibly asserted to be "about" the beneficiary's work. In the second article, the beneficiary's work is one of eight articles within endnote 71 of the 156 endnotes for that article. While some of the articles in endnote 71 are singled out for brief discussions in the text, (71(a), (b) and (h)) the beneficiary's article, 71(g), is not. The review article cannot be credibly asserted to be "about" the beneficiary's work or even the other articles in endnote 71 that are briefly discussed.

Counsel asserts that a third review article by [REDACTED] "highlights" the beneficiary's work but does not submit that review article. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, the AAO's June 23, 2010 request for evidence specifically requests that article, which the petitioner has now submitted. [REDACTED] cites the beneficiary's article as one of 11 articles for the proposition: "The syntheses of other fragments and model studies towards the spirastrellolides were reported." This article cannot be said to be "about" the beneficiary's work.

As none of the published material is "about" the beneficiary's work, 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)(C).

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

As noted by the petitioner initially and counsel on appeal, [REDACTED] asserts that the beneficiary "has aided [REDACTED] in lending her expertise for reviewing several scientific manuscripts to evaluate their suitability for publication in peer-reviewed journals" and "has directed the research of several other graduate and undergraduate students" in [REDACTED] group. The petitioner and

counsel also rely on the beneficiary's oral presentations of her own work at symposiums without explaining how these presentations constitute judging the work of others.

Directing the research of students does not constitute serving as a "judge" of the work of others. 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."

That said, the beneficiary's peer-review assistance is qualifying evidence under the plain language of the criterion set forth at 8 C.F.R. § 204.5(i)(3)(D).

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

As evidence relating to the beneficiary's original scientific or scholarly research contributions to the academic field, the petitioner submitted a list of patents, reference letters and the beneficiary's articles and conference presentations. 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.

In the context of a lesser classification under section 203(b)(2) of the Act, the AAO held that an alien must have a past history of demonstrable achievement with some degree of influence in the field as a whole, *New York State Dep't. of Transp.*, 22 I&N Dec. 215, 219, n.6 (Comm'r. 1998), and that a patent cannot, by itself, meet that threshold. *Id.* at 221, n.7. Rather, the significance of the specific innovation must be reviewed on a case-by-case basis. *Id.* This reasoning is persuasive authority and supports a finding that a patent, by itself, is not presumptive evidence of a contribution to the field as a whole. Finally, 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.

The petitioner submitted two articles, a manuscript with no indicia of publication and two abstracts for conference presentations. The petitioner also submitted what purports to be a list of articles that cite the beneficiary's [REDACTED]. This list indicates that it derives from SciFinder but it bears no indicia that it is the downloaded version of a citation index or list. Thus, the list is a self-serving document that has no evidentiary value. Specifically, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). As such, the AAO requested evidence of the citations, which the petitioner has now provided. The only article to garner more than two citations as of the date of filing is the beneficiary's [REDACTED].

The majority of the citations do not single out the beneficiary's work. For example, an article by [REDACTED] and coauthors cites the beneficiary's article as one of 19 for the proposition: "A number of elegant syntheses of major fragments of 1 and 2 have been reported along with total syntheses." Similarly, an article by [REDACTED] and his coauthors cites the beneficiary's work as an example of 11 elegant synthetic efforts toward spirastrellolides. [REDACTED] and coauthors cite two of the beneficiary's articles among 18 articles for the proposition: "Undoubtedly, these scarce natural products have attracted top schools of synthesis to embark on total synthesis." While including [REDACTED] group as one of the "top schools of synthesis," the citation does not suggest that the beneficiary's work has contributed to the field as a whole. [REDACTED] and his coauthors cite the beneficiary's article as one of nine articles by researchers "inspired" to pursue total synthesis. [REDACTED] and her coauthors state that no total synthesis of spirastrellolides has been described but that the beneficiary's articles are two of 14 that have reported the synthesis of fragments. Finally, other articles include the beneficiary's work as one of several articles in a footnote devoted solely to providing examples of similar studies.

We acknowledge that some of the citations reflect some reliance on the beneficiary's work. Specifically, an article by a German research team published in [REDACTED] cites the beneficiary's article as one of three articles for the team's process of protecting the hydroxyl group function with dimethoxybenzyl imidate. In addition, an article by [REDACTED] in the [REDACTED] appears to rely on the beneficiary's article to form the JKLM enone in 95 percent yield. Finally, an article by [REDACTED] relies on the beneficiary's article and two other articles for a protection process that produced ether in excellent yield. This minimal reliance cannot, by itself, establish that the beneficiary's Ph.D. research constitutes a contribution to the field as a whole. Rather, the citation evidence as a whole indicates that the beneficiary's work is part of a growing interest in that area of research.

In addition, while the regulation at 8 C.F.R. § 204.5(i)(3)(i)(E) does not require that the beneficiary's contributions be recognized in the academic field as outstanding, the regulation at 8 C.F.R. § 204.5(i)(3)(ii) states that beneficiary's Ph.D. research must be recognized within the field if that experience is to count towards her three years of qualifying experience. The citations provided do not suggest that the beneficiary's Ph.D. research is recognized in the academic field as outstanding. The reference letters are additional evidence that must be considered on this issue and will be addressed below.

[REDACTED] the beneficiary's team leader at the petitioning company, lists 17 patent applications that he states have yet to become public. Patents can establish that the innovation patented is original, but not that it constitutes a contribution to a field as a whole. As stated above, in a case involving a lesser classification than the one sought in this matter, this office stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. See *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 221 n. 7. The petitioner must establish the significance of the patent-pending innovations.

The remaining evidence pertaining to this category of evidence is comprised of reference letters. [REDACTED] discusses the beneficiary's Ph.D. research at the [REDACTED] where she discovered

and applied new synthetic methods for the laboratory synthesis of complex natural products. First, [REDACTED] states that the beneficiary “[REDACTED],” which was applied to the first [REDACTED]. This is the work published in [REDACTED]. [REDACTED] concludes that this work resulted “in an unprecedented assembly of an unprecedented complex molecule, the core feature of the [REDACTED].” [REDACTED] notes that [REDACTED] is an inhibitor of enzymes that regulate cell growth and has been shown to inhibit the growth of cancer cells. [REDACTED] concludes that this work “defines preparative routes to those human therapeutic candidates.” [REDACTED] provides no examples of any pharmaceutical company or academic laboratory pursuing the synthesis of therapeutic candidates based on the beneficiary’s work.

Second, [REDACTED] asserts that the beneficiary contributed to his program to develop inhibitors of protein serine-threonin phosphatase enzymes with enhanced ranges of selectivity and specificity. Specifically, [REDACTED] explains that the beneficiary developed and applied “novel synthetic routes to the assembly of key fragments of the okadaic acid class of natural products.” While [REDACTED] discusses the potential medical applications for these natural products, he does not explain how the beneficiary’s work in this area has already influenced the field such that it can be considered a contribution to the field as a whole. In fact, [REDACTED] concedes that this work had yet to be published.

Finally, [REDACTED] discusses the beneficiary’s work on “a novel hapten for the development of antibodies to serve as the basis for a rapid field assay for the detection of members of the okadaic acid class of marine toxins.” [REDACTED] concludes that the “impact of this remarkable research of [the beneficiary] transcends the specific application to the synthesis of haptens; it also reflects innovative new developments within the field of synthetic organic chemistry that are more broadly applicable.” [REDACTED] explains that the work involves intellectual property issues and, thus, has not been published. While intellectual property protections are a valid reason to delay publication, without evidence of a patent or publication that has garnered attention in the field, we cannot conclude that the beneficiary’s work is a recognized contribution to the field as a whole.

[REDACTED] a former associate professor at the [REDACTED], explains that the beneficiary’s work with okadaic acid, which binds to protein phosphatase enzymes, has implications for treating cancer, AIDS, inflammation, osteoporosis, Alzheimer’s disease and diabetes. [REDACTED] speculates that her “contribution to protein phosphate inhibitors study was singularly significant for further relevant drug design and discovery.” [REDACTED] provides no examples of the beneficiary’s work on okadaic acid being used for drug design and discovery.

[REDACTED] further explains that he and [REDACTED] became interested in [REDACTED] 2004 when the revised chemical structure of the product was reported. [REDACTED] began working on the lower half of the complex product while the beneficiary addressed the top half. [REDACTED] ranks the beneficiary’s “bisspiroketal formation as one of the best methodologies for the labile trioxadispiroketal construction” and concludes that this methodology “opened a new era for the polyketide chemistry from the originally

formalized acid catalyzed spiroketalization.” While [REDACTED] asserts that this work was recognized at the University of Minnesota, he provides no examples of bispiroketal formation being used outside this institution.

The petitioner also submits independent letters discussing her Ph.D. research. [REDACTED] at the University of California, San Diego, praises the petitioner’s article in *Organic Letters* and speculates that it “will certainly pave an unprecedented avenue to the chemical synthesis and study of the intricate trioxadispiroketal.” [REDACTED] characterizes the beneficiary’s achievements as “pioneering,” but he does not claim to have utilized any of the beneficiary’s methodologies or provide examples of independent laboratories that have done so.

[REDACTED] at the National University of Singapore, asserts that he was impressed when he read the beneficiary’s article in *Organic Letters*. [REDACTED] continues:

[REDACTED]

however, does not claim to be utilizing the beneficiary’s technology and does not identify any other organic chemists using the beneficiary’s “novel methodology.” [REDACTED] speculation that the beneficiary’s methodology will lead the way for others to use this methodology does not establish that the beneficiary’s work has already contributed to the field as a whole.

[REDACTED] a professor at Princeton University, states: “Since [the beneficiary’s] advisor, [REDACTED] is distinguished for his critical contribution to the protein phosphatase inhibitors total syntheses, I became aware of [the beneficiary’s] extraordinary research when I became involved in my own investigation into this area.” [REDACTED] characterizes the beneficiary’s work as “creative,” “pioneering” and “revolutionary.” He does not, however, claim to be applying her methodology in his own laboratory or identify any independent organic chemists who are doing so.

[REDACTED] at the Swiss Federal Institute of Technology, asserts that he knows the beneficiary through her published work, characterizes it as “an incredible achievement” but merely speculates that it “will have a profound impact on related studies around the world.” As with the other independent letters, [REDACTED] does not explain how the beneficiary’s work is already contributing to research at independent institutions.

[REDACTED] of the Harvard and Dana-Farber Program in Cancer Chemical Biology and the petitioner’s co-founder, discusses the beneficiary’s research for the petitioning company. Specifically, the beneficiary has “dedicated herself into the discovery of both nucleoside and non-nucleoside RNA dependant RNA polymerase inhibitors against hepatitis C virus (HCV).” Dr. Verdine

confirms that the beneficiary is the co-inventor on 11 patent applications after 15 months of work for the petitioner and “has discovered lead compounds of various chemical scaffolds.”

discusses the importance of HCV research, which is not contested. praises the beneficiary’s contributions to the research being performed at the petitioning company, reiterating that she is listed as co-inventor on 11 patents. does not, however, explain how the beneficiary’s work for the petitioner is already contributing to the field as a whole. According to the petitioner already had an alliance agreement with prior to the beneficiary’s work for the petitioner. The record contains no evidence that the petitioner has produced significant HCV research contributions to the field as a whole. For example, the record contains no evidence that the petitioner has attracted media attention or new investment based on the beneficiary’s research or patent-pending innovations.

While we acknowledge a letter from at the petitioning company, the letter is similar to those discussed above.

On appeal, the petitioner submits two new letters. In his new letter, discusses research on the HCV protein NS5A beginning in January 2009 when the petition was filed. The petitioner must establish the beneficiary’s qualifying contributions as of the date of filing. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l. Comm’r. 1971). The beneficiary’s work on NS5A postdates the filing of the petition and, thus, cannot be considered.

and one of the petitioning company’s scientific advisors, asserts that the beneficiary came to his attention upon publication of her work in concludes that the beneficiary’s cascade spiroketalization of spirastrellolide utilizing double intramolecular hetero-Michael addition (DIHMA) “not only created a novel technology in the spiroketal formation, but also achieved a rapid construction of the extremely complex natural products – thus representing one of the ultimate goals for every synthetic organic chemist.” Once again, does not claim to be using DIHMA or provide any examples of independent chemists who are doing so. While he asserts that her work for the petitioner has led to “a series of pre-clinical drug candidates with low *picomolar* concentration activity,” the record contains no evidence that the beneficiary’s work led to any preclinical drug candidates prior to the filing of the petition, 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. at 49.

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 skill, recognition and contributions without specifically 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.⁵ The letters from independent references do not suggest the authors have applied the beneficiary's work. 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.

Even if we accepted that the beneficiary's work published in [REDACTED] constitutes a qualifying contribution to the field, it is only one moderately-cited article. The regulation at 8 C.F.R. § 204.5(i)(3)(i)(E) requires evidence of contributions in the plural. The record contains no evidence that the beneficiary's other article, presentations or patents had contributed to the field as a whole as of the date of filing.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements of 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 two articles authored by the beneficiary. Thus, the petitioner 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 two of the criteria that must be satisfied to establish the minimum eligibility requirements for this classification. Specifically the petitioner submitted evidence to meet the criteria set forth at 8 C.F.R. §§ 204.5(i)(3)(i)(D) and (F). The next step, however, is 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

⁵ *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States*, 745 F. Supp. 9, 15 (D.C. Dist. 1990).

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 her own circle of collaborators. *See Kazarian*, 2010 WL 725317 at *5. The beneficiary's internal review of student work where she studies and works is not evidence indicative of international recognition. *Id.* Significantly, the classification at issue is limited to internationally recognized professors and researchers. Thus, the general supervision of students, work that is inherent to even the most inexperienced and anonymous professors, is not persuasive evidence of international recognition as outstanding.

Regarding the beneficiary's peer-review assistance, the record contains no evidence that journals have requested the beneficiary to review manuscripts. Rather, [REDACTED] strongly implies that he delegated the review requests he received to the beneficiary. Assisting with manuscript reviews for one's own supervisor is not indicative of any wider recognition beyond one's own supervisor. Moreover, we cannot ignore that scientific journals are peer reviewed and rely on many scientists to review submitted articles. Thus, peer review is routine in the field; not every peer reviewer enjoys international recognition. Without evidence that sets the beneficiary apart from others in her field, such as evidence that she has reviewed manuscripts for a journal that credits a small, elite group of referees, received independent requests from a substantial number of journals, or served in an editorial position for a distinguished journal, we cannot conclude that the beneficiary's judging experience is indicative of or consistent with international recognition.

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 of scholarly articles is indicative of the beneficiary's recognition as outstanding. *See Kazarian*, 596 F. 3d at 1122. As stated above, while the petitioner has now documented that the beneficiary has been cited, the citations themselves do not single out the beneficiary's work in any meaningful way. A single moderately cited article does not set the beneficiary apart in the academic community through eminence and distinction. Ultimately, the beneficiary's publication and citation record is not consistent with international recognition as an outstanding researcher.

In light of the above, our final merits determination reveals that the beneficiary's qualifying evidence, participating in the widespread peer review process at the request of her own Ph.D. advisor; publishing two articles, only one of which has garnered a notable number of citations, and contributing to several patent applications that have yet to be approved or garner any licensing interest 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 her 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. Job Offer and Ability to Pay

The regulation at 8 C.F.R. § 204.5(i)(3)(iii) provides that a petition must be accompanied by:

An *offer* of employment from a prospective United States employer. A labor certification is not required for this classification. The offer of employment shall be in the form of a letter from:

(A) A United States university or institution of higher learning *offering* the alien a tenured or tenure-track teaching position in the alien's academic field;

(B) A United States university or institution of higher learning *offering* the alien a permanent research position in the alien's academic field; or

(C) A department, division, or institute of a private employer *offering* the alien a permanent research position in the alien's academic field. The department, division, or institute must demonstrate that it employs at least three persons full-time in research positions, and that it has achieved documented accomplishments in an academic field.

(Emphasis added.) Black's Law Dictionary 1111 (7th ed. 1999) defines "offer" as "the act or an instance of presenting something for acceptance" or "a display of willingness to enter into a contract

on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract.” Black’s Law Dictionary does not define “offeror” or “offeree.” The online law dictionary by American Lawyer Media (ALM), available at www.law.com, defines offer as “a specific proposal to enter into an agreement with another. An offer is essential to the formation of an enforceable contract. An offer and acceptance of the offer creates the contract.” Significantly, the same dictionary defines offeree as “a person or entity *to whom an offer to enter into a contract is made* by another (the offeror),” and offeror as “a person or entity who makes a specific proposal *to another (the offeree)* to enter into a contract.” (Emphasis added.) Thus, a letter addressed to USCIS *affirming* the beneficiary’s employment is not a job *offer* within the ordinary meaning of that phrase.

In addition, the regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

Initially, the petitioner submitted a letter from its director of human resources confirming the beneficiary’s employment. As this letter is not a job offer, the director requested the actual job offer or employment contract. The director also requested evidence of the petitioner’s ability to pay the beneficiary the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). In response, the director requested additional time. As stated above, a response that does not include all of the requested evidence is considered a request for a decision on the evidence submitted. 8 C.F.R. § 103.2(b)(11). Nothing in the regulations would allow a petitioner to request additional time to respond to a request for evidence.

On appeal, the petitioner submits the beneficiary’s employment contract. The petitioner also submits a balance sheet showing net current assets of -\$8,229,590 as of September 30, 2008. The balance sheet contains the word “audited” but lacks any attestation by the auditor. Finally, the petitioner submits a December 12, 2006 article reporting that the petitioner “stands to earn at least \$57 million from an agreement with Abbott Laboratories.”

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). The appeal will be adjudicated based on the record

of proceeding before the director. The record before the director did not include a job offer/contract or evidence of the petitioner's ability to pay the proffered wage as of January 12, 2009.

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.