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



U.S. Citizenship
and Immigration
Services

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DATE: **JUL 01 2011** Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

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:

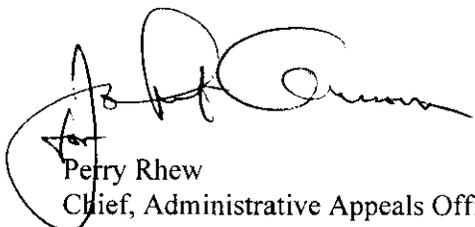
SELF-REPRESENTED

INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a medical device developer. 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 senior imaging software engineer. The director determined that the petitioner had not established that the petitioner had the ability to pay the proffered wage and that the beneficiary would be performing research duties.

On appeal, the petitioner submits a brief and additional evidence. For the reasons discussed below, the AAO finds that the petitioner was already paying the proffered wage as of the date of filing and did not pay the full amount earlier in the year because the beneficiary was on maternity leave. Thus, the AAO withdraws the director's finding that the petitioner did not have the ability to pay the proffered wage as of the date of filing. The AAO, however, concurs with the director that the job duties described in the job offer are not research duties.

Beyond the decision of the director, the record also fails to establish that the beneficiary enjoys international recognition. Specifically, 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 the 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, the purpose of the regulatory criteria.¹ *Employment-Based Immigrants*, 56 Fed. Reg. 30703, 30705 (proposed July 5, 1991) (enacted 56 Fed. Reg. 60897 (Nov. 29, 1991)).

Further, the petitioner has not established that it employs the requisite three full-time researchers in addition to the beneficiary as required by section 203(b)(1)(B)(iii)(III) of the Act; 8 C.F.R. § 204.5(i)(3)(C)(iii).

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).

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

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):

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*

*

(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.

II. Ability to Pay the Proffered Wage

The regulation 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, which is the date the petitioner filed the petition. *See* 8 C.F.R. § 204.5(d). Here, the petitioner filed the petition on May 10, 2010. The proffered wage as stated on the petition is \$88,000 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed an establishment date in April 1998, to have a gross annual income of \$1,336,869, and to currently employ 70 workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the petition establishes a priority date, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l. Comm'r. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l. Comm'r. 1967). The petitioner in the matter before the AAO submitted the requisite initial evidence set forth at 8 C.F.R. § 204.5(g)(2), specifically, an Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return for the most recent year available, 2009.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has employed the beneficiary since at least 2008 and began paying the beneficiary the full proffered wage in March 2010, prior to the priority date of May 10, 2010.

The director noted that the petitioner was not paying the full proffered wage prior to March 7, 2011 and determined that the annual wages for 2010 would not amount to \$88,000. On appeal, the petitioner submits evidence that the beneficiary was on maternity leave beginning in January 2010.

The petitioner need only demonstrate that it was paying the proffered wage or that it had the ability to do so as of the priority date, in this case May 10, 2010. The petitioner was paying the proffered wage as of that date. Therefore, the petitioner has established its ability to do so.

III. Research Duties

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.

The petitioner submitted the job description of the beneficiary's title [REDACTED]

– [REDACTED] The responsibilities are listed as follows:

- Design and develop image processing algorithms for tissue segmentation and obstruction detection.
- Extract multidimensional image features to aid tissue classification.
- Implement image processing and analysis algorithms in MATLAB and C.
- Implement and convert existing MATLAB code as commercial-grade software and validate the converted functions and algorithms in the MATLAB environment using MEX files.
- Build automated tools for quantitative imaging algorithm evaluation, comparison, and testing and for establish ground-truth data.
- Actively participate in product development plans, with emphasis on image processing and analysis, feature extraction and imaging software engineering.
- Provide support for various image processing and analysis related research and development efforts in [near infrared (NIR)] based vulnerable plaque detection.
- Assess and communicate research reported in the literature and elsewhere to develop and improve product. Summarize findings in technical reports, patent applications, oral presentations and peer-reviewed journal articles.

On appeal, the petitioner asserts that it is "a research-driven medical technology company dedicated to the development of diagnostic devices for the detection of cardiovascular disease (CAD)." The

petitioner further asserts that the inclusion of "software engineer" in the beneficiary's title "may have been misleading." The petitioner notes that the beneficiary has authored journal articles and is listed as an inventor on four patent/invention disclosures. The petitioner then lists two "research" contributions:

- For the NIR-only imaging system, [the beneficiary] created novel image processing algorithms based on research data collected from over 200 arteries in 85 human cadaveric heart specimens. These algorithms provide clean visualization of optical data collected in the coronary artery. These images aid physicians in their diagnosis of patients for LCP [lipid core plaques] by mapping the chemical composition of the coronary artery.
- For the combined NIR and IVUS [intravascular ultrasound] device, [the beneficiary] developed the critical imaging processing methods required to reconstruct the structural features of the artery. The reconstructed structure information is co-registered with the chemical information provided by NIR to aid physicians on more accurate diagnosis and treatment.

At issue is not the beneficiary's title but her job duties. The Merriam-Webster Dictionary 617 (2004) defines research as a "careful or diligent search" or the "studious inquiry or examination aimed at the discovery and interpretation of new knowledge." Most of the above duties appear to be primarily software programming and engineering duties. The only mention of "research" is the duty of supporting image processing and analysis related research and development. Providing software engineering support for research is not the same as performing research. While the beneficiary's primary duty is designing and developing algorithms, simply having design or evaluation responsibilities does not mean that an employee is necessarily a researcher. Software engineers, architects, and even artists design products, but they are not researchers.

Developing algorithms, even in support of a research and development team, is not research. Thus, the petitioner has not demonstrated that it has offered the beneficiary a research position.

IV. Experience

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 May 10, 2010 to classify the beneficiary as an outstanding researcher in the field of electrical engineering. Therefore, the petitioner must establish that the beneficiary had at least three years of teaching and/or 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 beneficiary received her Ph.D. on January 25, 2007. The petitioner confirms that the beneficiary began working there on June 25, 2007. [REDACTED] at [REDACTED] affirms that the beneficiary began working there as a full-time intern "in 2005" but "shortly thereafter" became a full-time employee. The petitioner submitted a March 20, 2006 revised job offer for an Engineer II, Research and Development position, from [REDACTED].

For the reasons discussed above, however, the petitioner has not demonstrated that the beneficiary has three years of *research* experience.

V. International Recognition

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.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 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.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); *Soltane*, 381 F.3d at 145;

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)).

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.

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 Criteria⁴

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

The petitioner did not explicitly assert that it was submitting qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(i)(3)(i)(B). The petitioner, however, did submit evidence relating to this criterion that warrants discussion.

The petitioner documented the beneficiary's membership in the [REDACTED]

and the [REDACTED]

According to the materials the petitioner submitted, IEEE membership "is limited to those who have satisfied IEEE-specified educational requirements and/or who have demonstrated professional competence in IEEE-designated fields of interest." The education requirement is as little as a three-to-five year university-level degree. As a degree is not an outstanding achievement, IEEE does not require outstanding achievements of its members.

AHA is "a national voluntary health agency." The petitioner did not submit evidence that AHA requires anything other than the payment of dues for membership. Thus, the petitioner has not established that AHA requires outstanding achievements of its members.

The petitioner submitted materials about the mission of SPIE but no evidence of its actual membership requirements, such as its bylaws or constitution. The beneficiary's welcome letter indicates there are over 17,000 professionals who have joined SPIE. The record does not establish that SPIE requires outstanding achievements of its general membership. While the materials in the record reveal that SPIE awards fellow and senior memberships, the beneficiary is a regular member.

In light of the above, the petitioner has not submitted 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

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

The petitioner asserted that the beneficiary satisfies a criterion the petitioner characterizes as follows: "Her work has been cited by other researchers in the field in their publications." The regulation at 8 C.F.R. § 204.5(i)(3)(i) does not contain any criterion with this wording. Instead, the regulation at 8 C.F.R. § 204.5(i)(3)(i)(C) requires evidence of published material about the beneficiary's work. The AAO reads "published material" to mean the article itself, not a mere footnote or a single sentence within an article. Articles which 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.

In light of the above, the citations are not qualifying evidence that meets the plain language requirements set forth 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

The petitioner submitted evidence that the beneficiary has reviewed manuscripts for *IEEE Processing Letters*. This evidence qualifies under the plain language of the criterion set forth at 8 C.F.R. § 204.5(i)(3)(i)(D).

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 original "research contributions." Had the regulation contemplated merely the submission of original research, it would have said so, and not have included the extra word "contributions." See *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) quoted in *APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003). Moreover, the plain language of the regulation requires that the contributions be "to the academic field" rather than an individual laboratory or institution.

The petitioner submitted evidence that the beneficiary has authored scholarly articles. The regulations, however, 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 did provide evidence that independent researchers have cited the beneficiary's work. The number of citations per article, however, is minimal. The beneficiary's citation record, by itself, is not indicative of contributions to the academic field as a whole.

_____ asserts that the beneficiary is listed on four patent disclosures at _____ Scientific. _____ does not identify which of these disclosures has resulted in _____ Scientific filing a patent

application. The petitioner also provided a letter addressed to the beneficiary from [REDACTED] a legal assistant at [REDACTED] Scientific. [REDACTED] references an enclosed patent application and requests that the beneficiary sign the assignment document. The petitioner also submitted three [REDACTED] Scientific memoranda advising the petitioner that her innovations were under review by either outside counsel or the company's patent review board.

This office has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 n. 7, (Comm'r. 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* No one from Boston Scientific indicates the company has licensed or marketed the beneficiary's patent-pending innovations. In fact, the company had yet to decide whether to pursue a patent for three of the beneficiary's four innovations. Thus, the impact of the innovations is not documented in the record.

[REDACTED] the beneficiary's Master's degree and Ph.D. advisor, asserts that she recruited the beneficiary to [REDACTED] in 2000 and to [REDACTED] in 2002. [REDACTED] praises the quality of the beneficiary's Master's thesis on image reconstruction and image quality evaluation in the wavelet domain. [REDACTED] does not explain how this work has impacted the field. [REDACTED] then discusses the beneficiary's Ph.D. work at [REDACTED]. Specifically, [REDACTED] explains that the beneficiary "designed and constructed a novel multi-scale curve representation framework for image structure" that has applications for medical imaging. While [REDACTED] asserts that the beneficiary's technique is superior to "widely accepted standard techniques" [REDACTED] does not provide examples of independent research institutions using the beneficiary's technique or assert that the beneficiary's technique is becoming one of the "widely accepted standard techniques" as would be expected of a contribution to the field as a whole.

[REDACTED] continues that the beneficiary "also proposed a texture representation system in wavelet domain, which is useful for medical image retrieval and classification without the laborious hands-on annotation that is currently performed on medical databases." Once again, [REDACTED] does not provide any examples of independent institutions using the beneficiary's system.

[REDACTED] explains that he supervised the beneficiary at [REDACTED] Scientific. [REDACTED] summarizes the beneficiary's contributions at [REDACTED] Scientific as follows:

1. The design and implementation of a test-bed for the imaging system, which was extensively used for the prototyping and performance studies.
2. The root-cause analysis of image artifacts, e.g. grid/picnic table like artifacts, and design of an anti-aliasing system to suppress the artifacts.

3. The design of image quality evaluation metric, which provides an objective evaluation tool that correlates well with human observers' evaluation of image quality.
4. The design of a new de-noising scheme to suppress the system noise, e.g., dynamic row noise in the image.

The significant contributions from [the beneficiary] allowed us to successfully design and construct the imaging system, which was the main functional component of the disposable colonoscope system. Our preliminary tests were so encouraging that we moved on to perform the world's first human trials using the disposable colonoscopy system she helped design.

further explains that the beneficiary proposed an innovative algorithm to simultaneously perform wide-based and narrow-band imaging without hardware complexity and that this work "was the enabler" that allowed Scientific to include narrow band functionality in a disposable gastroscope and a flexible urology scope.

As stated above, the petitioner provided evidence that Scientific had only decided to pursue one of the beneficiary's innovations for patent protection. The record contains no licensing agreements or evidence that Scientific has successfully tested and/or marketed a device on which the beneficiary worked.

of the petitioning company, discusses the beneficiary's work at that company. explains that the beneficiary has been the company's "principal scientist in the design and development of image algorithms for coronary artery lipid-rich plaque detection using near infrared illumination and ultrasound signal." continues:

Over the past three years, [the beneficiary] has made significant contributions to the design and development of world-class intravascular medical imaging systems with excellent image quality. Thanks in large part to her exceptional work and dedication, the [U.S. Food and Drug Administration (FDA)] granted approval of our NIR imaging stem, LipiscanTM, early last year.

The press release announcing FDA's approval is dated April 29, 2008, less than a year after the beneficiary began working for the petitioner. The record contains no evidence of invention disclosures or patent applications relating to the beneficiary's work for the petitioner.

continues that the beneficiary "played a critical role in the design and development of a multi-modality intra-coronary imaging device." Specifically, the beneficiary "successfully designed the algorithm for reconstruction of intravascular ultrasound (IVUS) images." discusses the potential applications for this product but does not suggest it is in use.

██████████ at the University ██████████ explains that the beneficiary visited the center in 2009 "to support the first human trial using [the petitioner's] dual-modality intravascular imaging prototype system." ██████████ explains the significance of NIR and IVUS technology but does not provide any examples of how the beneficiary's innovations are already being applied in the field. Instead, ██████████ asserts that the beneficiary helped solve "multiple key imaging algorithm questions" in the human trials, helping the study "make significant progress."

██████████ discusses the beneficiary's work on video transcoding through her design of "an efficient conversion scheme for transcoding between MPEG-2 and H.264." While ██████████ notes that the beneficiary published this work, he does not explain how it has impacted the field.

██████████ for ██████████ *On Signal Processing*, asserts that he learned of the beneficiary when arranging the review of the beneficiary's manuscript for that publication and that he has invited the beneficiary to review other manuscripts. ██████████ discusses the national interest in the beneficiary's transcoding research into an efficient conversion between image data and concludes that the beneficiary "has made substantial contributions to this problem." ██████████ further concludes that the beneficiary's work is "creative and promising" but does not explain how it is already a contribution to the field as a whole. Finally, ██████████ suggests the petitioner might have difficulty securing an alien employment certification for the beneficiary. The matter before us, however, is not a petition seeking a waiver of the alien employment certification process in the national interest pursuant to section 203(b)(2)(B).

Finally, the petitioner submitted two letters from researchers who have cited the beneficiary's work. ██████████, an ██████████ and ██████████ at the ██████████ in New York, affirm citing the beneficiary's work. Both researchers affirm the potential applications and benefits of the beneficiary's imaging algorithms. These letters have little value beyond the existence of the citations themselves, which are minimal.

The petitioner initially cited the following cases in support of the assertion that failing to consider expert testimony is a violation of due process: *Tun v. Gonzales*, 485 F.3d 1014 (8th Cir. 2007); *Banks v. Gonzales*, 453 F.3d 453-54 (7th Cir. 2006); *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 538-40 (7th Cir. 2005); *Lopez-Umanzor*, 405 F.3d 1049, 1056-58 (9th Cir. 2005); *McDonald v. Gonzales*, 400 F.3d 684, 687-88 (9th Cir. 2005); *Zahedi v. INS*, 222 F.3d 1157, 1165 (9th Cir. 2000). All but two of these cases involve asylum determinations. The petitioner has not explained the relevance of these cases to the matter before the AAO. Asylum cases are unique in their challenges to presenting corroborating evidence. See *Harminder Singh v. Eric Holder*, 638 F.3d 1264, 1270 (9th Cir. 2011) (explaining the unique nature of asylum claims).

The remaining two petitions, *Lopez-Ulmanzor* and *McDonald* involve removal proceedings. In *Lopez-Ulmanzor*, 405 F.3d at 1056-58, the court found that the immigration judge had erred by refusing to allow expert testimony regarding domestic abuse. In *McDonald*, 400 F.3d at 687-88, the court found that the immigration judge had erred by failing to allow expert testimony by a prosecutor as to the state interpretation of "knowingly" voting. Once again, the petitioner has not explained the relevance of these decisions to employment-based visa petitions. Regardless, the AAO is not rejecting the relevance of the reference letters in this matter.

The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." See, e.g., *Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

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

The 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.⁵ The petitioner also failed to submit sufficient corroborating evidence in existence prior to the preparation of the petition.

The record shows that the beneficiary is respected by her colleagues and has made useful contributions to her employers' projects. While the petitioner's algorithms are no doubt of value, it can be argued that any design project must be of value to the employer and some segment of the population to which it will be marketed. It does not follow that every software engineer who designs

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); *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).

original algorithms necessary for a medical device has contributed to the field of electrical engineering as a whole.

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth 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 petitioner has submitted evidence that qualifies under 8 C.F.R. § 204.5(i)(3)(i)(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 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*, 596 F. 3d at 1122. The AAO 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, the AAO cannot conclude that the beneficiary's judging experience is indicative of or consistent with international recognition.

Regarding the beneficiary's original designs, as stated above, they do not appear to rise to the level of contributions to the academic field as a whole. Demonstrating that the beneficiary's work was "original" in that it did not merely duplicate prior algorithms 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. Design 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 designs are, by definition, "outstanding" is to weaken that adjective beyond any useful meaning, and to presume that most designs are "unoriginal."

While the beneficiary has published articles, the Department of Labor's Occupational Outlook Handbook (OOH) 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 (accessed June 23, 2011 and incorporated into the record of proceeding). The OOH 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.*

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

In light of the above, the final merits determination reveals that the beneficiary's qualifying evidence, participating in the widespread peer review process and publishing articles that have not garnered widespread 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, the purpose of the regulatory criteria. 56 Fed. Reg. at 30705. Indeed, with the exception of a small number of citations, the record lacks evidence that members of the academic field outside of the beneficiary's immediate circle of colleagues are even aware of her work.

C. Conclusion

The petitioner has shown that the beneficiary is a talented software engineer, who has won the respect of her collaborators, employers, and mentors, while securing some degree of exposure for her work. 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.

VI. Three Full-Time Researchers

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." *See also* 8 C.F.R. § 204.5(i)(3)(C)(iii). The petitioner indicated on the petition that it employs 70 U.S. employees. The petitioner contends, however, that it has met this requirement through its employment of the Vice President, a principal scientist, a senior scientist and the beneficiary. The alien beneficiary is currently employed in a nonimmigrant classification. The petitioner lists the Vice President's responsibilities as "business and advanced development." This brief phrase does not suggest that the Vice President engages in full-time research activities.

Even if USCIS accepted that the beneficiary is a researcher, and it does not, the petitioner only employs the beneficiary and two other researchers in full-time 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 beneficiary can herself 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 the beneficiary 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 beneficiary. Thus, the statutory construction demonstrates that the beneficiary seeks to become the fourth researcher in a company that already employs three *other* researchers. In instances where the beneficiary is already in the United States as a nonimmigrant, and the beneficiary 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, the position held by the 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 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.⁶

In light of the above, the petitioner has not established that it employs the necessary number of full-time researchers such that it is a qualifying petitioner.

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.

⁶ 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.