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**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B3

Date: JUL 2 4 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Nebraska 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 company involved in the understanding of complex medical problems. 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 an Institute Fellow. The director determined that the petitioner had not established that it had offered the beneficiary a permanent job as of the date of filing.

On appeal, counsel submits a brief and a June 6, 2006 Interoffice Memorandum from Acting Director for Domestic Operations, United States Citizenship and Immigration Services (USCIS). Counsel also submits a letter from the petitioning company's Director of Human Resources. Counsel asserts that despite the explicit language limiting the term of Institute Fellows in its faculty handbook, they constitute permanent positions as defined in the June 6, 2006 USCIS memorandum. For the reasons discussed below, while the memorandum may provide useful factors to consider for contracts that are annually renewable indefinitely, it does not suggest or imply that these factors can overcome employment terms that are fundamentally temporary. Any other interpretation would result in the untenable conclusion that the memorandum directly contradicts the pertinent statute, legislative history, regulations and commentary issued with the final regulation. Thus, we uphold the director's decision.

Beyond the decision of the director, we further find that the petitioner has not demonstrated that the beneficiary had attained the outstanding level of achievement required for classification as an outstanding researcher. 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).

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

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (B) Outstanding professors and researchers. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien is recognized internationally as outstanding in a specific academic area,

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

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

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

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

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

## I. Permanent Job Offer

The legislative history unequivocally states that the beneficiary "must be offered a tenured or tenure-track teaching position, or comparible [*sic*] position as a researcher." H.R. Rep. No. 101-723, 59 (Sept. 19, 1990).

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 regulation at 8 C.F.R. § 204.5(i)(2), provides, in pertinent part:

> *Permanent,* in reference to a research position, means either tenured, tenure track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have an expectation of continued employment unless there is good cause for termination.

In promulgating the final regulation, the Immigration and Naturalization Service (INS), now USCIS, recognized that it is unusual for colleges and universities to place researchers in tenured or tenure-track positions. Thus, the commentary to the final rule accepts that research positions "*having no fixed term* and in which the employee will *ordinarily* have an *expectation* of permanent employment" are comparable positions. (Emphasis added.) 56 Fed. Reg. 60897, 60899 (Nov. 29, 1991).

As stated above, the petitioner submits the memorandum *Guidance on the Requirement of a "Permanent Offer of Employment" for Outstanding Professors and Researchers,* AFM Update AD06-00, Acting Director for Domestic Operations (USCIS), June 6, 2006. In pertinent part, the memorandum states that USCIS should not deny a petition where the job offer lacks a "good cause for termination" clause provided "the offer of employment is intended to be of an indefinite or unlimited duration and that the nature of the position is such that the employee will ordinarily have an expectation of continued employment." The memorandum continues:

> For example, many research positions are funded by grant money received on a yearly basis. Researchers, therefore, are employed pursuant to employment contracts that are valid in one year increments.

The memorandum then explains that in such situations, the positions should be considered permanent where the petitioner demonstrates the intent to continue to seek funding and a reasonable expectation that funding will continue. The memorandum concludes that a position "that appears to be limited to a specific term, such as in the example above, can meet the regulatory test if the position normally continues beyond the term (i.e., if the funding grants are normally renewed)."

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit).

Where the petitioner proposes an interpretation of guidance in a memorandum that directly contradicts the plain and unambiguous language in a regulation, we cannot adopt that interpretation. Thus, we cannot read memorandum as stating that the offered position, including renewals, need *not* be indefinite with a reasonable expectation of continued employment.

Thus, while the potential for future funding may be a reasonable consideration for annually renewable positions that are not limited to the number of renewals, positions that, by their very terms, are limited to one or two annual renewals are inherently temporary.

On Part 6 of this petition, filed on May 27, 2011, the petitioner indicated that the beneficiary's proposed employment as an Institute Fellow was a permanent position.

On June 17, 2011, the director requested evidence that the petitioner had extended a permanent job offer to the beneficiary, including the portion of the petitioner's faculty handbook that relates to the beneficiary's position. In response, the petitioner submitted a letter dated March 20, 2008 from the petitioner's Institute Director, offering the beneficiary a position as a Postdoctoral Fellow at an annual salary of $50,000, which position was accepted by the beneficiary on March 21, 2008. The letter specifies that the beneficiary's appointment will have a term of twelve months, and may be renewed for an additional term of twelve to twenty-four months. The petitioner also submitted a letter dated December 13, 2010 from advising the beneficiary that he had been promoted to Institute Fellow, with an increase in his annual salary to $62, 000. Further, the petitioner submitted a portion of its employee handbook entitled "Section I Employee Classifications." This section states the positions of Institute Fellow and Postdoctoral Associate "are for the purpose of engaging in advanced training and research *and are typically for a period of one to three years*." (Emphasis added.)

The director concluded that the petitioner's employee handbook clearly classifies the position of Postdoctoral Fellow as an inherently temporary position and denied the petition. Although the director did not specifically address the issue of whether the proposed employment as an Institute Fellow constitutes a permanent position, as stated above the petitioner's employee handbook states that both positions are typically for a period of one to three years.

On appeal, counsel notes the June 6 memorandum quoted above. Counsel also submits a letter from the petitioner's Director of Human Resources, stating, "while the Institute Fellow position offered to the beneficiary is typically for a period of one to three years before advancement to the next career level in our Research/Investigative track . . . researchers here at GNF ordinarily have an expectation of continued employment if the project is progressing towards an innovative scientific discovery that is beneficial to the research institute. As projects are progressing in this manner, he can expect continued employment at GNF . . . for an indefinite duration." Therefore, counsel concludes that the letter from confirms that the beneficiary's position is permanent.

In this situation, Institute Fellow positions, which are limited by the terms of the petitioner's employee handbook to three years, including renewals, are inherently temporary. While has expressed the petitioner's interest in keeping the beneficiary, she has not demonstrated that the petitioner has *formally* waived the limit for Institute Fellows clearly stated in the petitioner's own employee handbook such that the beneficiary may be renewed in this position indefinitely.

Our findings are consistent with Congressional intent in limiting this classification to aliens with job offers for positions comparable to tenure or tenure track positions. It is rudimentary that interpretation of the statutory language begins with the terms of the statute itself, and if those terms, on their face, constitute a plain expression of congressional intent, they must be given effect. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1994). Where Congress' intent is not plainly expressed, we then need to determine a reasonable interpretation of the language and fill any gap left, either implicitly or explicitly, by Congress. *Id.* at 843-44. The rules of statutory construction dictate that we take into account the design of the statute as a whole. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Moreover, the paramount index of congressional intent is the plain meaning of the words used in the statute taken as a whole. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). The legislative purpose is presumed to be expressed by the ordinary meaning of the words used. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984).

Had Congress intended this classification to apply to an internationally recognized researcher with any type of job offer, it could have said so. Instead, Congress stated that the research position must be comparable to a tenure or tenure-track position. Section 203(b)(1)(B)(iii)(II) of the Act. Tenure and tenure-track positions are not limited to one or two annual renewals. In light of the above, we uphold the director's finding that the beneficiary's position is inherently temporary.

**II. 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.[1] 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.[2] 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.

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[1] Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) (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)).

[2] 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.

103.3(a)(1)(iv); *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) (recognizing the AAO's *de novo* authority).

## III. Analysis

*A. Evidentiary Criteria*[3]

This petition, filed on May 27, 2011, seeks to classify the beneficiary as researcher who is recognized internationally as outstanding in his academic field. The petitioner has submitted documentation pertaining to the following categories of evidence under 8 C.F.R. § 204.5(i)(3)(i).

> *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 submits evidence that ten of the beneficiary's articles have been cited a total of approximately 400 times, and provides copies of some of the citing articles. Citations are evidence of the impact and influence of the article cited. Nevertheless, upon review the submitted articles citing the beneficiary's work are still primarily about the author's research, not the beneficiary and his research. Thus, the citations cannot be considered published material about the beneficiary's work and cannot serve to meet this criterion. However, the beneficiary's citation history is a relevant consideration as to whether the evidence is indicative of the beneficiary's recognition beyond his own circle of collaborators. *See Kazarian,* 596 F3d at 1122. The citation history will be considered below in our final merits determination.

The petitioner also submitted two press releases that briefly discuss the beneficiary's work and that of his colleagues, at the University of Warwick and at Harvard University, respectively. The plain language of the regulation at 8 C.F.R. § 204.5(i)(3)(i)(C) requires that the published material shall include the title, date, and author of the material. However, one of the articles does not include the author of the material, and the other does not state the date of the press release, as required by the plain language of this regulatory criterion.

The petitioner also provided documentation indicating that four articles on which he was co-author were posted and received seven total evaluations by the "Faculty of 1000" website, a subscription-based "online research service." One of the articles received three reviews in August 2005, two "Must Read" and one "Recommended." Two other articles received one review each of "Recommended", in February 2007 and March 2006, respectively. The remaining article received two reviews in July and August, 2007, respectively, "Must Read" and one "Recommended." The information provided indicates that the site allows any of the numerous scientists on the faculty to identify and evaluate "the most important articles in biology

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

and medical research publications." The Service accessed the website, which states that the papers may receive one of three ratings: "Recommended", "Must read" and "Exceptional". Thus, two of the beneficiary's papers were given the lowest rating, and were rated by only one faculty member. These published evaluations briefly discuss the referenced work in relation to recent work in the academic field. As such, they cannot be considered published material about the beneficiary's work.

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)(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 reviewed a manuscript in 2002, at the request of his doctoral advisor and co-author, [redacted] for the journal *Plant Physiology*. The petitioner also submitted evidence that the beneficiary reviewed a manuscript for *The Plant Journal* in 2008. Further, the petitioner submitted evidence that in 2003, during his post-doctoral studies, the beneficiary reviewed a research grant for the Biotechnology and Biological Sciences Research Council (BBSRC).

This evidence qualifies under the plain language of the criterion set forth at 8 C.F.R. § 204.5(i)(3)(i)(D). Pursuant to the reasoning in *Kazarian,* 596 F. 3d at 1122, however, the nature of these duties may be and will be considered below in our final merits determination.

*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 has submitted the following: reference letters from five individuals (one of whom is from the beneficiary's immediate circle of colleagues and collaborators); documents from biomedcentral.com and Plant Cell.org listing two of the applicant's articles as being frequently downloaded; and, documents from the National Center for Biotechnology Information's GenBank database, in which the beneficiary is listed as a co-author of 11 genomic DNA sequences.

The petitioner has submitted documents from biomedcentral.com, listing one of the beneficiary's articles as "Highly accessed" in BMC Plant Biology 2006. The petitioner has also submitted documents from Plant Cell.org, listing one of the applicant's articles as being among the publication's most downloaded articles for March 2006. However, evidence that two of the beneficiary's articles were among the most downloaded articles for all or a part of 2006, without other evidence, does not demonstrate that this original research is considered a contribution to the academic field. Downloads of the beneficiary's articles carry less weight than citations. One

could download the article and realize it isn't useful; if one has cited the article, one has used it, at least as background.

The petitioner has submitted documents from the National Center for Biotechnology Information's GenBank database, in which the beneficiary is listed as a co-author of 11 genomic DNA sequences, all submitted in December 2006 as research findings of his doctoral thesis at the University of Warwick. While the beneficiary's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who obtains a Ph.D. or has contributed genomic DNA sequences has made a contribution of major significance. The record does not establish that the beneficiary's work represented a groundbreaking advance in his 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 being said, the plain language of the regulation does not simply require original research, but an original "research contribution." Had the regulation contemplated merely the submission of original research, it would have said so, and not have included the extra word "contribution." Moreover, the plain language of the regulation requires that the contribution be "to the academic field" rather than an individual laboratory or institution.

We acknowledge that the beneficiary has authored several journal articles in the academic field, and has presented his work at several international conferences, as is mentioned in the reference letters. 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. In addition, even if we considered the original nature of the beneficiary's research to qualify it under the criterion at 8 C.F.R. § 204.5(i)(3)(i)(E), and we do not, whether or not the contributions are indicative of the beneficiary's international recognition in the field is a valid consideration under our final merits determination. (We will consider the published materials under 8 C.F.R. § 204.5(i)(3)(i)(F)).

dean of the division of biological sciences at the University of California, San Diego, states that the beneficiary has been a "prominent contributor in the field of circadian biology, although he does not indicate how he first became aware of the beneficiary's work. He states that the beneficiary's research focused on understanding the genetics of the circadian clock in the crop species *Brassica oleracea*. He states that the beneficiary's research also focused on "the genetic nodes of plant signaling pathways, which can be manipulated by researchers to improve plant growth and survival." He states that the beneficiary applied his findings regarding *Brassica oleracea* to the closely related model plant species, *Arabidopsis,* using high density genetic maps. He does not explain how the beneficiary's work has already impacted the academic field. He states that the beneficiary's research findings "have important practical implications for global food production". However, speculation as to a future contribution cannot establish that the beneficiary has already contributed to the academic field as a whole.

a professor at Dartmouth College, New Hampshire, states that he first met the beneficiary in 2002 at a conference in the academic field. He states that the beneficiary's research findings concerning the plant species *Arabidopsis,* showing that signaling pathways that govern the circadian clock and flowering time pathways partially overlap, "have important implications for future studies regarding yields for crops." However, as stated above, speculation as to a future contribution cannot establish that the beneficiary has already contributed to the academic field as a whole. He states that the beneficiary applied his findings regarding *Arabidopsis* to the circadian clock in the crop species *Brassica oleracea,* using genomic co-linearity and genetic mapping studies. He states that his laboratory, "greatly influenced by Neeraj's pioneering studies," has started a project to investigate the circadian clock in another *Brassica* crop subspecies. While notable, an example of an independent research lab utilizing the beneficiary's work in its research is not evidence of a contribution to the field as a whole. does not explain how the beneficiary's research findings are already being applied in the field, as would be expected of a contribution to the field as a whole.

an assistant professor of regulatory biology at the Salk Institute for Biological Sciences, San Diego, states that he was asked by the petitioner's hiring manager to evaluate the beneficiary as a candidate for employment in 2007. He states that the beneficiary's research was the first to elucidate the circadian signaling pathways of two genes in the *Arabidopsis* circadian signaling pathways of two genes of *Arabidopsis* circadian clock, SRR1 and FLC. He states that the beneficiary was also able to identify regions of the *Brassica* genome that contained genes controlling circadian timing in *Brassica.* He states that the beneficiary's research findings can lead to the use of circadian rhythm information in varieties of crop species "to inform breeding programs to optimize plant growth." However, as stated above, speculation as to a future contribution cannot establish that the beneficiary has already contributed to the academic field as a whole. does not provide specific examples of research institutions utilizing the beneficiary's research findings, or state that the beneficiary's findings have already influenced the academic field such that it can be considered a contribution to the field as a whole.

associate professor in the department of ecology and evolution at the University of Chicago, states that he first met the beneficiary in 2002 at a conference in the academic field. He states that during the beneficiary's post-doctoral research at Harvard the beneficiary "pioneered a novel technology to identify the genetic composition of recombinant strains of the model plant organism *Arabidopsis*" for which the beneficiary received a research grant from the National Science Foundation (NSF). Regarding the beneficiary having received an NSF research grant, research grants simply fund the work of a scientist or professor. Every successful scientist or professor engaged in research, of which there are hundreds of thousands, receives funding from somewhere. Obviously the past achievements of the principal investigator are a factor in grant proposals. The funding institution has to be assured that the investigator is capable of performing the proposed research. However, even if the beneficiary were the principal investigator, a research grant is principally designed to fund future research, and not to recognize past achievement. He states that the beneficiary's "powerful genotyping tool can be used to narrow down the genomic region of a single mutation in a plant population, and is readily extendable to other crop species." However, does not state that the beneficiary's genotyping tool

has already influenced the field such that it can be considered a contribution to the field as a whole.

a researcher at the Arnold Arboretum of Harvard University, Boston, states that she worked with the beneficiary during his postdoctoral studies at Harvard University. She states that the beneficiary's research identified a novel genetic pathway by which light signaling affects the circadian clock in plants. She states that the beneficiary also studied the genetic regulation of the plant circadian clock and its effects on flowering time. She states that the beneficiary also developed a novel plant genotyping technology in studying the species *A. thaliana*, which "has the obvious potential to speed up selective breeding in agricultural crops, to increase crop productivity." However, as stated above, speculation as to a future contribution cannot establish that the beneficiary has already contributed to the academic field as a whole. She states that the beneficiary and his colleagues at Harvard were able "to confirm the presence of numerous genes regulating important traits such as flowering time and light sensing." However, she does not provide specific examples of independent research institutions utilizing the beneficiary's research findings, or that the beneficiary's genotyping tool has already influenced the field such that it can be considered a contribution to the field as a whole.

Further, and the independent references, do not indicate that they learned of the beneficiary's work through the beneficiary's international reputation.

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. United States Citizenship & Immigration Services (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. While the record adequately establishes that the beneficiary's work is original, or it would not be appropriate for publication, at issue is whether it has already contributed to the field as a whole. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.[4] Considering the letters in the aggregate, the record does not establish that the beneficiary's research is original or can be considered a contribution to the field as a whole.

In light of the above, the AAO finds that 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.*

The petitioner submitted evidence that the beneficiary has authored several journal articles and has presented his work at several international conferences.

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 his own circle of collaborators. *See Kazarian*, 596 F. 3d at 1122. The petitioner submitted evidence that the beneficiary reviewed a manuscript in 2002, at the request of his doctoral advisor and co-author, [redacted] for

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[4] *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).

the journal *Plant Physiology*. The petitioner also submitted evidence that in 2003 the beneficiary reviewed a manuscript for *The Plant Journal* in 2008. Further, the petitioner submitted evidence that the beneficiary reviewed a research grant for the Biotechnology and Biological Sciences Research Council (BBSRC).

The AAO cannot ignore the fact that scientific journals are peer reviewed and rely on many scientists to review submitted articles. In addition, the petitioner has not submitted any evidence that beneficiary was identified as a prospective reviewer on an application for a BBSRC research grant based upon his international reputation in the academic field. Peer review is routine in the field; not every peer reviewer enjoys international recognition. Without other evidence that sets the beneficiary apart from others in his field, such as evidence that he has reviewed manuscripts for a journal that credits a small, elite group of referees, or received independent requests from a substantial number of journals, the AAO 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. The fact that the beneficiary was among the first to make a new discovery carries little weight. 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."

The Department of Labor's Occupational Outlook Handbook, 2008-2009 (accessed at www.bls.gov/oco on January 28, 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. Of far greater importance in this proceeding is the impact the beneficiary's work has already had on the overall academic field.

The petitioner submits evidence that ten of the beneficiary's articles have been cited a total of approximately 400 times, and provides copies of some of the citing articles. As stated above, the beneficiary's citation history is a relevant consideration as to whether the evidence is indicative of the beneficiary's recognition beyond his own circle of collaborators. *See Kazarian*, 596 F. 3d at 1122. The petitioner has also provided, as evidence to establish the impact of the beneficiary's work, ISI Web of Knowledge Journal Citation Reports for some of the journals that have published the beneficiary's work, listing the impact factor and/or rank of those journals. Counsel

asserts that the Scientific Citation Index Impact Factors and the rankings of the journals that have published the beneficiary's work sufficiently establish their impact. The impact of a given journal is not persuasive evidence of the impact of every article published in that journal. The fact that a journal has a high overall impact factor does not imply that any one article in that journal has had a proportionate impact. A review of the beneficiary's citation record shows that two of the beneficiary's articles, from 2005 and 2006, respectively, were cited an aggregate total of approximately 170 times. A review of the citations per year of these two articles demonstrates that since their publication they have exceeded the one-year citation average for articles in their respective journals (30.028 and 9.868, respectively, as reported in 2006). While the level of citation for these two articles is notable, the petitioner has only provided one citing article for the beneficiary's 2005 article, which does not substantively discuss the beneficiary's work, but cites it as one among many other authorities. A review of the citation record for the beneficiary's eight remaining articles shows that they generally have not exceeded the one-year citation average for articles in their respective journals. [5] While evidence that the beneficiary's work is widely cited can serve to establish the impact of this work, the record does not contain evidence that independent experts have consistently cited or relied upon the beneficiary's work.

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.

## IV. Conclusion

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

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.

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[5] One 2008 article did exceed the journal's citation average in 2010 and 2011, and one 2007 article did exceed the journal's citation average in 2008.