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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 19 2013 Office: NEBRASKA 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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical device manufacturer. 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 Systems Research Engineer, in the field of biomedical and neural engineering. The director determined that the petitioner had not established that the beneficiary had attained the outstanding level of achievement required for classification as an outstanding researcher.

On appeal, counsel submits a brief, evidence that was already part of the record, and new evidence. For the reasons discussed below, the AAO concurs with the director that the petitioner has not established that the beneficiary enjoys international recognition as outstanding.

Specifically, when the AAO simply "counts" the evidence submitted, the petitioner has submitted qualifying evidence under three of the regulatory criteria as required: (1) judging the work of others; (2) original scientific or scholarly research contributions to the academic field; and (3) scholarly articles. 8 C.F.R. §§§ 204.5(i)(3)(i)(D), (E) 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 the petition, 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)).

Beyond the decision of the director, the record lacks the actual job offer issued by the petitioner to the beneficiary. 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).

I. Statute

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 --

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

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

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

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

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

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

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

II. Job Offer from Qualifying Employer

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;
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> (B) A United States university or institution of higher learning offering the alien a permanent research position in the alien's academic field; or
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> (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 has not submitted its job offer to the beneficiary. Instead, the petitioner submitted a letter from the petitioner, addressed directly to the United States Citizenship and Immigration Services (USCIS), describing the beneficiary's position. The ordinary meaning of an "offer" requires that it be made to the

offeree, not a third party. *See Black's Law Dictionary* 1189 (9th ed. 2009) defines "offer" as "the act or an instance of presenting something for acceptance" or "a display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract" and defines "offeree" as "[o]ne to whom an offer is made." In addition, *Black's Law Dictionary* defines "offeror" as "[o]ne who makes an offer." *Id.* at 1190. Thus, the letter from the petitioner to USCIS describing the beneficiary's employment is not an offer of employment within the ordinary meaning of that phrase. The petitioner failed to submit required initial evidence pursuant to 8 C.F.R. § 204.5(i)(3)(iii).

III. Beneficiary's Qualifications

A. Law

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 November 6, 2012 to classify the beneficiary as an outstanding researcher in the field of biomedical and neural 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 petitioner has submitted evidence that is has employed the beneficiary since February 2009. At issue in this matter is whether the petitioner has demonstrated that the beneficiary's work has been recognized internationally within the field as outstanding.

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

> (A) Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;
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> (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;
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> (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;
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> (E) Evidence of the alien's original scientific or scholarly research contributions to the academic field; or
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> (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.

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[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)).

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*.

B. Analysis

1. Evidentiary Criteria [4]

The petitioner initially asserted that the beneficiary was submitting qualifying evidence under three of the six criteria: (1) judging the work of others; (2) original scientific or scholarly research contributions to the academic field; and (3) scholarly articles pursuant to 8 C.F.R. §§§ 204.5(i)(3)(i)(D), (E) and (F). The director determined that the petitioner had submitted qualifying evidence under the above three criteria.

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 plain language of the regulation at 8 C.F.R. § 204.5(i)(3)(i)(D) requires evidence that the beneficiary actually participated in judging the work of others. The petitioner submitted evidence that the beneficiary reviewed manuscripts for the following journals: *Progress in Electromagnetics Research; IEEE Transactions on Biomedical Engineering; IEEE Transactions on Neural Systems and Rehabilitation Engineering; IEEE Journal on Emerging and Selected Topics in Circuits and Systems; IEEE Engineering in Medicine and Biology; IEEE International Symposium on Circuits and Systems; and IEEE Biomedical Circuits and Systems Conference.*

In light of the above, the petitioner has submitted qualifying evidence that meets the plain language requirements 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.

As evidence relating to the beneficiary's original scientific or scholarly research contributions to the academic field, the petitioner submitted several testimonial letters and a citation record revealing that the beneficiary's work has been cited approximately 20 times.

Citations, such as a reference to the beneficiary's work in an article, are evidence of the impact and influence of

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

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

the article cited. 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 evidence that the beneficiary is the co-inventor of two patents assigned to the petitioner. 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.* The beneficiary's patents will be considered below in our final merits determination.

In addition, we acknowledge that the beneficiary has authored several journal articles in the academic field, 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. Even if we consider 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), 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)).

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." Moreover, the plain language of the regulation requires that the contributions be "to the academic field" rather than an individual laboratory or institution. The director concluded that the petitioner had submitted sufficient evidence under this criterion. We will not withdraw that finding.

Dr. Associate Director, states that he has known the beneficiary since 2006 at where the beneficiary conducted his doctoral research. He reviews the beneficiary's research in the area of improving microelectrode strategies for recording from chronically implanted animals as follows: discovering a hybrid method for implanting flexible microelectrodes in the neural substrate using an enzyme-based technique; addressing the problem of movement artifact identification and elimination in neural recordings; and studying the tissue-electrode interface in near real-time in collaboration with MRI experts. He also summarizes the beneficiary's work at the petitioning company, and states that through this research the beneficiary stands to discover "some of the long-evasive neurological mechanism[s]" that may result in a cure for many neurological diseases. However, speculation as to a future contribution cannot establish that the beneficiary has already contributed to the academic field as a whole. Although Dr. states that the beneficiary's research "has been used by neural engineering researchers around the world," he does not provide specific examples of how those contributions have impacted the academic field or his own research, rather than simply the work of or the beneficiary's employer.

Dr. Associate Professor, Department of Biomedical Engineering, in

does not state how he first became aware of the beneficiary's work. He summarizes some of the beneficiary's research as follows: proposing and successfully testing a method to automatically distinguish between neural signals and ambient or interfering noise; developing a microelectrode system that it safe for use with high field MRI and has successful recording quality and histology outcomes; and, at the petitioning company, developing "the world's first completely implantable light stimulation system ideal for Optogenic research and application." Again, while Dr. states that the beneficiary's research has, "yielded immediate, tangible, benefits in the neurological research community" and has "served to greatly benefit my own work," he does not provide specific examples of how the beneficiary's research has already impacted either his own research or the academic field as a whole.

Dr. Associate Professor, Department of Bioengineering, does not state how he first became aware of the beneficiary's work. He states that the beneficiary developed a useful algorithm that could distinguish between a true neuronal signal and a muscle signal. He states the beneficiary also developed a new surgical technique that reduces the initial insertion trauma of implanting arrays in the brain and reduces the tissue-electrode interface degradation. He states that at the petitioning company the beneficiary's research resulted in the development of one of the first implantable solutions for Optogenetic Neuromodulation.

Dr. Associate Professor, Department of Ophthalmology and Biomedical Engineering, does not state how he first became aware of the beneficiary's work. Dr. states that the beneficiary devised a surgical method to allow easier penetration of microelectrodes into the brain, also resulting in superior long-term performance. Although he states that this is "a technique that is routinely cited when researchers talk about implanting flexible structures in the brain," he presents no supporting evidence for his assertion. He also discusses the beneficiary's research on artifact removal from intracortical neural recordings, the use of MRI to study tissue-electrode interface, and the beneficiary's research in Optogenetic Neuromodulation resulting in the development of a fully implantable light delivery system. Although he describes the beneficiary's research as "a major advancement," "a commendable achievement," and "substantial leaps," he does not explain how the beneficiary's work in this area has already influenced the field such that it can be considered a contribution to the field as a whole.

Dr. Associate Professor, Bioengineering, states that he met the beneficiary at conferences and meetings and has followed his research over several years. He states that the beneficiary's research with the petitioning company "will significantly change the neurological devices market in the coming years." Again, speculation as to a future contribution cannot establish that the beneficiary has already contributed to the academic field as a whole.

Dr. Vilas Distinguished Service Professor, Department of Biomedical Engineering, does not state how he first became aware of the beneficiary's work. He discusses the beneficiary's development of a method to allow easier penetration of microelectrodes into the brain, also resulting in superior long-term performance. Although he describes this method as having "widespread applicability and *adoption*" he does not provide specific example of researchers who have adopted the

beneficiary's method. He does state that his group, "have recently integrated some of these techniques into ou[r] own research studies." He also generally discussed the beneficiary's research results in the use of MRI to study tissue-electrode interface, and the beneficiary's research in Optogenetics at the petitioning company.

Dr. Associate Professor, Electrical and Computer Engineering, states that he first met the beneficiary in 2008 at a professional conference. He summarizes the beneficiary's research findings in devising a surgical method to allow easier penetration of microelectrodes into the brain, his research on artifact removal from intracortical neural recordings, and the beneficiary's research in Optogenetic Neuromodulation.

Dr. Associate Professor, Electrical Engineering and Computer Science does not state how he first became aware of the beneficiary's work. He states that the beneficiary has developed the world's first completely implantable optical stimulation system. He also discusses the beneficiary's development of an algorithm to detect neuronal signals, his devising a surgical method to allow easier penetration of microelectrodes into the brain, and his use of MRI to study tissue-electrode interface.

Professor The Netherlands, states that he worked closely with the beneficiary for two years at and is one of the beneficiary's co-authors. He describes their work in using MRI to monitor tissue-electrode interface in neural implantation devices as "seminal" and "an incredible advancement." He also describes the beneficiary's research in devising a surgical method to allow easier penetration of microelectrodes into the brain and artifact removal from intracortical neural recordings. He further describes the beneficiary's research at the petitioning company studying the effect of radiation therapy on implanted devices,

Dr. Benesse Career Development Professor, Associate Professor in Biological Engineering, states he met the beneficiary in 2009 when the witness gave a talk at the petitioning company. He states that the beneficiary and his group at the petitioning company developed the first fully implantable optical stimulator system, which he characterizes as having "tremendous importance to the company [the beneficiary] works for."

Dr. Associate Professor, Denmark, states that she knows the beneficiary through interactions with him at professional conferences. She describes the beneficiary's research in developing a surgical method to allow easier penetration of microelectrodes into the brain, an algorithm to detect neuronal signals, and the beneficiary's development, at the petitioning company, of "the world's first fully-implantable system capable of delivering programmable optical/light pulses within the body." She refers to several authors who have cited the beneficiary's work in their own publications, including Drs. and above.

Dr. Department of Neurobiology, Israel, states that he has collaborated with the beneficiary on Optogenetic Neuromodulation. He states that the beneficiary "developed the world's first fully implantable, programmable, battery-powered system capable of delivering light pulses to

enable optogenetic neuromodulation." He states that the beneficiary's research findings "may allow - for the first time – the mainstream adoption of optogenetic technique for neuromodulation and change the manner in which neuromodulation is done from electrical systems to optical systems."

Dr. President and Founder, does not state how he first became aware of the beneficiary's work. He explains that in the last five years, researchers at have developed a technique called Optogenetics to study the nervous system using light. He states that the beneficiary's work at the petitioning company, in collaboration with researchers at has led to "the development of the world's first implantable light targeting and generating system." He states that the beneficiary's research "paves the way for seminal studies with optogenetics to assess its . . . value as a therapeutic alternative to electrical techniques." He also discusses the beneficiary's work at developing a surgical method to allow easier penetration of microelectrodes into the brain, using MRI to monitor tissue-electrode interface in neural implantation devices, and his work on artifact removal from intracortical neural recordings.

Dr. Chief Technology Officer, states she interacted with the beneficiary and reviewed his research in her capacity as editor for She discusses several of the beneficiary's publications. As stated above, 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 beneficiary's published materials will be considered under 8 C.F.R. § 204.5(i)(3)(i)(F).

Dr. Assistant Professor of Bioengineering, does not state how he first became aware of the beneficiary's work. He discusses the beneficiary's research on artifact elimination from neural recordings, his work using MRI to monitor tissue-electrode interface in neural implantation devices, and his work at the petitioning company resulting in "the world's first completely implantable light-delivery system for enabling clinical grade Optogenetic research."

Dr. Clinical Studies Leader, , states that he worked closely with the beneficiary at for five years. He discusses the beneficiary's work at the petitioning company in developing the first implantable optical delivery device. He also discusses the beneficiary's work studying the effects of various energy sources on implanted neurological devices, as well as the effects of radiation treatment on such implantable devices. He further discusses the beneficiary's work developing a surgical method to allow easier penetration of microelectrodes into the brain, his work on artifact removal from intracortical neural recordings, and his work developing an MRI compatible microelectrode implant system.

Dr. Professor and Chair of Bioengineering, does not state how he first became aware of the beneficiary's work. He discusses the beneficiary's work at the petitioning company in developing "the first completely implantable optical stimulation system." He also describes the beneficiary's work developing an MRI-compatible micro-wire implant system for chronic intracortical

recordings, and the beneficiary's work developing a surgical method to allow easier penetration of microelectrodes into the brain.

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 above evidence confirms that the beneficiary has produced useful results. It is inappropriate to consider at this point whether the evidence of the beneficiary's contributions are indicative of or consistent with international recognition as outstanding. Given the evidence discussed above in the aggregate, we will not withdraw the director's conclusion that the beneficiary has made original contributions to his field.

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 one book chapter, and several journal articles and proceeding papers. As the only consideration when counting this evidence is whether the beneficiary has authored articles in qualifying journals, we find 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 three 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),(E) and (F). The next step 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.

2. 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)).

In denying the petition, the director observed that at the time of filing the petition, the beneficiary had authored ten articles that had been published in scholarly journals. The director observed that researchers are generally expected to publish their research results. Moreover, the director observed that publication is not as reliable a gauge as the citation history of the published works. The director concluded that the beneficiary's citation record of seventeen total cites indicates a minimal degree of interest in the beneficiary's work, but is not indicative of an unusual level of interest as to distinguish the beneficiary as outstanding in his field.

On appeal, counsel asserts that the beneficiary is a scientist who works in private industry, and thus there is no expectation of publication or presentation in their scientific field for career advancement. Counsel highlights the fact that the beneficiary has published ten papers and seven conference abstracts, including three papers since joining the petitioning company, and suggests this is high. Counsel also highlights the fact that the beneficiary's articles have been cited 17 times at the time of filing, and 20 times at the time of decision, and asserts this is high within the academic field.[5] Counsel asserts that the nature of the beneficiary's citation record is evidence of the beneficiary's overall influence and outstanding contribution in the field, considering the fact that the beneficiary's work has been cited in review articles, has been cited and relied upon by researchers around the globe at prominent universities, has been written about in various media outlets, and has been acknowledged by experts around the world to have impacted the international research community. Counsel previously asserted, in response to the director's notice of intent to deny (NOID), that the number of citations to the beneficiary's work is highly discipline-dependent, and the number of citations to the beneficiary's work is high relative to others in the same academic field.

Counsel's assertions are unpersuasive. Counsel provides no factual basis or documentary evidence to support the assertion that a scientist who works in private industry is not expected to publish or present in their scientific field. To the contrary, the evidence the petitioner submitted suggests that scientists from private industry routinely publish and present. Specifically, the petitioner submitted the conference overview for *International Solid-State Circuits Conference (ISSCC) 2010,* which reflects that out of the 210 papers accepted for presentation, 108 of the papers were industry papers (as opposed to 102 university papers). The petitioner has submitted no objective evidence to establish that the beneficiary's publication and presentation rate is significantly higher than his peers in this field, as to be indicative of or consistent with international recognition.

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[5] On appeal, counsel asserts that the beneficiary's citation record has increased from 20 to 21 citations at the time of appeal, but failed to provide any corroborating evidence.

More importantly, the petitioner submitted no evidence to establish that the beneficiary's citation record is indicative of or consistent with international recognition. The beneficiary's citation history is a recognized relevant consideration when evaluating the beneficiary's recognition in the field. *See Kazarian*, 596 F. 3d at 1122. As the director concluded, a citation record of 17 (or 20) cites indicates a minimal degree of interest in the beneficiary's work, but is not indicative of an unusual level of interest as to distinguish the beneficiary as outstanding in his field. While the AAO acknowledges counsel's claim that the number of citations is relative and highly discipline-dependent, the petitioner failed to provide objective, factual data to establish that the beneficiary's citation record is high compared to the average citation rate of articles in the beneficiary's actual academic field. On appeal, counsel provides data regarding the average citation rate of articles in the fields of cell biology and aerospace engineering, but not for the fields of biomedical and neural engineering.

Regarding counsel's assertion that the beneficiary's work has been cited and relied upon by researchers around the world at prominent universities (specifically , the petitioner has not established that the nature of the citations is indicative of or consistent with international recognition. A review of the citations themselves indicates that the beneficiary's work was mostly cited as general background material, one of a string of other references, or was described briefly without any explanation as to the significance of the beneficiary's work. For instance, researchers at cited the beneficiary's work as one of several references to support the assertion that additional outputs, such as optical stimulation for use with optogenetics or electronically controlled drug delivery, "could be integrated" into electrophysiological systems for freely behaving primates. Researchers at cited the beneficiary's team as one of four different teams to have studied and measured the force of neural probe penetration into brain tissue. Researchers at cited the beneficiary's work to support the assertion that biodegradable coatings to ease insertion could be used as an alternate insertion technique to water-activated coatings. Researchers at cited the beneficiary's work as developing "methodologies for online de-noising of the signals from non-neuronal noise arising from animal's movements." Researchers at cited the beneficiary's work as one of two references to support the assertion that "[m]icroelectrode array (MEA) microchip has been attracting increasing interest in recent years because of its versatile applications in biological study." Researchers at cited the beneficiary's work to support the assertion that thin-film silicon micro probe has been widely characterized electrically and mechanically for insertion force, and then proceeded to state that this study, among other studies, lacked full cell activity information in 3-D space which is needed to achieve detailed studies. None of these articles discussed the beneficiary's work in-depth or indicated that the researchers substantially relied upon the beneficiary's work. Thus, a review of the citations themselves fails to support counsel's assertion that the citation of the beneficiary's work by researchers around the world at prominent universities is indicative of or consistent with international recognition.

Regarding counsel's assertion that the beneficiary's work has been written about in various media outlets, these articles did not specifically identify the beneficiary, but rather, discussed the petitioning organization's

work in general.[6] Moreover, these articles state that over 500-600 laboratories are "furiously pursuing" optogenetic technology. Considering the number of laboratories involved in developing optogenetic technology alone, the record further supports the conclusion that the beneficiary's minimal citation record is not indicative of an unusual level of interest as to distinguish the beneficiary as outstanding in his field. This minimal reliance cannot, by itself, establish that the beneficiary's Ph.D. research constitutes a contribution to the field as a whole. Rather, the citation evidence as a whole indicates that the beneficiary's work is part of a growing interest in that area of research.

On appeal, counsel highlights the fact that the beneficiary's article, "New Approaches to Eliminating Common-noise Artifacts in Recordings from Intracortical Arrays: Inter-electrode Correlation and Virtual Referencing," was listed in Science Direct Top 25 Downloads for the *Journal of Neuroscience Methods.* However, the number of downloads is not equivalent to the number of citations an article has garnered. One can download and view an article and realize it is not useful, whereas if an article is cited, it is used in some manner, even if only as background material. The record reflects that this particular article has been cited only one time.

On appeal, counsel emphasizes the distinguished nature of the journals that have published the beneficiary's articles. While such publication demonstrates the promising nature of the beneficiary's work, more persuasive evidence is how the beneficiary's work was received upon publication. As discussed above, the petitioner submitted no objective, credible evidence to establish that the beneficiary's citation record distinguishes the beneficiary as outstanding in his particular academic field.

The nature of the beneficiary's judging experience is also a relevant consideration as to whether the evidence is indicative of the beneficiary's recognition beyond his own circle of collaborators in the final merits determination. *See Kazarian*, 596 F. 3d at 1122. On appeal, counsel emphasizes that the beneficiary has been a judge on 29 separate occasions for seven different journals, and asserts that this is an "unusually large" number, especially for a full time researcher in private industry "who is not expected to publish or judge." Counsel also discusses the prestige of the journals for which the beneficiary has reviewed manuscripts and notes that the journals assign manuscripts to reviewers with expertise in the subject area.

However, again, counsel provides no factual basis or documentary evidence to support the assertion that a scientist who works in private industry is not expected to judge. Counsel provides no objective, credible evidence to establish that the beneficiary's judging record distinguishes the beneficiary as outstanding in his field. The AAO does not question that journals assign peer-review to those members of the field with "expertise" in the subject area. Scientific journals, however, are peer reviewed and rely on many scientists to review submitted articles. Without 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, received independent requests from a substantial number of journals, or served in an editorial position for a

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[6] In contrast, these articles quoted senior engineering manager in the petitioning organization's neuromodulation division, and identified two key developers of optogenetics at and Stanford.

distinguished journal, the petitioner failed to establish that the beneficiary's judging experience is indicative of or consistent with international recognition.

The AAO acknowledges the evidence establishing that the beneficiary has made original scientific or scholarly research contributions to the academic field. However, this is only one factor to be considered in determining whether the beneficiary is recognized internationally as outstanding in his academic field. Regarding the beneficiary's original research, 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."

Significantly, the Department of Labor's Occupational Outlook Handbook (OOH) provides the following information about biomedical engineers:

> ***Biomedical engineers*** may design instruments, devices, and software; bring together knowledge from many technical sources to develop new procedures; or conduct research needed to solve clinical problems. They often serve a coordinating function, using their background in both engineering and medicine. In industry, they may create products where an in-depth understanding of living systems and technology is essential. They frequently work in research and development or in quality assurance. Biomedical engineers design electrical circuits, software to run medical equipment, or computer simulations to test new drug therapies. They also design and build artificial body parts to replace injured limbs. In some cases, they develop the materials needed to make the replacement body parts. They also design rehabilitative exercise equipment. The work of these engineers spans many professional fields. For example, although their expertise is based in engineering and biology, they often design computer software to run complicated instruments, such as three-dimensional x-ray machines. Alternatively, many of these engineers use their knowledge of chemistry and biology to develop new drug therapies. Others draw heavily on mathematics and statistics to build models to understand the signals transmitted by the brain or heart.

See www.bls.gov/oco (accessed September 16, 2013 and incorporated into the record of proceedings). Thus, original designs, including those resulting in a patent, are inherent to the beneficiary's occupation. The letters establish that the beneficiary has provided useful designs for his employer but do not establish his international recognition beyond his employer. While the letters include unsupported assertions of widespread recognition, merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof.[7]

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[7] *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).

While the beneficiary's name appears on two patents the record lacks evidence that the innovations described in the patents have garnered independent attention in the trade media or otherwise.

In light of the above, our final merits determination reveals that the majority of the beneficiary's qualifying evidence, namely participating in the widespread peer review process, co-authoring two patents and publishing articles that have not garnered significant citations or other response in the academic field, does not set the beneficiary apart in the academic community through eminence and distinction based on international recognition, 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 peers, collaborators and employer. 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.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.