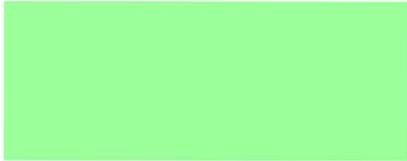


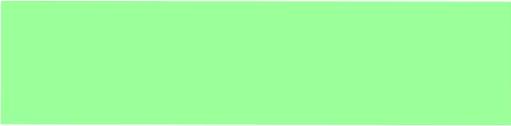


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 14 2013 Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(O)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(O)(i)

ON BEHALF OF PETITIONER:


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,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition, and certified the decision to the Administrative Appeals Office (AAO). The AAO will affirm the director's decision to deny the petition.

The petitioner filed this petition seeking to classify the beneficiary as an O-1 nonimmigrant pursuant to section 101(a)(15)(O)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(O)(i), as an alien of extraordinary ability in the sciences. The petitioner states that it operates a pharmaceuticals/healthcare business. It seeks to employ the beneficiary in the position of Manager, Fresh Cow Reproduction for a period of three years.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary has received "sustained national or international acclaim" or to demonstrate that he is one of the small percentage who has risen to the very top of his field of endeavor. Specifically, the director determined that the evidence submitted did not satisfy the criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(A) or at least three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).

The director issued a notice of certification advising the petitioner that the matter has been certified to the AAO pursuant to 8 C.F.R. § 103.4(a)(2), and granting 30 days in which to submit a brief or written statement. As of this date, the AAO has not received a brief or statement from counsel or the petitioner, and the record will be considered complete.

For the reasons discussed below, the AAO will affirm the director's decision to deny the petition.

I. The Law

Section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i), provides for the classification of a qualified alien who:

has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim . . . and whose achievements have been recognized in the field through extensive documentation, and seeks to enter the United States to continue work in the area of extraordinary ability .

...

The regulation at 8 C.F.R. § 214.2(o)(3)(ii) defines, in pertinent part:

Extraordinary ability in the field of science, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

The extraordinary ability provisions of this visa classification are intended to be highly restrictive for aliens in the fields of business, education, athletics, and the sciences. *See* 59 FR 41818, 41819 (August 15, 1994); 137 Cong. Rec. S18242, 18247 (daily ed., Nov. 26, 1991) (comparing and discussing the lower standard for the arts).

In a policy memorandum, the legacy Immigration and Naturalization Service (INS) emphasized:

It must be remembered that the standards for O-1 aliens in the fields of business, education, athletics, and the sciences are extremely high. The O-1 classification should be reserved only for those aliens who have reached the very top of their occupation or profession. The O-1 classification is substantially higher than the old H-1B prominent standard. Officers involved in the adjudication of these petitions should not "water down" the classification by approving O-1 petitions for prominent aliens.

Memorandum, Lawrence Weinig, Acting Asst. Comm'r., INS, "Policy Guidelines for the Adjudication of O and P Petitions" (June 25, 1992).

The regulation at 8 C.F.R. § 214.2(o)(3)(iii) states, in pertinent part:

Evidentiary criteria for an O-1 alien of extraordinary ability in the fields of science, education, business, or athletics. An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

- (A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or
- (B) At least three of the following forms of documentation:
 - (1) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
 - (2) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized or international experts in their disciplines or fields;
 - (3) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;
 - (4) Evidence of the alien's participation on a panel, or individually as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;
 - (5) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;
 - (6) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;

- (7) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;
 - (8) Evidence that alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.
- (C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

Additionally, the regulation at 8 C.F.R. § 214.2(o)(2)(iii) provides:

The evidence submitted with an O petition shall conform to the following:

- (A) Affidavits, contracts, awards, and similar documentation must reflect the nature of the alien's achievement and be executed by an officer or responsible person employed by the institution, firm, establishment, or organization where the work was performed.
- (B) Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability . . . shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.

The decision of U.S. Citizenship and Immigration Services (USCIS) in a particular case is dependent upon the quality of the evidence submitted by the petitioner, not just the quantity of the evidence. The mere fact that the petitioner has submitted evidence relating to three of the criteria as required by the regulation does not necessarily establish that the alien is eligible for O-1 classification. 59 Fed Reg at 41820.

In determining the beneficiary's eligibility under these criteria, the AAO will follow a two-part approach set forth in a 2010 decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Similar to the regulations governing this nonimmigrant classification, the regulations reviewed by the *Kazarian* court require the petitioner to submit evidence pertaining to at least three out of ten alternative criteria in order to establish a beneficiary's eligibility as an alien with extraordinary ability. *Cf.* 8 C.F.R. § 204.5(h)(3). 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. The court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet two of the 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. 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)). Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then, if qualifying under at least three criteria, considered in the context of a final merits determination.

The AAO finds the *Kazarian* court's two part approach to be appropriate for evaluating the regulatory criteria set forth for O-1 nonimmigrant petitions for aliens of extraordinary ability at 8 C.F.R. § 214.2(o)(3)(iii), (iv) and (v). Therefore, in reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. 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).

In this matter, the AAO has reviewed the evidence under the plain language requirements of each criterion claimed. As the petitioner has failed to submit evidence that satisfies three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iv)(B), the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence.

II. Discussion

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on September 21, 2009. The petitioner describes its business activities and the beneficiary's proposed position as "Manager [REDACTED]" as follows:

Recently [the beneficiary] was hired by [the petitioner], a leading pharmaceutical company in the animal health arena . . .¹ [The beneficiary] applies his cutting-edge knowledge and research in the areas of animal health, preventative medicine, and fertility to make positive changes that will bring value to dairy producers and the dairy industry. Additionally [the petitioner] has a commitment to develop and apply cutting-edge research to improve animal well-being and the production of a safe and high-quality food supply, and educating clients and veterinarians about proper timing and effective treatment choices for sick animals.

* * *

As [REDACTED] Manager [the beneficiary] will design and conduct field trials in dairy cow nutrition, reproduction and health, and call on dairy producers, veterinarians, dealers, consultants, and distributor representatives to sell [the petitioner's] products and services that address a broad array of animal health and production issues

The petitioner stated that the beneficiary's work "is regarded as extraordinary by experts in the worldwide research community." The petitioner also stated that it considers "[the beneficiary's]

¹ At the time of filing, the petitioner stated it employed the beneficiary "on Optional Practical Training (OPT) valid through September 29, 2009."

distinguished accomplishments and extraordinary ability in the field of Postpartum health and reproduction of dairy cows essential in realizing its commitment to continuous improvement upon what is essential to human progress.” The petitioner further stated that the beneficiary’s knowledge and experience “are essential in creating a strong partnership with members of the industry in California to foster improved research and technology, and strengthen the impact of [the petitioner] on the local industry.”

The record consists of: the Form I-129 petition and supporting evidence; the director’s request for evidence dated October 5, 2009 and the petitioner’s response; and, the director’s decision dated November 18, 2009 and her notice of certification. The AAO has reviewed the evidence of record in its entirety in reaching its decision.

A. The Beneficiary's Eligibility under the Regulatory Criteria

If the petitioner establishes through the submission of documentary evidence that the beneficiary has received a major, internationally recognized award pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(A), then it will meet its burden of proof with respect to the beneficiary's eligibility for O-1 classification. The regulations cite to the Nobel Prize as an example of a major award. *Id.* The petitioner does not claim that the beneficiary can meet this criterion.

As there is no evidence that the beneficiary has received a major, internationally recognized award, the petitioner must establish the beneficiary's eligibility under at least three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B). The petitioner has submitted evidence relating to the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1),(2),(4),(5),(6) and (8). The petitioner has not submitted any evidence relating to the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B) (3) and (7), and raises no objection to the director’s determination that these criteria have not been met. The remaining six criteria will be discussed below.

Documentation of the alien’s receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

To meet criterion number one, the petitioner must submit documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor. 8 C.F.R. § 214.2(o)(3)(iii)(B)(1).

In a letter dated September 18, 2009, counsel addressed the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B), claiming that the beneficiary meets this criterion based upon his receipt of the following prizes or awards:

- [REDACTED] Gainesville, [REDACTED] \$200 travel grant for travel to the [REDACTED] (2006), held in Minneapolis, Minnesota;
- [REDACTED] Gainesville, [REDACTED] \$200 travel grant for travel to the [REDACTED] (2004), held in Porto Seguro,

Bania, Brazil;

- [REDACTED] Gainesville, [REDACTED] \$200 travel grant for travel to the [REDACTED] (2003), held in Phoenix, Arizona;
- Award of two-year Graduate Scholarship from the [REDACTED], Gainesville (2001).

Scholarships are generally based on past *academic* achievement, not for accomplishments in a field of endeavor. Such support funding is presented not to established researchers with active professional careers, but rather to students seeking to further their research, training and experience.

In a letter dated November 2, 2009, in response to the director's request for evidence (RFE) counsel stated as follows:

The research produced by Ph.D. students advances the field of endeavor and awards for excellence are important awards within the field and often bring the top researchers to the attention of other researchers in the U.S. and abroad.

While they may be prestigious, scholarships, fellowships and other sources of competitive financial support are not nationally or internationally recognized prizes or awards because only other students – not recognized experts in the field – compete for such funding. We cannot conclude that receiving funding for one's research and academic training constitutes receipt of a nationally or internationally recognized prize or award for excellence in the field of endeavor.

Furthermore, academic study is not a field of endeavor, but training for a future field of endeavor. As such, academic scholarships, student awards, and financial aid awards cannot be considered nationally or internationally recognized prizes or awards in the petitioner's field of endeavor. Academic awards and honors received while preparing for a vocation fall substantially short of constituting a national or international prize or award for recognition in the field. Scholarships are simply not evidence of international recognition in the field. Rather, they represent high academic achievements in comparison with his fellow students.

Similarly, the beneficiary's receipt of the travel grants from the [REDACTED] Gainesville during his graduate studies at the university are institutional awards that have not been shown to be recognized nationally or internationally.

Further, it is the petitioner's burden to establish every element of this criterion. While the petitioner has provided evidence of the beneficiary's receipt of the scholarship and travel grants listed, the petitioner has not provided any documentation explaining the *significance* of these awards, and thus there is no evidence demonstrating that the beneficiary's receipt of such awards is tantamount to a nationally or internationally recognized prize or award for excellence in the beneficiary's field of endeavor. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)

For the reasons stated above, the petitioner has not submitted evidence that meets this criterion.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields

The petitioner submitted evidence of the beneficiary's election to membership of [REDACTED]. The submitted materials about [REDACTED] reveal that [REDACTED] invites to full membership those who have demonstrated "noteworthy achievement as an original investigator in a field of pure or applied science." These achievements must be evidenced by "publications, patents, written reports or a thesis or dissertation." A noteworthy achievement is not necessarily an outstanding achievement. In fact, the record suggests that the society does not take a particularly strict view of noteworthy achievements. Specifically, the materials imply that publication is sufficient to constitute a noteworthy achievement. Publication in research is the norm, rather than the exception. We cannot conclude that publication is an outstanding achievement.

In addition, the petitioner submitted a copy of the applicant's membership record reflecting that the beneficiary's Trainee-Graduate membership in the Society for the [REDACTED] is *pending*. The petitioner also submits information reflecting that the [REDACTED] has certain educational and professional requirements for trainee members, such as being a student-in-training in the field of reproductive biology, obtaining a recommendation from a Regular member of the society and obtaining a letter from a major professor or mentor verifying trainee status. Such requirements are not "outstanding achievements" in the field. Regardless, the petitioner has not established that the beneficiary is a member of the [REDACTED]. Moreover, even if the beneficiary is a member, he is only a student member of the [REDACTED]. The petitioner provided information on [REDACTED] membership downloaded from its website. While [REDACTED] may confer membership to Regular members "on the basis of scientific productivity and continuing interest in the field of reproduction or a related area," the record contains no evidence that regular members, let alone student members, must demonstrate outstanding achievements.

Thus, the petitioner has not established that the beneficiary meets this criterion.

Evidence of the alien's participation on a panel, or individually as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought

The petitioner submitted evidence that the journal [REDACTED] invited the beneficiary to review a manuscript.

As the plain language of the regulation requires "the alien's participation . . . as a judge of the work of others," the mere request to serve as a judge, or even agreeing to judge, without evidence of actually judging the work of others is insufficient to meet the plain language of this regulatory criterion. In fact, there is no evidence establishing that the petitioner actually completed the requested review for [REDACTED].

For the reasons stated above, the petitioner has not submitted evidence that meets this criterion.

Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field

As evidence relating to the beneficiary's original science-related contributions of major significance in the academic field, the petitioner submitted the beneficiary's citation record from [REDACTED] containing approximately six total citations to three of the beneficiary's articles. This information demonstrates that only one of the beneficiary's articles has been moderately cited in the several years since it was published in 2005. 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 addition, the petitioner has not provided the articles that cite the beneficiary's work to determine whether they substantively discuss the beneficiary's work, or simply cite it as one among many other authorities. Further, the petitioner has not provided a complete list of the citing articles from which to determine how many may be self-citations of the beneficiary or his co-authors.

Counsel asserts that the Scientific Citation Index Impact Factors 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.

As additional evidence relating to the beneficiary's original science-related contributions of major significance in the academic field, the petitioner submitted a total of five letters of support from the beneficiary's colleagues and professional contacts. We will address these letters in depth. At the outset, however, we note that the letters from [REDACTED] and [REDACTED], while not identical, use very similar language consistent with a common source. We acknowledge that the authors signed their letters, affirming the contents. Nevertheless, the use of slightly modified boilerplate language somewhat reduces the evidentiary weight of these letters.

[REDACTED] former researcher at the [REDACTED] [REDACTED] Beltsville, Maryland, states he first became familiar with the beneficiary's work "through peer review publications and paper presentations at the [REDACTED] [REDACTED] and at [REDACTED] Beltsville as an invited speaker." He summarizes the beneficiary's research findings regarding the positive effects of [REDACTED] on uterine involution, stating that the findings "can potentially have a great impact in the dairy industry to reduce cost associated antibiotic treatments, milk withholding, and culling rates due to reproductive failure." In addition, he summarizes the beneficiary's research findings demonstrating that organic sources of Selenium leverage better health and fertility than inorganic forms of Selenium in dairy cows with Selenium deficiency, stating that the findings "impact current knowledge of mineral supplementation in areas of Selenium deficiency in the U.S.(i.e., southeast) and internationally." Further, he summarizes the beneficiary's research findings that sequential strategic feeding of omega-6 and omega-3 fatty acids resulted in increased fertility in dairy cows, stating that the findings "are unprecedented in the scientific literature." He states the beneficiary's research findings can "optimize production and reproductive efficiency of the USA commercial dairy production system."

[REDACTED], professor of dairy science at the [REDACTED]-Madison states he first became familiar with the beneficiary's work "through peer review publications and paper presentations at the [REDACTED] and the [REDACTED]. He states that the beneficiary's research work on feed supplementation with organic forms of Selenium "helped to advance the technology of organic minerals in diets to improve immunity and health of dairy cows." He also states that the beneficiary's research revealed that sequential strategic feeding of omega-6 and omega-3 fatty acids "results in the best combination to maximize fertility in lactating dairy cows."

[REDACTED] professor of [REDACTED], [REDACTED] states that he has known the beneficiary since the beginning of the beneficiary's M.S. program and that he was the co-chair in the beneficiary's Ph.D. program. He is also the beneficiary's co-author. He summarizes some of the beneficiary's research findings relative to the uterine health of dairy cows and states "[the beneficiary] has augmented the awareness of the scientific community for a multidisciplinary approach (i.e., Veterinary Medicine, nutrition, immunology, and endocrinology) in the areas of dairy cow health and fertility."

[REDACTED] Associate Professor, [REDACTED] states that he served on the beneficiary's Ph.D. committee and has known the beneficiary's research since the beginning of the beneficiary's master's program. He states he is also the beneficiary's co-author on five research articles. He states the beneficiary was the first scientist to reveal the positive effects of [REDACTED] on uterine involution in dairy cows. He uses identical language to [REDACTED] in stating and that this finding "can potentially have a great impact in the dairy industry to reduce cost associated antibiotic treatments, milk withholding, and culling rates due to reproductive failure." He also uses identical language to [REDACTED] in stating that the beneficiary's research findings regarding sequential strategic feeding of omega-6 and omega-3 fatty acids "are unprecedented in the scientific literature."

[REDACTED], [REDACTED] Professor, [REDACTED], states he has known the beneficiary for the past eight years and was his Master's and doctoral advisor. He states that "improvement in the health of postpartum cows (focus on uterine involution and infection), reproductive performance, and lactation remain a central focus for researchers and are essential for the profitability of dairy operations, animal well-being, and safe food production worldwide." [REDACTED] summarizes the beneficiary's Master's and doctoral research work impacting those areas. He states that the beneficiary "stands poised to markedly benefit the animal production systems of the USA."

Upon review, the preceding letters of recommendation demonstrate that the beneficiary's work has earned the respect and admiration of those with whom he has collaborated and consulted, but these letters do not establish that he has made original science-related contributions of major significance in his field.

According to the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B)(5), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the petitioner is admired for his skills in the field of science, specifically related to dairy cow reproduction, and his work on projects has

benefited his colleagues and employers, there is no evidence demonstrating that he has made original contributions of major significance in his field. For example, the record does not indicate the extent of the petitioner's influence on others in his field nationally or internationally, nor does it show that the field has somehow changed as a result of his work.

In this case, the letters of recommendation submitted by the petitioner are not sufficient to meet this criterion. The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful extraordinary ability claim. 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 (Commr. 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 evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. Thus, the content of the experts' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance that one would expect of a business executive who has sustained national or international acclaim. Without extensive documentation showing that the beneficiary's work has been unusually influential, highly acclaimed throughout his field, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media

The director concluded that the petitioner failed to submit sufficient evidence to meet this criterion. A review of the record reflects that the petitioner submitted sufficient documentation demonstrating the beneficiary's authorship of scholarly articles in the field, in professional or major trade publications or other major media, including journal articles, a book chapter, and articles and abstracts for conferences and symposia.

In light of the above, the AAO withdraws this portion of the director's decision, and finds that the evidence satisfies the plain language of the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(6).

Evidence that alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence

The petitioner has offered the beneficiary an annual salary of \$81,000 for the proffered position of Manager- [REDACTED]. In the request for evidence, the director advised the petitioner that it must submit evidence, such as a statistical comparison of salaries in the beneficiary's field of endeavor from the [REDACTED] or like organization, to establish that the alien has commanded or will command a high salary.

In response to the RFE, the petitioner submitted salary information from the U.S. Department of Labor's Foreign Labor Certification Data Center Online Wage Library (www.flcdcenter.com). The salary information pertains to the occupation of "Animal Scientist" with the educational level

“Bachelor’s degree.” The information provided indicates that the average salary for the occupation ranges from \$43,576 to \$55,848.

The petitioner also provided salary data from the same source for the occupation of “Biological Scientist,” with no set educational level. The information provided indicates that the average salary for the occupation ranges from \$41,600 to \$53,352.

We find the above-referenced documentation is insufficient to meet the petitioner’s evidentiary burden. The petitioner has provided wage data for two different occupational titles, one requiring a bachelor’s degree and the other with no set educational level, in an attempt to establish that the beneficiary earns a high salary. The petitioner submitted wage information reflecting salaries for average level positions in the field rather than salaries for high level positions. The proffered salary of \$81,000 may be high for average level positions in the field but may not be considered high for the beneficiary, who has a doctoral degree and several years of professional experience. Nor has the petitioner documented what salary it typically pays to a Manager- [REDACTED] with experience comparable to that of the beneficiary; therefore, it is impossible to determine whether the beneficiary’s salary is comparatively high by the petitioner’s own standards. Based on evidence submitted by the petitioner we cannot make a determination that the beneficiary’s proffered salary is high among similarly employed individuals.

In addition, the petitioner has not established that the beneficiary has commanded a high salary in the past.

In light of the above, the AAO withdraws this portion of the director’s decision, and finds that the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B)(8).

Summary

We concur with the director’s determination that the petitioner has failed to demonstrate the beneficiary’s receipt of a major, internationally recognized award, or that he meets at least three of the eight categories of evidence that must be satisfied to establish the minimum eligibility requirements necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 214.2(o)(3)(iii).

The record does not establish that the beneficiary is an alien of extraordinary ability in the sciences whose achievements have been recognized in the field through extensive documentation, as required by section 101(a)(15)(O)(i) of the Act.

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a consideration of the evidence in the context of a final merits determination. However, as discussed above, the petitioner failed to establish eligibility under at least three of the evidentiary criteria specified in the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B). The AAO will not conduct a final merits determination.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

For the above-stated reasons, the petitioner has not established the beneficiary's eligibility pursuant to the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B), and the petition may not be approved.⁵

Accordingly, the AAO shall not disturb the director's denial of the petition.

ORDER: The director's November 18, 2009 decision is affirmed. The petition is denied.

⁵The AAO maintains *de novo* review. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding on motion or as a result of litigation, the AAO maintains the jurisdiction to conduct a final merits determination as the official who made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* Section 103(a)(1) of the Act; Section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii)(2003); *Matter of Aurelio*, 19 I & N Dec. 458, 460 (BIA 1987)(holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).