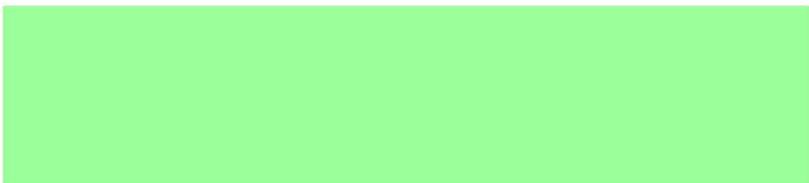




U.S. Citizenship
and Immigration
Services

(b)(6)

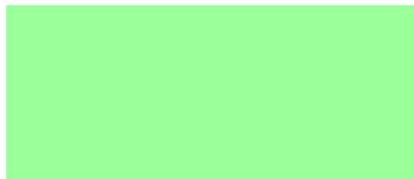


Date: **JUL 30 2014** Office: VERMONT SERVICE CENTER FILE:

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

The petitioner filed this petition seeking to classify the beneficiary as an O-1A 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, a regional planning agency, seeks to employ the beneficiary as a Data Systems Manager for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary meets the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iii)(A) or at least three of the eight criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner asserts that the beneficiary meets four of the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). The petitioner submits a brief and additional evidence in support of the appeal.

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 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.

II. Discussion

The sole issue to be addressed is whether the petitioner submitted sufficient evidence to establish that the beneficiary qualifies as an alien with extraordinary ability in the field of science, specifically, whether the evidence satisfies the evidentiary criterion 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).

A petitioner may establish eligibility for O-1 classification by submitting documentary evidence that the beneficiary has been nominated for, or has been the recipient of, a major national or international awards or prizes in the particular field, such as a Nobel Prize. 8 C.F.R. § 214.2(o)(3)(iii)(A). The petitioner does not

assert, and the record does not reflect, eligibility under this provision for a major award. Thus, 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).¹

The petitioner claims to have met the criteria listed at 8 C.F.R. § 214.2(o)(3)(iii)(B) subparagraphs (3), (5), (6), (7), and (8).² In denying the petition, the director determined that the evidence submitted meets one of the criteria, specifically, 8 C.F.R. § 214.2(o)(3)(iii)(B)(5). Upon review, and for the reasons discussed herein, we conclude that the petitioner has established eligibility under two of the evidentiary criteria, specifically, 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(5) and (6).

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

Under the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(3), the petitioner submitted several articles that discussed the results of the study conducted by the beneficiary and a group of researchers in which they assessed the health of coral species worldwide and their risk of extinction. These articles were published on the websites of major publications or media, including [REDACTED] as well as in an international news release by the [REDACTED] which specifically identified the beneficiary as the lead author of the study.

However, we cannot find that these articles constitute published materials *about* the beneficiary, as required by the plain language of the regulation. Rather, these articles are about the results of the research conducted by the beneficiary and other researchers, not about the beneficiary himself. Although the news release specifically mentions the beneficiary as the study's lead author, the fact remains that the article is not about the beneficiary. An article that is not about the beneficiary does not meet this regulatory criterion. *See, e.g., Negro-Plumpe v. Okin*, 2:07-CV-820-ECR-RJJ at *1, *7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor). Similarly, evidence that simply mentions the beneficiary's name, quotes the beneficiary, or is not otherwise about the beneficiary is not published material about the alien relating to his work in the field. *Id.*

The plain language of the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(3) requiring published material "about the alien, relating to the alien's work in the field" contains two related but distinct elements: first, the article must be about the alien; second, the article must relate to the alien's work. If we were to construe articles simply relating to alien's work to be sufficient, then the phrase "about the alien" would be rendered superfluous or inoperative. A basic tenet of statutory construction, equally applicable to regulatory construction, [is] that [a text] should be construed so that effect is given to all its provisions, so that no part

¹ The submission of evidence meeting at least three criteria does not, in and of itself, establish eligibility for O-1 classification. 59 Fed. Reg. at 41820; *cf. Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if qualifying under at least three criteria, considered in the context of a final merits determination).

² Because the petitioner does not claim that the beneficiary meets the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1), (2), and (4), they will not be discussed in this decision.

will be superfluous or inoperative, void or insignificant. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) quoted in *APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003). Compare 8 C.F.R. § 204.5(i)(3)(i)(C) relating to outstanding researchers or professors pursuant to section 203(b)(1)(B) of the Act, which only requires published material about the alien's work.

Accordingly, the petitioner failed to establish the beneficiary's eligibility under 8 C.F.R. § 214.2(o)(3)(iii)(B)(3).

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

We agree with the director that the petitioner established the beneficiary's eligibility under 8 C.F.R. § 214.2(o)(3)(iii)(B)(5).

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

The petitioner submitted evidence that the beneficiary has co-authored approximately twelve scholarly articles published in professional journals.³ The evidence meets the plain language of the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(6).

We will withdraw the director's finding and comments with respect to this criterion. In the denial, the director acknowledged the evidence of the beneficiary's published articles, but concluded that these articles were insufficient to meet the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(6) because the articles were co-authored by several of the scholars or researchers within the research team and not just the beneficiary. The director's conclusion and reasoning goes beyond the plain language of the regulation.

Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation

Under the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(7), the petitioner asserted that the beneficiary "has continuously performed critical roles within numerous renowned research groups from around the world." The petitioner highlighted the beneficiary's role as a GIS analyst for the [REDACTED] project, a joint initiative of the [REDACTED] during his employment at [REDACTED]. The petitioner also asserted that the beneficiary will continue to be employed in a critical capacity for the petitioner. As evidence under this criterion, the petitioner submitted numerous letters from the beneficiary's colleagues, and a letter from the petitioner.

³ While the petitioner asserts that the beneficiary also co-authored a book chapter, the petitioner's evidence is insufficient to corroborate this assertion. The petitioner's evidence, which includes a press release and a copy of the book's cover and introduction, establishes the publication of the book [REDACTED] but does not specifically identify the beneficiary as an author.

The letters from the beneficiary's colleagues consist of the following:

1. Letter from Dr. [REDACTED] a marine biologist at [REDACTED] who collaborated with the beneficiary on the [REDACTED] project. Dr. [REDACTED] letter discusses his and the beneficiary's roles within the [REDACTED] project, and the benefits of their research findings to marine managers like himself [REDACTED], and to marine conservation generally;
2. Letter from Dr. [REDACTED] permanent staff scientist at the [REDACTED], who collaborated with the beneficiary on the [REDACTED] project. Dr. [REDACTED] discusses the beneficiary's role within the [REDACTED] project, and the benefits of their research findings to marine conservation generally;
3. Letter from Dr. [REDACTED] Professor in Biological Sciences at [REDACTED] and manager of the [REDACTED] Dr. [REDACTED] was the beneficiary's academic advisor and supervisor at [REDACTED] Dr. [REDACTED] discusses the beneficiary's graduate research on the pattern of biodiversity in the [REDACTED] and the significance of this research to marine biogeography. Dr. [REDACTED] also attests that the beneficiary has been a co-author in some of his other published articles;
4. Letter from Dr. [REDACTED] Senior Research Associate and Project Manager of the [REDACTED] who worked with the beneficiary on the [REDACTED] project. Dr. [REDACTED] explains the beneficiary's role during the [REDACTED] project and the benefits of their research to conservation, research, and government agencies;
5. Letter from Dr. [REDACTED] Post-Doctoral Research Associate at [REDACTED] who collaborated with the beneficiary on the [REDACTED] project. Dr. [REDACTED] discusses the beneficiary's technical contributions to the [REDACTED] project and to marine conservation generally, and asserts that the beneficiary's analyses have provided a foundation for several publications;
6. Letter from Dr. [REDACTED] Professor [REDACTED] at the [REDACTED] Dr. [REDACTED] discusses how he received training from the beneficiary in the use of [REDACTED] a [REDACTED] program for building spatial data bases, and attest that the beneficiary has used his expertise in [REDACTED] analysis to train undergraduate and graduate students and advise scientists and colleagues. Dr. [REDACTED] also discusses the beneficiary's contributions to marine conservation at large;
7. Letter from [REDACTED] Senior Scientific Officer, [REDACTED] Mr. [REDACTED] discussed the significance of the beneficiary's roles in the [REDACTED] project, as well as a workshop to discuss mapping standards and protocols for the [REDACTED];
8. Letter from Dr. [REDACTED] Deputy Director, [REDACTED] Dr. [REDACTED] discusses the importance of the beneficiary's role as a [REDACTED] analyst for the [REDACTED] project;
9. Letter from Dr. [REDACTED] Vice President for Science and Chief Scientist at [REDACTED], a non-profit conservation organization, who has collaborated with the beneficiary on a couple of projects. Mr. [REDACTED] discusses the beneficiary's role with respect to one particular project involving the [REDACTED] Mr. [REDACTED] concludes that the beneficiary "will continue to contribute substantially" to his former employer, [REDACTED]

10. Letter from Dr. [REDACTED] Postdoctoral Research Assistant at the [REDACTED] who collaborated with the beneficiary on the [REDACTED] project. Dr. [REDACTED] discusses beneficiary's role in the [REDACTED] project, as well as his recent role in a workshop on the conservation status of the world's cone snails, in which he facilitated the Red List process and provided [REDACTED] support to the workshop. Dr. [REDACTED] also discusses the importance of the information compiled at this workshop with respect to national and international conservation policy and the conservation community;
11. Letter from Dr. [REDACTED] Canadian Research Chair in [REDACTED] in which capacity he has collaborated with the beneficiary. Dr. [REDACTED] describes the beneficiary's contributions and major analyses to the research work of the [REDACTED] and states their research work could not have progressed to the advanced level required to publish in one of the most influential journals in the field without the beneficiary's skills and abilities;
12. Letter from Dr. [REDACTED] Principal Biodiversity Specialist at [REDACTED] on the [REDACTED] who collaborated with the beneficiary on the [REDACTED] project. Dr. [REDACTED] describes the beneficiary's role in the [REDACTED] project, his attributes, and his contributions to global conservation. Dr. [REDACTED] states that the beneficiary has made "a significant and valuable contribution . . . to [REDACTED] work towards assessment of marine species on an international scale" without further explaining this statement;
13. Letter from Dr. [REDACTED] Assistant Research Scientist and Adjunct Professor of Environmental Science at [REDACTED] who collaborated with the beneficiary on his master's thesis research on biogeography of marine organisms in the [REDACTED]. Dr. [REDACTED] describes the beneficiary's role and contributions to their research project, and the importance of this research project to biogeography at large. Dr. [REDACTED] also mentions the beneficiary's work in the [REDACTED] project;
14. Letter from [REDACTED] Professor, School of Biological Sciences at the [REDACTED] who collaborated with the beneficiary on the [REDACTED] project. Dr. [REDACTED] discusses the benefits of the beneficiary's work with respect to the project and describes the beneficiary's qualifications as a GIS analyst;
15. Letter from [REDACTED] Ecosystems Research Group, Environment Department, [REDACTED]. Mr. [REDACTED] attests that, without the beneficiary's services, his group would not have been able to meet its deadline of assessing all 640 species of tropical marine gastropod mollusks of the genus *Conus* for an international workshop in [REDACTED] 2011;
16. Letter from Dr. [REDACTED] Professor of Marine Conservation, Environment Department, [REDACTED]. Dr. [REDACTED] attests the beneficiary's services were essential to the successful completion of his research project to assess the threatened status of cone snails, which culminated in an international workshop in [REDACTED] 2011;
17. Letter from [REDACTED] Geospatial Director at [REDACTED], who worked with and managed analysis and other [REDACTED] tasks that the beneficiary performed for [REDACTED]. Mr. [REDACTED] highlights the beneficiary's role with respect to a particular flood modeling tool project on behalf of the U.S. Air Force; and
18. Another letter from Dr. [REDACTED] explaining the beneficiary's role with respect to the [REDACTED] project and other projects such as regarding biodiversity in the [REDACTED]

The letters from the beneficiary's colleagues primarily attest to the beneficiary's role as a [REDACTED] analyst for the [REDACTED] project. These letters sufficiently establish the beneficiary's critical or essential capacity for the specific [REDACTED] project. However, the letters do not explain the significance of the [REDACTED] project to [REDACTED] as a whole, which in turn would establish whether the beneficiary was employed in a critical or essential capacity for the above organization(s).

Similarly, a few of the letters attest to the beneficiary's role as a [REDACTED] analyst for other projects and workshops, such as a cone snail workshop and a flood modeling project for the U.S. Air Force. Again, while these letters establish the beneficiary's critical or essential capacity for the specific projects or workshops, they do not explain the significance of these projects or workshops to the beneficiary's respective employers as a whole. Overall, the evidence falls short of establish that the beneficiary was employed in a critical or essential capacity for his prior employers.

Moreover, the petitioner failed to establish that it will employ the beneficiary in a critical or essential capacity. In its letter, the petitioner states that it employs "[o]nly the best scientists and professionals in their respective fields [to] perform the type of advanced analysis and recommendations that the Commission provides," and that the beneficiary "is such an individual." The petitioner then provides a description of the beneficiary's job duties, as follows:

As a Data Systems Manager, [the beneficiary] will provide his cutting-edge expertise and management support in providing [REDACTED] technical support. His specific duties will include performing complex technical computer data functions by collecting, cataloguing, and analyzing digital demographic and spatial data using multiple information technologies; managing the [REDACTED] role as a State Data Center Affiliate; and maintaining the [REDACTED] website and computer hardware/software.

The petitioner's letter fails to explain why the beneficiary's employment will be in a critical or essential capacity. Although the petitioner's letter characterizes the beneficiary as a top scientist in his field who will perform "cutting-edge expertise and management support," the petitioner fails to explain the significance of the beneficiary's proposed employment capacity to its organization as a whole.

On the basis of the above, the petitioner has failed to establish that the beneficiary has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation, pursuant to the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(7).

While we ultimately agree with the director that the petitioner did not establish eligibility under 8 C.F.R. § 214.2(o)(3)(iii)(B)(7), we will withdraw the director's comment that the evidence submitted under this criterion is insufficient to establish that the beneficiary "can be considered to be one of a small percentage who has risen to the top of the field." The director's comment goes beyond the plain language of the regulation.⁴

⁴ The director's consideration of whether the evidence demonstrates the beneficiary as a one of a small percentage who has risen to the top of the field is not relevant to the beneficiary's eligibility under this particular criterion, but it is relevant to the final merits determination. *See Kazarian*, 596 F.3d 1115.

Evidence that the 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 director determined that the petitioner did not establish eligibility under the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(8). On appeal, the petitioner does not contest or address the director's finding with respect to this criterion. Therefore, we will consider the petitioner's claim of eligibility under 8 C.F.R. § 214.2(o)(3)(iii)(B)(8) to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09-CV-27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO).

III. Conclusion

The petitioner failed to establish the beneficiary's eligibility under the evidentiary criterion 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). Accordingly, the petitioner failed to establish that the beneficiary can be classified as an alien of extraordinary ability in his field.

The petition will be denied and the appeal dismissed for the above stated reasons. 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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed