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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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**U.S. Citizenship
and Immigration
Services**

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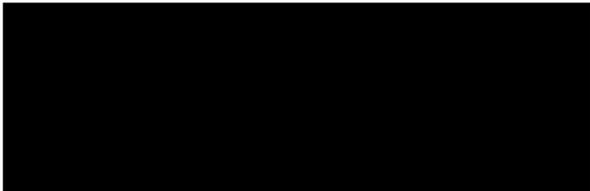
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FILE:  Office: CALIFORNIA SERVICE CENTER Date: **MAR 11 2011**

IN RE: Petitioner: 
Beneficiary: 

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, a higher education and research institution, 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 seeks to employ the beneficiary as a clinical lecturer 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).

On appeal, counsel for the petitioner asserts that the director erred by improperly imposing novel substantive and evidentiary requirements beyond those stated in the regulations, by failing to review all the evidence contained in the record, and by failing to follow guidance provided in *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. March 4, 2010), a recent decision issued by the U.S. Court of Appeals for the Ninth Circuit. Counsel contends that the petitioner has submitted relevant, probative and credible evidence to satisfy at least three of the eight evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B), and has met its burden of proof to establish that the beneficiary has risen to the very top of his field.

For the reasons discussed below, we uphold the director's conclusion that the petitioner has not established the beneficiary's eligibility for the exclusive classification sought. We find that the evidence submitted meets only two of the eight evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B), of which at least three are required to meet the minimal evidentiary requirements for this classification. As explained in our final merits determination, the beneficiary has worked in his field of endeavor for less than two years, and his accomplishments in the field do not yet favorably compare with the accomplishments of the most experienced and renowned members of the field. Thus, a review of the amount and type of evidence submitted does not result in a finding that the beneficiary enjoys sustained national or international acclaim. As will be discussed further in our final merits determination, while we acknowledge the caliber of the references who support the petition, such testimonial evidence cannot overcome the petitioner's failure to submit evidence that meets at least three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B).

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 a 2010 decision issued by the U.S. Court of Appeals for the Ninth Circuit. *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. March 4, 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).

Specifically, the *Kazarian* 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 *6 (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 *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 final merits determination analyzes whether the evidence is consistent with the statutory requirement of "extensive documentation" and the regulatory definition of "extraordinary ability" as "one of that small percentage who have risen to the very top of the field of endeavor."

The AAO agrees with counsel's assertion that the *Kazarian* court's two-part approach is 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*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director

reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

In the present matter, the petitioner has submitted evidence pertaining to several of the evidentiary criteria, but has not established that the beneficiary has risen to the very top of his field or that he has achieved sustained national or international acclaim. 8 C.F.R. §§ 214.2(o)(3)(ii) and (iii).

II. The Beneficiary's Eligibility under the Evidentiary Criteria

The beneficiary in this matter is a native and citizen of the Philippines. The beneficiary received his medical degree from St. Luke's College of Medicine in the Philippines, and completed his residency in anatomic and clinical pathology at the State University of New York (SUNY) Health Science Center in Brooklyn, New York in 2008. He received board-certification in Anatomic and Clinical Pathology from The American Board of Pathology in July 2009. Since July 2008, the beneficiary has been a Pathology Informatics Fellow at the petitioning university, in J-1 status. The petitioner seeks classification of the beneficiary as an alien with extraordinary ability in the sciences in the field of pathology informatics. The petitioner indicates that the beneficiary "is considered to be among the best contemporary pathology informaticists in the United States."

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.* There is no evidence that the beneficiary has received any major awards in his field, and the petitioner does not claim that the beneficiary meets 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).¹

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

The petitioner claims that the beneficiary meets the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1) based on his receipt of the following awards:

- 2009 - Association for Pathology Informatics (API) Junior Investigator's Award
- 2008 - Honorable Mention, Best Scientific Session – Bioinformatics, Advancing Practice, Instruction & Innovation through Informatics (APIII) Conference

¹ The petitioner has not claimed to meet or submitted evidence relating to the criteria not discussed in this decision.

- 1992 - [REDACTED]
- 1992 - [REDACTED]

The petitioner submitted evidence corroborating the beneficiary's receipt of the awards, as well as testimonial evidence explaining the selection criteria and judging standards for the awards. The director determined, without discussion, that this criterion has been satisfied. Upon review, the evidence supports a finding that the beneficiary's [REDACTED] and [REDACTED] he received at the 2008 APIII Conference are nationally-recognized awards for excellence in the beneficiary's field, and therefore this evidence meets the plain language of the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1). An evaluation of the significance of the beneficiary's awards is sanctioned under *Kazarian*, 596 F. 3d at 1121-11, and will be included in our final merits determination below.

The beneficiary's awards in the Philippine National Computer Programming Competition cannot be considered "prizes or awards for excellence in the field of endeavor" as required by the plain language of the regulation. The evidence of record indicates that this competition awards excellence in the field of computer science. Counsel argued that the field of computer programming is "inextricably linked with the field of pathology informatics." The AAO notes that the beneficiary won these awards when he was 16 years old, before he completed his medical training in the field of anatomic and clinical pathology and pathology informatics, and before the field of pathology informatics even existed as a medical subspecialty. While the awards are evidence of the beneficiary's talent in the field of computer programming, the AAO cannot find that they were awards for excellence in the field of pathology informatics, or that the specific skills that garnered him a computer programming award as a high school student in 1992 are in fact closely linked to his current field, such that it could be considered the same field of endeavor. The plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1) is clear and does not require that USCIS consider awards for excellence in a "related" field of endeavor when evaluating whether this criterion has been met.

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

To meet the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(5), the petitioner has submitted a copy of the beneficiary's abstract for his presentation titled "Use of Self-Configuring Lexical Analysis Approaches for Automated and Semiautomated Anatomic Pathology Data Extraction and Transformation." The abstract was published in the July 2009 issue of the *Archives of Pathology and Laboratory Medicine*. This presentation also garnered the beneficiary the above-referenced API Junior Investigator's Award in 2009, and the Honorable Mention award at the 2008 APIII Conference.

The petitioner has also submitted several testimonial letters in support of this criterion, representative samples of which are discussed below.

██████████ the beneficiary's direct supervisor at the petitioning university, is an ██████████ and director of the university's Division of Pathology Informatics. ██████████ states that the beneficiary "has generated multiple novel programmatic solutions for analysis of operational health care data that are of monumental business importance to the field of pathology data reporting, not just for the [the petitioner] but on a global level, with broad adoption of his applications now confirming this reality." ██████████ states that the beneficiary has made contributions to the field in two specific areas "which have received national recognition in light of their significant impact." He further elaborates as follows:

The first area is in the subspecialty of lexical analysis, and involved [the beneficiary's] taking on of a project which until that point had largely been considered insurmountable by the Pathology Informatics community, owing to the prior myriad of failed attempts at producing a direct and reproducible programmatic solution. Specifically, the problem is that of automatically or semi-automatically migrating legacy data from older database architectures (used to house the prior generations of anatomic and clinical pathology data) to modern architectures, based on extensible mark up language (XML) and on the use of relational database design.

* * *

. . . [the beneficiary] ultimately was able to construct a comprehensive tool suite which effectively converted what would otherwise have been more than 2000 hours of conventional effort for interactive manual legacy data transformation into a 15 minute process of merely providing programmatic heuristic examples. Remaining data transformation was simply an autonomous 2 hour conversion, which upon at the conclusion had rendered a near-flawless resulting relational database, transformed from the original non-coordinated data.

It is not too strong a statement to say that this level of autonomous free text transformation is unprecedented in Pathology Informatics, and in recognition of this accomplishment, [the beneficiary] was appropriately recognized at the premier Pathology Informatics meeting in September 2009, with his receiving of ██████████

██████████ states that the beneficiary's second area of significant contribution to the field has been his "use of specialized variants of an algorithm known as ██████████ with his focusing specifically upon modifications of this base algorithm that allow for content-based image retrieval (CBIR)." ██████████ further explains:

In essence, the approach seeks to search images with images themselves and not with keyword-based search approaches, as is currently the norm. This approach holds great promise for allowing surgical pathologists to query image-based databases with a more intuitive and morphologically based approach, where like images are paired with like images,

thereby allowing matching of current unknown cases with an appropriate cohort of prior cases, based on morphologic criteria (a feature as yet unrealized in clinical surgical pathology practice settings).

With the variations in algorithmic design that [the beneficiary] has implemented . . . [the beneficiary] has been able to increase computational efficiency of the general class of VQ algorithm by at least six log, making it possible to instantiate a true, real-time decision support platform.

The tool built by [the beneficiary] has been shared collaboratively with a number of sites for clinical and investigative use-case settings including [redacted] lab at the University of California, Davis (Laboratory of Comparative Mouse Genomics) and [redacted] lab at the National Institutes of Health / National Cancer Institute (Laser Capture Micro-dissection [LCM] Core Lab) for the purpose of automating high throughput spatially-gated LCM. Both of these collaborations are proceeding very well with the generation of refined algorithms now being the result.

For both of these use-cases, spatial selectivity and total image gating throughput are now markedly improved as a result of his algorithm. Similarly in discussions with [redacted] who is arguably one of the most influential contemporary Pathology Informaticists, he can provide firm consonance with the notion that [the beneficiary's] work is both far-reaching and has had a significant impact on the use of digital whole-slide images in everyday surgical pathology practice settings.

[redacted] opines that the beneficiary has attained "a truly apogean status within the Pathology Informatics continuum" and is "already a star in our field."

The petitioner submitted a letter from [redacted] [redacted] discusses the relevance of the beneficiary's Junior Investigator's Award, noting that the criteria used to select award recipients includes "scholarly originality, quality of work, impact on the immediate practice of pathology informatics and immediacy of potential for dissemination." [redacted] further states:

[The beneficiary] has demonstrated his ability to select and solve challenging problems within the field including problems associated with lexical analysis and natural language processing, as well as the very challenging area of content based image retrieval, where he is, as I understand it, currently forging new ground in concert with the National Cancer Institute.

The petitioner also provided a letter from [redacted] [redacted] and [redacted] states:

This letter recognizes [the beneficiary's] excellent contributions to the integration of laser capture microdissection with new imaging technologies and pathology-based informatics, an exciting development in the field of molecular pathology that holds promise to significantly advance both laboratory research and eventually clinical practice. Based on the work of [the beneficiary] and [REDACTED], one of the trainees in my laboratory, we have made substantial progress on this effort and tremendous new opportunities for high-throughput technologies are becoming possible.

My laboratory was involved in the creation and subsequent commercialization of laser capture microdissection (LCM), a technology that facilitates procurement of phenotypically defined cell types from histological sections. . . . However, there are still challenges in employing LCM for certain studies and additional improvements in the technique are needed.

The technology offered by [the beneficiary] is exceptionally innovative and holds great promise to solve some of the difficulties associated with LCM; namely, the ability to dissect sufficient cells for study in a rapid and operator-independent manner. In fact, early work between [the beneficiary] and Hipp using this automated, morphologically-gated image area selection and actuation process has effectively demonstrated a complete and fully-functional turnkey solution whereby specific morphologically gating criteria programmatically selection regions for capture (most notably without any human intervention) resulting in a fully automated solution yielding significantly greater quantities of morphologically constrained tissue than previously possible.

Based on this pilot study, we fully anticipate the successful and complete integration of LCM with [the beneficiary's] algorithm, producing a novel system which will greatly extend the ability for both single investigators and investigative groups to consistently and quickly capture highly constrained morphologic cohorts of exceptionally consistent tissue subsections, ultimately leading to much greater preparative quantities of tissue (and consequently both DNA and RNA for subsequent high-throughput analysis methodologies). Taken together, this newfound capability, based on the sophisticated algorithm and implementation of said algorithm as carried out by [the beneficiary], represents a significant leap in the overall field of high-throughput laser capture micro dissection and consequently an extremely high-impact contribution to the field, which I fully expect will be transformative and enabling for significant discoveries and significantly accelerated pace of discovery for those using LCM.

[REDACTED] describes the beneficiary as "an outstanding imaging scientist who has already contributed substantially to the biological sciences and specifically high-throughput LCM."

The petitioner also submitted a letter from [REDACTED]

[REDACTED] states:

[I]n the case of [the beneficiary], his recent developments at the Pathology Informatics lab at the [petitioning university] in concert with [REDACTED], of a series of extremely promising algorithms [*sic*] for real time pathology imagery classification and image retrieval, underscore for me the reality that he has already attained the level of maturity and accomplishment equal with any of the best contemporary Pathology Informaticists within the US continuum.

[REDACTED] states that he knows the beneficiary through his active Emeritus status with the Department of Pathology at the petitioning university. [REDACTED]

[REDACTED] states:

Towards the issue of [the beneficiary's] talent and accomplishments, the fact that he was able to secure the most prestigious informatics award within just one year of his starting his subspecialty training speaks to me volumes about his level of dedication and level of competency. Not only were the problems addressed in his Young Investigator presentation scholarly in their design and execution, but they both addressed currently unmet needs for actual production settings in pathology; one issue being the very difficult task of legacy data migration using automated means and the other being the ongoing challenge of effectively utilizing our coring digital repositories of histopathology imagery content for the purpose of case retrieval and differential diagnosis generation. His pilot work in both of these fields cuts new ground and truly opens up the possibility of entirely new modality practice settings, made possible by his very technology and inventive genius. I do not offer these observations lightly, and have significant experience in this field to recognize high caliber science for Pathology Informatics

Finally, the petitioner's initial evidence included a letter from [REDACTED]

[REDACTED] indicates that he has reviewed the beneficiary's curriculum vitae and academic work, including his presentation at the APIII Pathology Informatics national meeting. [REDACTED] further states:

[The beneficiary's] contributions to the field of Pathology Informatics are impressive, even at this early stage, and I think he holds great potential to further the field of Pathology Informatics in several key areas including image-based query and natural language text analysis. Both of these areas are important to the growth of our field and yet are significantly under-represented, owing to a dearth of trained Pathology Informatics professionals.

The field of Pathology Informatics involves, among other things, improving existing laboratory information technology and enhancing the value of existing laboratory data in order to improve the care of patients and the investigation of their diseases. . . . [The beneficiary's] particular areas of expertise – lexical analysis and image analysis – are particularly compelling in that these are two of the highest growth areas involving high-throughput technologies. It is anticipated that the algorithms that will likely arise from [the beneficiary's] research will greatly enhance the profession at large.

The director issued a request for additional evidence ("RFE") on April 23, 2010. With respect to this criterion, the director acknowledged the testimonial evidence submitted, but observed that "the letters do not appear to indicate how the beneficiary has already made original contributions of major significance in the field and how his work has impacted the field as a whole." The director noted that the letters indicate "the potential impact of the beneficiary's work."

In response to the RFE, counsel emphasized that the beneficiary is "the first-ever pathology informaticist to implement a comprehensive tool suite for migrating pathology data from older database architectures to modern architectures," and "has sustained national and even international acclaim, as confirmed by the receipt of the field's most prestigious awards and the enclosed letters from top experts in the field." Counsel cited the letters of [REDACTED] and a newly submitted letter from [REDACTED], as being particularly relevant to this criterion.

[REDACTED] discusses the beneficiary's API Junior Investigator's Award, and the Honorable Mention award he received [REDACTED] noting that such awards, "reflect the attainment of the highest levels of excellence in the field of pathology informatics." [REDACTED] further states:

The awards were granted for [the beneficiary's] pioneering and far-reaching work in data extraction from anatomic pathology databases and for his developing of a critically needed vector-based algorithmic model to extract information from pathology images and text repositories. Data management is a significant problem in healthcare, and pathology databases contain more information than any other part of healthcare; therefore, [the beneficiary's] work has addressed one of the most urgent problems we currently face – how to extract data from both the textual and image formats that currently exist in pathology databases into a usable and easily searchable form.

The petitioner also provided a letter from [REDACTED] who states that the work undertaken by the petitioning university's Division of Pathology Informatics, is "very highly regarded internationally." He further states that "the work that [the beneficiary] has been doing on lexical analysis and content-based image retrieval is ground-breaking and likely to have a major impact on the way that anatomical pathology – the gold standard for cancer diagnosis – will be done around the world in the near-future."

Counsel emphasized that "[p]rocesses developed by [the beneficiary] [REDACTED] and noted that "[the beneficiary's] discovery has eliminated the use of manual LCM, an accomplishment of major importance to no less than the United States' top medical research agency." Finally, counsel stated:

While there is no regulatory requirement to show "impact" on the field, and the Service cannot unilaterally impose novel substantive or evidentiary requirements, clearly [REDACTED] letter reflects the impact of [the beneficiary's] accomplishments on the field, as the prestigious NIH has implemented [the beneficiary's] fully-automated turnkey.

The director determined that the petitioner failed to submit evidence of the beneficiary's original, scholarly or business-related contributions of major significance in the field. The director quoted excerpts from the letters of [REDACTED], [REDACTED], and [REDACTED], noting that "the letters indicate what may come from the beneficiary's research and the possible impact that it could have." The director emphasized that the fact that the beneficiary's work has the potential to significantly impact the field does not establish that the beneficiary's past achievements have made a major, significant impact on the field.

On appeal, counsel asserts that the director imposed novel and substantive evidentiary requirements beyond those stated in the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B)(5), contrary to the guidance provided by *Kazarian*. Counsel argues that "[t]here is simply no mention in the regulations of the word 'impact,' no less a 'major, significant impact.'" Counsel asserts that the dictionary definition of "significant" is "having or likely to have a major effect; important," thus consideration of "the potential future effect of the beneficiary's past contributions should be considered, based on the plain meaning of the words in the regulation." Counsel acknowledges that "the Service cannot engage in the process of predicting what potential future contributions a beneficiary would make," but notes that the director should not have refused "to consider the contributions already made that may lead to future contributions of major significance."

Counsel summarizes the beneficiary's eligibility under this criterion as follows:

[The beneficiary] has won the top award in the field of pathology informatics for his contributions of major significance. For a published paper documenting his contributions of major significance he won another award. Experts have attested to his contributions of major significance in the field. His work has been used at the National Cancer Institute. Therefore the evidence provided is sufficient to meet all the evidentiary requirements of 8 C.F.R. § 214.2(o)(3)(iii)(B)(5).

Counsel adds that "developing technology that has been used by the National Institutes of Health, the largest medical institute in the world, that experts in the field had previously found impossible, is logically an original contribution of major significance." Counsel also contends that "the beneficiary's receipt of the top award in the field is objective evidence of his having made a contribution of major significance," and notes that the director failed to mention the beneficiary's award when discussing this criterion. [REDACTED] submits

a new letter, in which he confirms that the award the beneficiary received is "given for actual accomplishments and not simply for forward-looking expectations."

Finally, counsel asserts that, even if USCIS determines that the beneficiary's potential future contributions to the field should not counted among the preliminary requirements, such contributions most definitely should be considered in the final merits determination, along with the beneficiary's contributions to date.

Upon review, the petitioner has not submitted evidence to satisfy this criterion. 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. Although counsel objects to the director's discussion as to whether the beneficiary's work has "impacted" the field, we find that a demonstrable influence on the field is in fact necessary in order to meet satisfy this criterion. The petitioner's field, like most science, is research-driven, and there would be little point in publishing or presenting research that did not add to the general pool of knowledge in the field. Any research must be shown to be original and present some benefit if it is to receive attention from the scientific community in the form of publication or presentation at a scientific conference. Measuring the impact of such research on the field is a reasonable way to separate the typical published or presented research finding from a contribution that is truly of "major significance."

To be considered a contribution of major significance in the field of science, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the significance of the beneficiary's work. Further, the petitioner must demonstrate the beneficiary's contribution to the field as a whole, rather than simply to an employer or collaborator.

With respect to the beneficiary's [REDACTED] we note that [REDACTED], [REDACTED] states that this award "recognizes superior achievements by: pathologists in training, pathology fellows and practicing pathology informaticists in the initial phases of their career." She states that the award "is intended to bring attention to their high-impact scholarly work and at the same time, encourage their continued interest and further achievements within this field." While the beneficiary's API award is a significant achievement, we do not concur with counsel's assertion that "the beneficiary's receipt of the top award in the field is objective evidence of his having made a contribution of major significance." The regulations contain a separate criterion regarding the beneficiary's receipt of nationally or internationally-recognized prizes or awards for excellence in the field. 8 C.F.R. § 214.2(o)(3)(iii)(B)(1). If the regulations are to be interpreted with any logic, it must be presumed that the regulation views "original contributions of major significance" as a separate evidentiary requirement from awards. Furthermore, while the "Junior Investigator Award" may be the "top award" in the beneficiary's field, it also appears to be the only award in the field. Its pool of potential recipients is limited to pathologists in training and in the early phases of their careers in the field. While it is evident that the beneficiary's scholarly work was deemed exceptional within this pool of candidates, the award itself does not provide evidence of the "major significance" of the beneficiary's contribution.

A further review of the record of proceeding reflects that the petitioner submitted documentary evidence reflecting that the beneficiary has participated in a total of two APIII conferences (2008 and 2009) at which he presented his papers. While the presentation of the beneficiary's papers demonstrate that his work was shared with others and may be acknowledged as original contributions based on the selection of them to be presented, we are not persuaded that presentations of the beneficiary's work are sufficient evidence establishing that the beneficiary's work is of major significance to the field as a whole. Many professional fields regularly hold conferences and symposia to present new work, discuss new findings, and to network with other professionals. These conferences are promoted and sponsored by professional associations, businesses, educational institutions, and government agencies. Participation in such events, however, does not equate to an original contribution of major significance in the field. There is no evidence showing that the beneficiary's conference presentations have been frequently cited by independent researchers or have otherwise significantly impacted the field.

The API awarded the beneficiary for his presentation [REDACTED] [REDACTED], the beneficiary's supervisor at the petitioning university, referring to this research, notes that the beneficiary "ultimately was able to construct a comprehensive tool suite which effectively converted what would otherwise have been more than 2000 hours of conventional effort for interact manual legacy data transformation into a 15 minute process of merely providing programmatic heuristic examples." However, the record lacks evidence as to how the beneficiary's "self-configuring lexical analysis approach" or tool suite has contributed to the field as of the date the petition was filed. None of the persons who provided testimonial letters have mentioned adopting the beneficiary's approach or tools suite in their own work, provided specific examples of any independent researchers who have applied the beneficiary's findings in their work, or described how this tool has influenced their own research or practice in the field. We acknowledge that [REDACTED] indicated that the beneficiary's work in data extraction from anatomic pathology databases as "pioneering and far-reaching," but the AAO concurs with the director that there is insufficient evidence of this claimed impact.

The beneficiary's other claimed original contribution of major significance is, according to [REDACTED] his "use of specialized variants of an algorithm known [REDACTED] with his focusing specifically upon modifications of this base algorithm that allow for content-based image retrieval (CBIR)." The beneficiary was invited to the APIII 2009 Conference to present [REDACTED]

There is no evidence that the beneficiary's work in this area has been published. [REDACTED] indicates that the tool the beneficiary built "has been shared collaboratively with a number of sites for clinical and investigative use-case settings including [REDACTED]'s lab at the University of California, Davis (Laboratory of Comparative Mouse Genomics) and [REDACTED] [REDACTED] confirms the collaboration and states that he "anticipates the successful and complete integration of LCM with [the beneficiary's] algorithm." However, the beneficiary's work in this area appears to be in the research and pilot stage, rather than a fully operational solution that could be considered to be a contribution of major significance at the time of filing. Furthermore, while we

recognize that the beneficiary's algorithm is being used in [REDACTED] laboratory at the National Cancer Institute, [REDACTED] indicates that his laboratory, specifically, a trainee within his laboratory, is collaborating with the beneficiary in these efforts. The petitioner has not established that the beneficiary's algorithm is being used outside of collaborative efforts with a select few pathology informatics laboratories.

[REDACTED] also stated that [REDACTED] "can provide firm consonance with the notion that [the beneficiary's] work is both far-reaching and has had a significant impact on the use of digital whole-slide images in everyday surgical pathology practice settings." However, upon review of the letters [REDACTED] provided, he has not specifically mentioned the impact of the beneficiary's work in everyday pathology practice.

As noted by the director, many of the letters proffered do in fact discuss far more persuasively the future promise of the beneficiary's research and the impact that may result from his work, rather than how his past research already qualifies as a contribution of major significance in the field. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The assertion that the beneficiary's research results are likely to or expected to be influential or far-reaching is not adequate to establish that his findings are already recognized or acclaimed as major contributions in the field. While the experts who have provided testimony deem the beneficiary's research findings to be both novel and of great potential import within research and clinical settings, the fact remains that any measurable impact that results from the beneficiary's research will likely occur in the future.

The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *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"). Thus, the content of the experts' statements and how they became aware of the beneficiary'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 that one would expect of a research scientist who has made original contributions of major significance. Without supporting evidence showing that the beneficiary's work equates to original contributions of major significance in his field, we cannot conclude that he meets this criterion.

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

The petitioner provided evidence that an abstract of the beneficiary's scientific session presentation [REDACTED]

[REDACTED]. The petitioner confirmed in response to the director's RFE that this is the beneficiary's only published work to date.

The director determined that the beneficiary's authorship and publication of a single abstract does not meet the plain language of the regulation, which requires evidence of multiple scholarly articles. The AAO concurs with the director's finding that a publication record that includes only one abstract is insufficient to satisfy this criterion. The petitioner has not contested this determination on appeal.

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

The petitioner indicates that the beneficiary is qualified under this criterion based on his role as a pathology informatics fellow at the petitioning university. The petitioner submitted testimonial evidence in an effort establish that the beneficiary has been employed in a "critical or essential capacity" and to document the reputation of the university's pathology informatics program.

The director acknowledged the petitioning institution's distinguished reputation, but determined that "staff, assistant, or trainee positions are not considered employment in a 'critical or essential capacity.'"

Upon review, and for the reasons discussed below, we concur with the director's determination. At issue for this criterion, according to the plain language of 8 C.F.R. § 214.2(o)(3)(iii)(B)(7), are the positions the beneficiary was selected to fill and the reputation of the organization or establishment that selected him. We acknowledge the distinguished reputation of the petitioning university and its department of pathology.

The beneficiary completed his fellowship training in pathology informatics at the petitioning institution from July 2008 until June 30, 2009 and remained in the position of pathology informatics fellow at the time of filing. [REDACTED] states that the beneficiary "has fulfilled a critical role" within the petitioner's department, and solved a "myriad of clinical operational problems" for the university's entire health system. [REDACTED] describes the beneficiary's development of an automated anti-biogram report tool that "represents significant savings in both human effort and financial expenditure, with additional intangible benefits secondary to the healthcare enterprise no longer being out of compliance with significant regulatory requirements."

In response to the director's RFE, the petitioner submitted additional testimonial evidence from [REDACTED] and health centers. [REDACTED] states that the beneficiary "completely restructured and re-architected [sic] the Health System's antibiogram report generation system," and has allowed "the clinical microbiology laboratory, the infection control team and the infectious diseases division to generate precise site specific data on demand," processes that previously took months to generate manually. [REDACTED] states that the improved reporting ability is critical because it allows the petitioner's health system to contain infections quickly, to stay in compliance with state and federal regulations, and has resulted in significant savings in both human effort and financial expenditures. [REDACTED]

Director of the petitioner's Clinical Microbiology and Virology Laboratories also submitted a letter attesting to the beneficiary's role in the re-engineering of the antibiogram reporting infrastructure.

The petitioner also submitted a letter from [REDACTED] petitioning University and [REDACTED] states that the beneficiary "has been a tremendous asset to our reference laboratory business, MLabs . . . by creating and delivering two, critical, previously unavailable reporting processes that have helped us care for patients and to win and retain new clients." [REDACTED] states that the beneficiary's performance during his fellowship was outstanding.

On appeal, counsel asserts that "there is nothing in the plain language of the regulation to preclude an alien occupying the position of Research Fellow from meeting the criteria for this category of evidence and providing that he has been employed in a critical or essential capacity." Counsel asserts that "job titles do not always reflect the critical or essential capacity in which employees are employed," and notes that a U.S. District Court has previously determined that the Service improperly discounted the importance of a position based solely on the job title. *Grimson v. INS*, 934 F. Supp. 965 (N.D. Ill. 1996).

Upon review, the AAO concurs with the director's determination. The letters submitted speak highly of the petitioner's intelligence and work ethic. Several of the letters describe the beneficiary's duties in detail and often state that the work that he does is critical to the institution. While the beneficiary has clearly been able to provide expertise in the area of medical information systems automation within the petitioning institution, there is no evidence that his role as a pathology informatics fellow is essential or critical for the petitioner's university or medical school as a whole. The beneficiary was assigned informatics projects as part of the normal responsibilities of a fellow, and achieved results that met or exceeded his employer's expectations. While the university staff may consider the beneficiary's achievements to be of great benefit to the university, the focus of this criterion, based on the plain language of the regulation, is the beneficiary's role itself. The purpose of a fellowship is to complete training for a future professional career in the field of endeavor. The petitioner's evidence does not demonstrate how the beneficiary's fellowship role differentiated him from the other fellows at the institution let alone from its tenured faculty, department heads and other senior staff. The documentation submitted by the petitioner does not establish that the beneficiary was responsible for the petitioner's success or standing to a degree consistent with the meaning of "essential or critical capacity." The fact that the beneficiary may have served as the main developer of one or more information systems that resulted in significant time and cost savings for the petitioner does not elevate his position within the institution above that of a research fellow for the purposes of this criterion.

With respect to the U.S. District Court decision cited by counsel, counsel did not establish that the facts of the two cases are analogous. The cited matter involved a player position on a major league hockey team, a type of organization with no clearly delineated hierarchy among players on its roster. The organization of a university's faculty and staff is not comparable. Additionally, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715

(BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Counsel's reliance on *Grimson v. INS* is not persuasive.

While counsel, the petitioner, and the expert testimonials have attested to both the beneficiary's value to the petitioning institution due to a scarcity of trained personnel in the beneficiary's medical subspecialty, and the critical nature of the beneficiary's work in terms of optimizing the institution's medical information systems, these considerations go beyond the scope of this evidentiary criterion, which must focus on the beneficiary and the relative importance of his position within the scope of the organizations that have employed him. We concur with the director that the beneficiary's employment as a pathology informatics fellow, while of great value to the petitioning university for a variety of reasons, is not considered employment in a "critical or essential capacity."

In light of the above, the petitioner has not submitted evidence that meets the plain language requirements of 8 C.F.R. § 214.2(o)(3)(iii)(B)(7).

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

At the time of filing, the petitioner provided a letter from [REDACTED] indicating that the beneficiary was a potential candidate for her organization's position as Director of Pathology Informatics. She indicates that, "due to the shortage of candidates for this position, the offer we made to our candidate was in excess of \$300,000, making the Director of Pathology Informatics a highly compensated position."

In the request for evidence, the director acknowledged the letter from [REDACTED], but noted that there was no evidence that the beneficiary had accepted the position or that he has earned or will earn the stated salary. The director further advised the petitioner that no evidence was provided to compare the beneficiary's salary to that of others in the field, such as a statistical comparison from the Economic Research Institute, or like organization, to establish that the beneficiary has commanded or will command a high salary compared to others in his field.

In response, the petitioner submitted evidence that the beneficiary has received an employment offer from [REDACTED] for a position as a bioinformatics and medical image processing specialist, based in Toronto, Canada, at an annual salary of \$180,000 (Canadian). The company's offer letter is dated April 29, 2010. The petitioner also provided prevailing wage survey results from [REDACTED] for the position of [REDACTED] which indicate that the wage for the position is \$81,188. Counsel noted that the beneficiary may accept the employment offer in Canada if he is unable to remain in the United States.

The director determined that the petitioner did not provide evidence to satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(8). The director noted that, according to salary data provided on The Association of

the annual salary for pathologists ranges from \$239,000 to \$331,842. Therefore, the director determined that, even if the beneficiary had commanded a salary of \$300,000, this salary would not be considered a "high salary" within the field. The director did not consider the beneficiary's offer from Objective Pathology Services Limited, as the offer was made subsequent to the filing of the petition.

On appeal, counsel does not object to the director's determination or otherwise address this criterion. Upon review, we concur with the director's determination. As the beneficiary in this matter is a medical doctor and trained pathologist, we find the salary data pertaining to this medical specialty to be a more appropriate point of comparison than that of a bioinformatics programmer analyst. The petitioner has not established that the beneficiary has commanded or will command a high salary or other remuneration for his services. Accordingly, the petitioner has not established that the beneficiary meets the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(8).

Summary

In this case, 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).

B. Comparable Evidence under 8 C.F.R. 214.2(o)(3)(iii)(C)

On appeal, counsel argues that, if the evidence provided to satisfy the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(7) is insufficient or not relevant to that criterion, that it should be considered under the "comparable evidence" category pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(C). Counsel asserts that while the beneficiary's has held the position of "pathology informatics fellow" at the petitioning university, his role "has been nothing less than extraordinary." Counsel asserts that the testimonial letters submitted by senior university officials should be considered, even if it is determined that a fellow is not a critical or essential capacity within the meaning of 8 C.F.R. § 214.2(o)(3)(iii)(B)(7).

The regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C) allows for the submission of "comparable evidence" only if the eight categories of evidence "do not readily apply to the beneficiary's occupation." The regulatory language precludes the consideration of comparable evidence in this case, as there is no evidence that eligibility for O-1 classification in the beneficiary's occupation cannot be established by the categories of evidence specified by the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B). In fact, the petitioner has claimed eligibility under five of the eight evidentiary criterion set forth therein. Where an alien is simply unable to meet three of the regulatory criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B) the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(C) does not allow for the submission of comparable evidence.

Nevertheless, there is no evidence showing that the documentation the petitioner requests reevaluation of as comparable evidence constitutes achievements and recognition consistent with sustained national or international acclaim at the very top of the field of pathology informatics. The beneficiary's contributions to

the petitioning university and medical school may indeed be considered to be of value, but there is no evidence that he has been recognized for such contributions beyond the confines of the petitioning organization, such that his accomplishments have earned him national or international acclaim.

C. Final Merits Determination

In accordance with the *Kazarian* opinion, we must next conduct a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) that the beneficiary has achieved a level of expertise indicating that he is one of that small percentage who have risen to the very top of the field of endeavor pursuant to 8 C.F.R. § 214.2(o)(3)(ii); and (2) that the beneficiary has sustained national or international acclaim and that his achievements have been recognized in the field of expertise, pursuant to 8 C.F.R. § 214.2(o)(3)(iii). See *Kazarian*, 2010 WL 725317 at *3. In the present matter, several of the deficiencies in the documentation submitted by the petitioner have already been addressed in our preceding discussion of the regulatory criteria at 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(1), (4), (5), (6), (7) and (8).

In our final merits determination, we must look at the totality of the evidence to conclude the petitioner's eligibility pursuant to section 101(a)(15)(O)(i) of the Act. In this case, the beneficiary has authored one published abstract, presented papers at two conferences, successfully undertaken internal medical information systems projects for his employer while serving as a research fellow, and won a nationally-recognized award that is available only to pathologists in training, pathology informatics fellows, and pathology informaticists who are in the early stages of their careers. The petitioner has also provided extensive testimonial evidence from experts in the field attesting to the originality and significance of the beneficiary's work to date. However, the beneficiary's accomplishments fall far short of establishing that he "is one of that small percentage who have risen to the very top of the field of endeavor" and that he "has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." See 8 C.F.R. § 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i), and 8 C.F.R. § 214.2(o)(3)(iii).

The regulation at 8 C.F.R. § 214.2(o)(3)(iii) provides that the petitioner "must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise." The petitioner's evidence must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B) therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 214.2(o)(3)(ii).

The petitioner has established that the beneficiary received [REDACTED] which was presented at the 2008 APIII conference. As discussed above, the president of the awarding organization indicates that this award, while nationally recognized in the beneficiary's field, "recognizes superior achievements by: pathologists in training, pathology fellows and practicing pathology informaticists in the initial phases of their career." We

cannot conclude that an award won by the beneficiary in an age-restricted competition or from a pool of candidates limited to scientists in training or in the early stages of their career indicates that he "is one of that small percentage who have risen to the very top of the field of endeavor." See 8 C.F.R. § 214.2(o)(3)(ii). USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Commr. 1994); 56 Fed. Reg. at 60899.² Likewise, it does not follow that a researcher who has had success in an awards process restricted to young scientists and scientists in training should necessarily qualify for an extraordinary ability nonimmigrant visa in the sciences. To find otherwise would contravene the regulatory requirement at 8 C.F.R. § 214.2(o)(3)(ii) that this visa category be reserved for "that small percentage of individuals that have risen to the very top of their field of endeavor."

The beneficiary's original research, as discussed at length above, does not appear to rise to the level of contributions of "major significance" in the field pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(B)(5). Furthermore, even if we determined that the petitioner's evidence satisfied this criterion, the petitioner would still not meet its burden of establishing the beneficiary's eligibility under at least three of the evidentiary criteria at 8 C.F.R. § 214.2(o)(3)(iii)(B). The testimonial evidence in the record suggests that the beneficiary's work in devising algorithmic solutions to lexical and image analysis problems in his field, while considered novel or even groundbreaking in the field, have not had a major or significant impact on the field as of the date the petition was filed. Dr. Friedman noted that the beneficiary's "pilot work in both of these fields cuts new ground and truly opens up the possibility of entirely new modality practice settings, made possible by his very technology and inventive genius." Similarly, ██████████ stated that the beneficiary "holds great potential to further the field of Pathology Informatics in several key areas including image-based query and natural language text analysis." Assertions that the beneficiary's work is likely to be influential or has the potential to be of major significance are not adequate to establish that his findings are already recognized as major contributions in the field. The lack of supporting documentary evidence gives the AAO no basis to gauge the significance of the petitioner's present contributions.

² While we acknowledge that a district court's decision is not binding precedent, we note that in *Matter of Racine*, 1995 WL 153319 at *4 (N.D. Ill. Feb. 16, 1995), the court stated:

[T]he plain reading of the statute suggests that the appropriate field of comparison is not a comparison of Racine's ability with that of all the hockey players at all levels of play; but rather, Racine's ability as a professional hockey player within the NHL. This interpretation is consistent with at least one other court in this district, *Grimson v. INS*, No. 93 C 3354, (N.D. Ill. September 9, 1993), and the definition of the term 8 C.F.R. § 204.5(h)(2), and the discussion set forth in the preamble at 56 Fed. Reg. 60898-99.

Although the present case arose within the jurisdiction of another federal judicial district and circuit, the court's reasoning indicates that USCIS' interpretation of the regulation at 8 C.F.R. § 204.5(h)(2) is reasonable. The definition of the terms "extraordinary ability" at 8 C.F.R. § 204.5(h)(2) is identical to the definition at 8 C.F.R. § 214.2(o)(3)(ii).

In addition, given the descriptions in terms of "pilot work," future applicability, and results that may occur at a later date, it appears that the beneficiary's work, while original, is still ongoing and that the findings he has made are not currently being implemented in his field outside of the petitioner's laboratories and those of its collaborators. Again, the letters do not indicate that the beneficiary's work is being currently applied so as to establish that his findings have already impacted the field in a significant manner. While we do not dispute the originality of the beneficiary's research and findings, as well as the fact that experts in the field have taken notice of the potential of his work, the actual present impact of the beneficiary's work has not been established. A petitioner cannot file a petition under this classification based on the expectation of future eligibility. The assertion that the petitioner's research results are likely to be influential is not adequate to establish that his findings are already recognized as major contributions in the field within the meaning of 8 C.F.R. § 214.2(o)(3)(iii)(B)(5). The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r. 1971).

We acknowledge that the petitioner has published one abstract in his capacity as a pathology informatics fellow with the petitioning university. We agree with the director's determination that a single published abstract does not satisfy the plain language of the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B)(6). The petitioner has not contested this finding. Publication of one abstract does not constitute extensive documentation of sustained acclaim through publication of scholarly articles. That said, we acknowledge the very positive response in the field to the petitioner's research that he co-authored with his supervisor, [REDACTED], and the positive response to his conference presentations. We are not persuaded, however, that the medical community's reaction to the beneficiary's contributions rises to the level of sustained national or international acclaim in his field. All of the beneficiary's notable work was published or presented in the year and a half to two years preceding the filing of the petition, and no citation history has been provided. While there is evidence of significant interest in the beneficiary's work in the form of testimonial evidence from experts in the scientific and medical communities, it would be premature to conclude that the beneficiary, as of April 2010, was widely recognized as having sustained national or international acclaim in the field.

As discussed above, the petitioner has not established that the beneficiary's employment as a pathology informatics fellow satisfies the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(7). The AAO cannot conclude that appointment to a fellowship is an academic role reserved for professionals who are at the very top of their field. The AAO acknowledges that the petitioner's rationale for seeking to employ the beneficiary is readily apparent, and is based both on his talent and potential, outstanding performance during his fellowship, and a shortage of qualified individuals in his field. However, unlike recruiting and hiring decisions, eligibility for this visa classification is not based on a beneficiary's having specific professional competencies, however unusual or in-demand they may be, but rather hinges on the beneficiary's sustained national or international acclaim and recognition in the field. The context is much broader than an evaluation for suitability for a particular position.

Notwithstanding the numerous opinions in the record, the fact remains that the evidence consists almost entirely of testimonial evidence. In order to establish eligibility for extraordinary ability classification, the statute requires

evidence of the alien's "sustained national or international acclaim" and evidence that the alien's achievements have been recognized in the field of endeavor through "extensive documentation." Section 101(a)(15)(O)(i) of the Act.

As discussed above, the favorable opinions of experts in the field, while not without evidentiary weight, are not a solid basis for a successful extraordinary ability claim.³ Unusual in its specificity, section 101(a)(15)(O)(i) of the Act clearly requires "extensive documentation" of the alien's achievements. Again, USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. at 795. However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.*

Ultimately, the evidence in the aggregate does not distinguish the beneficiary as one of the small percentage who have risen to the very top of the field of endeavor. The beneficiary is a research fellow who began his training in pathology informatics less than two years before the petition was filed. The petitioner relies primarily on the beneficiary's Junior Investigator's Award, his very limited publication record, the praise of experts in his field, and the affirmation of his colleagues that he is important to the university and department where he now works in an inherently subordinate position. While the petitioner need not demonstrate that there is no one more accomplished than the beneficiary in order to establish that he is qualified for the classification sought, it appears likely that the very top of the beneficiary's field of endeavor is well above the level he has attained. The petitioner has not established that the beneficiary's achievements at the time of filing the petition were commensurate with sustained national or international acclaim in the pathology informatics field, or that he is among the small percentage at the very top of the field of endeavor.

III. Conclusion

Review of the record does not establish that the beneficiary has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage

³ Letters may generally be divided into two types of testimonial evidence: expert opinion evidence and written testimonial evidence. Opinion testimony is based on one's well-qualified belief or idea, rather than direct knowledge of the facts at issue. *Blacks Law Dictionary* 1515 (8th Ed. 2007) (defining "opinion testimony"). Written testimonial evidence, on the other hand, is testimony about whether something occurred or did not occur, based on the witness' direct personal knowledge. *Id.* (defining "written testimony"); *see also id.* at 1514 (defining "affirmative testimony").

Depending on the specificity, detail, or credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. 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).

at the very top of his field. The evidence is not persuasive that the beneficiary's achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 101(a)(15)(O)(i) of the Act and the petition may not be approved.

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.

ORDER: The appeal is dismissed.