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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

D8.

[Redacted]

FILE: [Redacted]

Office: [Redacted]

Date: **AUG 11 2010**

IN RE: Petitioner: [Redacted]
 Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the 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 \$585. 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,

[Redacted]

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, an Internet software development company, 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), as an alien of extraordinary ability in the field of science. The petitioner seeks to employ the beneficiary as a senior software architect for a period of three years.

On July 21, 2009, the director denied the petition concluding that the petitioner failed to establish that the beneficiary has received "sustained national or international acclaim" or to demonstrate that he is one of the small percentage who has risen to the very top of his field of endeavor. Specifically, the director determined that the evidence submitted did not satisfy the criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(A) or at least three of the eight criteria set forth at 8 C.F.R. § 214.2(o)(3)(iii)(B).

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director erred in determining that the evidence submitted failed to satisfy the evidentiary criterion at 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(6), (7) and (8). Counsel 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 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 [redacted] aliens in the fields of business, education, athletics, and the sciences are extremely high. The [redacted] classification should be reserved only for those aliens who have reached the very top of their occupation or profession. The [redacted] classification is substantially higher than the old [redacted] prominent standard. Officers involved in the adjudication of these petitions should not "water down" the classification by approving [redacted] petitions for prominent aliens.

Memorandum, [redacted] 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 [redacted] 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 recently set forth in a 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 [REDACTED] 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."

Although the director's decision pre-dates the [REDACTED], AAO finds the [REDACTED]'s two part approach to be appropriate for evaluating the regulatory criteria set forth for O-1 nonimmigrant petitions for aliens of extraordinary ability at 8 C.F.R. § 214.2(o)(3)(iii), (iv) and (v). Therefore, in reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. 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 China. The beneficiary holds a Ph.D. in Computer Science from the University of California at Los Angeles that was conferred in 1997. The beneficiary also holds a Master of Science in Computer Science from the University of Louisville (1993), and a Bachelor's degree in Electrical Engineering from [REDACTED] in China (1991).

In this case, the petitioner seeks classification of the beneficiary as an alien with extraordinary ability in the sciences, specifically in computer science. The petitioning company was formed in January 2008 and states that it is "creating a unique interactive site for on-line shopping," focusing on price comparison of bundled products through its patent-pending search engine and related core technologies.

The petitioner initially submitted a job offer for the beneficiary and comparative salary information, the beneficiary's résumé, the beneficiary's publications and conference presentations, evidence of citations to the beneficiary's major work, information regarding the petitioner, evidence related to the beneficiary's patents and patent applications, the beneficiary's educational diplomas, and a reference letter. In response to a Request for Evidence ("RFE") dated May 27, 2009, the petitioner submitted two supplemental letters and other background information regarding the significance of the beneficiary's publications and conference presentations.

On July 21, 2009, the director denied the petition, finding that the beneficiary meets only two of the eight regulatory criteria for establishing sustained national or international acclaim at 8 C.F.R. § 214.2(o)(3)(iii)(B). On appeal, counsel contends that the beneficiary meets at least three additional criteria, specifically, 8 C.F.R. §§ 214.2(o)(3)(iii)(B)(6), (7), and (8).

After careful review of the record, it must be concluded that the petitioner has failed to overcome the grounds for denial. The extraordinary ability provisions of this visa classification are intended to be highly restrictive. In order to establish eligibility for extraordinary ability, the statute requires evidence of "sustained" national or international acclaim and evidence that the alien's achievements have been recognized in the field of endeavor through "extensive documentation." The petitioner has not established that the beneficiary's abilities have been so recognized.

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

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

To meet the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1), the petitioner must submit evidence that the beneficiary has received nationally or internationally recognized prizes or awards for excellence in the field.

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

At the time of filing the petitioner claimed that the beneficiary meets this criterion based on three granted U.S. patents. In the RFE, the director advised the petitioner that patents are not considered national or international prizes or awards and cannot be used to satisfy this criterion. The AAO agrees with the director, and the petitioner does not contest the director's finding that the beneficiary's patents do not satisfy the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(1). The beneficiary's patents will be considered under the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(6) and in the final merits determination.

2. *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*

In general, in order for published material to meet this criterion, it must be primarily "about" the beneficiary and, as stated in the regulations, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.²

The director concluded that the petitioner submitted evidence that meets this criterion. The AAO disagrees and will withdraw the director's finding. As noted above, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)

The petitioner did not initially claim that the beneficiary meets this criterion. In response to the RFE, the petitioner claimed eligibility under this criterion based on "numerous and continuous citations" to the beneficiary's co-written article, "[REDACTED]" which was published in the journal *Autonomous Robots* in 1997. The petitioner's claims are supported by documentary evidence of the number of citations to this work. Regarding the scientific articles that merely reference the petitioner's published work, we note that the plain language of this regulatory criterion requires that the published material be "about the alien." The submitted citations to the beneficiary's work do not discuss the merits of his work, his standing in the field, any significant impact that his work has had on the field, or any other aspects of his work so as to be considered published material *about* the beneficiary as required by this criterion. Instead, these citations are more relevant to the regulatory criteria at 8 C.F.R. §§ 214.2(o)(3)(iii)(5) and (6) and the final merits determination, and thus will be addressed further below.

In light of the above, while the citation evidence is relevant as to the significance of the beneficiary's scholarly articles and contributions in the field of publication, it does not meet the plain language requirements for qualifying evidence under 8 C.F.R. § 214.2(o)(3)(iii)(3). Accordingly, the petitioner has not established that the beneficiary meets this criterion.

² Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

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

At the time of filing, the petitioner submitted evidence that the beneficiary has been granted two U.S. patents in support of its claim that the beneficiary meets the criterion for having made original scholarly contributions of major significance in the field, pursuant to 8 C.F.R. § 214.2(o)(3)(iii)(B)(5). The petitioner has also submitted a total of four recommendation letters from prior employers which further address the significance of the beneficiary's work. In addition, as discussed above, the citation evidence pertaining to the beneficiary's published scholarly articles may be considered under this criterion.

With respect to the beneficiary's patents, the petitioner submitted Issue Notifications for the following inventions: *Method and Apparatus for Entity Search* (U.S. Patent number 7483894, issued January 27, 2009), and *Method and Apparatus for Awareness of Geography and Languages* (U.S. Patent number 7523108, issued April 21, 2009). The petitioner also submitted a Notice of Allowance and Fee(s) Due for the invention *Method and Apparatus for Freshness and Completeness of Information*, and noted that a patent number is expected in the second quarter of 2009.³ The petitioner provided receipts for four additional U.S. patent applications submitted by the beneficiary and currently pending, and a patent application submitted to the World Intellectual Property Organization.

The director determined that the petitioner met this requirement based on the evidence related to the beneficiary's patents alone, and did not further discuss this criterion. The AAO disagrees with the director's conclusion that the beneficiary's receipt of patents is sufficient to establish that the beneficiary has made an original contribution of major significance in the field. The grant of a patent demonstrates only that an invention is original. This office has previously stated that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 n. 7, (Commr. 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.*

The petitioner initially submitted a letter from [REDACTED] of Boundless Flight, Inc., in support of this requirement. [REDACTED] stated that he met the beneficiary through one of his former students in 2004, and later worked with him on "a joint project in which [the beneficiary] played a leadership role for several months." [REDACTED] further states:

Throughout most of 2006, [the beneficiary] and his friends tried to apply search technology to transportation and logistics. The opportunity was a multi-billion dollar one, the technology made sense and the team was strong. I was invited to be on the advisory board of this startup. The board was very enthusiastic and active so I flew to Los Angeles many times to attend meetings and work with [the beneficiary] on the strategy and architecture of the product

³ This notice clearly states it is "not a grant of patent rights," although the application was examined and is allowed for issuance as a patent.

being developed. [The beneficiary's] expertise and his enthusiastic leadership keep [sic] the team focused and driven that entire year.

In April 2006, [the beneficiary] and his leadership team came to Cleveland at my invitation and presented this new technology to [redacted], the renowned [redacted] of InformationWeek magazine. [redacted] was significantly impressed by the technology and agreed with the business vision of the team. The venture attracted significant attention in the industry and was very close to being funded with \$5 million but it fell short in late 2006 due to circumstances outside the control of [the beneficiary] and his team.

Since late 2007, I have had the pleasure of working with [the beneficiary] again, this time as an advisory board member of [the petitioning company]. The technology developed by [the petitioner] under [the beneficiary's] guidance is some of the most progressive search engine technology in the world. Several applications have already been developed which are generating revenue and which can be expanded to significant international audiences. [The petitioner] has received significant funding well beyond anything experienced during the effort in 2006.

[redacted] further states that the beneficiary "is on a successful path as a world-class innovator and entrepreneur," and indicates that he appreciates the beneficiary's "expertise, tenacious work ethic and growth as a person of extraordinary talent."

In a second letter dated [redacted] reiterates that the beneficiary's "recent effort has been in applying search technology to specific industry domains such as transportation, logistics and online shopping." He notes that the beneficiary's "vision and efforts have attracted the active support and investment," of prominent individuals. [redacted] further states that the beneficiary's "vision is now being fulfilled at [the petitioning company]," and without the beneficiary's patented inventions, the petitioning company would not have been formed.

[redacted] speaks highly of the beneficiary's work in the Internet search technologies field as progressive, innovative, and attractive to investors and entrepreneurs, he offers no support for a finding that the beneficiary's work has been recognized beyond the scope of his current and former employers, and their circle of investors, such that it equates to an original contribution of major significance in the field.

The petitioner has also submitted a letter from [redacted] candidate at Rutgers University and former co-worker of the beneficiary. While the letter from [redacted] was submitted primarily to establish that the beneficiary was employed in a critical or essential capacity by [redacted] commented that he was aware of the beneficiary's recent U.S. patent applications, noting that he "especially liked the one invention making sites auction in order to display their information the first on a search engine." He further states that "current engines have no capacity of this sort," and that "search engine companies should hurry and buy this product."

While [REDACTED] acknowledges the beneficiary's expertise in Internet search technologies, his statements that he personally "likes" the beneficiary's invention, and considers it to be an original search engine with promising commercial and investment value, do not lead us to a determination that the beneficiary has already made an original contribution of major significance in the field based on the recently patented technology.

A petitioner cannot file a petition under this classification based on the expectation of future eligibility. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Rather than providing specific examples of how the beneficiary's work has already had a significant impact in the field, both [REDACTED] and [REDACTED] suggest that the beneficiary's inventions in the Internet search technology field have not been fully implemented and remain at the start-up stage. In short, they speak to the possibilities of the beneficiary's invented technologies rather than any tangible present application in the field. There is no evidence showing that the beneficiary's patented technologies have been successfully marketed, or otherwise had a significant national or international impact in the industry such that it equates to an original contribution of major significance in his field. The petitioner indicated on Form I-129 that it has one employee and no gross or net annual income. While the petitioning company may indeed be built around technology that was primarily developed by the beneficiary, the petitioner must establish that the beneficiary's technology has had an influence beyond serving as the impetus for the formation of a start-up company and attraction of investors.

Finally, the petitioner submits on appeal a letter from [REDACTED] Senior [REDACTED] of Ask.com [REDACTED]. [REDACTED] letter was also submitted primarily to establish that the beneficiary was employed by this organization in a critical or essential role. However, he spoke more generally of the beneficiary's experience in the field of search technologies as follows:

[The beneficiary] possesses extraordinary skills in search technologies that are possessed by the small percentage of software engineers who have arisen to the very top of their field. I personally recruited [the beneficiary] because he has a great deal of knowledge about cutting-edge search technologies. He had performed extensive prior research and had written several influential scholarly articles about the innovative ways to apply search technologies. His prior research in the field gave him a firm understanding of our company's products and how they could be applied to future algorithmic search engine capabilities.

[REDACTED] speaks in general terms regarding the beneficiary's influential scholarly articles and innovative approach to search technologies, but does not identify the beneficiary's original contribution to the field.

According to the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B)(5), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. While the evidence indicates that the beneficiary performed admirably on the projects to which he was assigned and is considered an innovator by those with whom he has worked, the submitted documentation does not establish that he has made original scientific contributions of "major

significance" in his field. For example, the record does not indicate the extent to which his work has impacted others in his field, nor does it show that the field has significantly changed as a result of his work.

Therefore, in this case, the letters of recommendation submitted by the petitioner are not sufficient to meet this regulatory criterion. We note that the submitted letters are all from individuals with whom the beneficiary has worked. While such letters are important in providing details about the beneficiary's role in various projects, they cannot by themselves establish his acclaim beyond his immediate circle of professional contacts. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. Thus, the content of the writers' 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 of original contributions of major significance that one would expect of a software architect who has sustained national or international acclaim. Without evidence showing that the beneficiary's work has been unusually influential, highly acclaimed throughout his field, or has otherwise risen to the level of contributions of major significance, we cannot conclude that he meets this criterion based on his patents in the field of Internet search technologies or prior work in the field.

Although not specifically submitted in support of this criterion, the petitioner also provides evidence that the beneficiary's article, "[REDACTED] Antecedents and Directions," published in *Autonomous Robots*, has been cited frequently and continuously since its publication in 1997. Counsel states that the paper is "a milestone paper in the important and active field of cooperative mobile robotics," which has been cited to hundreds of times over the last decade by other researchers in the field of artificial intelligence, as well as by researchers in other fields including physics and health science.

The AAO finds that the beneficiary's published article fails to meet this criterion. While the petitioner has provided citation evidence from sources such as Google Scholar and ISI Web of Science, the record contains no supporting testimonial evidence or other documentary evidence regarding the article and its influence in the field, and thus no explanation as to how it constitutes an original contribution of major significance in the field. The citation history is solid evidence that other researchers are familiar with the beneficiary's published article, but, without more, this documentation is insufficient to establish that the beneficiary meets this requirement.

Without additional, specific evidence showing that the beneficiary's work has been influential, highly acclaimed throughout his field, or has otherwise risen to the level of contributions of major significance, we cannot conclude that he meets this criterion.

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

The director acknowledged that the beneficiary presented papers at three conferences between 1992 and 1995, and published the above-referenced scholarly article in *Autonomous Robotics* in 1997. The director determined that the petitioner did not submit evidence to meet this criterion. The director excluded the beneficiary's conference presentations from consideration, and determined that the beneficiary's publication of a single article written 12 years prior to the filing of the petition "is insufficient to establish sustained international recognition."

On appeal, counsel asserts that the director erred by requiring the beneficiary's article to have been recently published, emphasizing that the petitioner provided evidence that the article has been cited to since its publication in 1997, and as recently as 2008. Counsel further states that the director failed to review an additional publication, "Integrating a Priori Information in [REDACTED]" which was published in 1992 in the journal *Proc. SPIE*. In addition, the petitioner submits evidence on appeal to establish that the beneficiary's conference presentation "[REDACTED]" a virtual reality project exhibited at the 1999 SIGGRAPH conference, was subsequently published.

Upon review, the AAO agrees with counsel that, for purposes of satisfying the plain language of the regulatory criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(6), the petitioner must only establish that the beneficiary has published scholarly articles in his field. The weight to be given to the beneficiary's body of published work, and an analysis as to whether that body of published work is indicative of sustained acclaim, should be considered in a final merits determination.

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

The petitioner claims that the beneficiary has been employed by both the petitioning company and by [REDACTED] in a critical or essential capacity.⁴ In support of the first claim, [REDACTED] asserts that the beneficiary is critical to the success of the petitioning company because he has been granted three U.S. patents and filed six additional patent applications, that underpin the company, and that without his work, the company would not have been funded.

The director determined that the petitioner did not submit any evidence to establish that the petitioning company has a distinguished reputation, noting that the fact that it attracted notable investors as a start-up company in a weak economic environment is insufficient to support such a finding. The director noted that "a company which enjoys a distinguished reputation can easily provide articles in major media about the company indicating a

⁴ [REDACTED] classification petition filed by Platformation Technologies, LLC, presumably an affiliate or predecessor of the petitioner, which was valid from October 2007 until April 2008.

distinguished reputation." The AAO concurs with the director, and notes that the petitioner has not contested this finding on appeal. While the beneficiary's services appear to be critical to the petitioning company based on his research and inventions in the Internet search and e-commerce field, the petitioner also indicates that it presently has one employee and no income, and has not been able to establish the company's distinguished reputation given its current stage of development.

The director noted that [REDACTED] does have a distinguished reputation and considered the testimonial letter provided by [REDACTED]. In his letter dated July 1, 2009, [REDACTED] stated that the beneficiary joined the company when it was in the process of developing the second version of its search engine, the version which ultimately enabled the company to be competitive with Google. He indicated that the beneficiary "played an essential role in implementing and optimizing a critical component of the new version," specifically in the areas of internationalization, large-scale operations, and artificial intelligence.

The director found that [REDACTED] letter was lacking in specific details regarding the beneficiary's role with Ask Jeeves, and further noted that it was unclear that [REDACTED] as a former co-worker of the beneficiary, was in a position to make statements on behalf of the entire company regarding the beneficiary's contribution.

On appeal, the petitioner submits the above-referenced letter from [REDACTED] to meet this criterion. [REDACTED] states that he was the beneficiary's direct supervisor during the beneficiary's tenure with the company as a senior software engineer. As noted above, [REDACTED] discusses in some detail the beneficiary's expertise in search engine technologies, and states that the beneficiary's services as a senior software engineer were "essential and critical" to the company. He states that "although many people made it possible for our company's search engine to compete against search giants such as Google, [the beneficiary's] role was essential and extremely critical to our company's successes." [REDACTED] states that the beneficiary was hired at a time when the company needed to expand its capabilities in foreign languages, "related searches," and large-scale operations, and that the beneficiary had the knowledge and skills necessary to contribute to these developments.

Upon review, the petitioner has not established that the beneficiary was employed in a critical or essential capacity with [REDACTED]. [REDACTED] has provided a more detailed letter than that provided by [REDACTED] the essential and critical nature of the beneficiary's role of senior software engineer has not been adequately explained. Rather, [REDACTED] explains why he believes the beneficiary's knowledge is superior compared to other software engineers. The record shows that the beneficiary joined [REDACTED] when the company was already in the middle of developing the second version of its search engine software, and [REDACTED] acknowledges that many people were involved in its development. Although [REDACTED] stated that the beneficiary possesses extensive expertise in the field and repeats the regulatory language by indicating that the beneficiary's services were "essential and critical," it is not clear how his duties and contributions would have set him apart from any other software engineer working on the same product, let alone from more senior technical personnel and managers who had been involved in all stages of developing the company's search technology. It is reasonable to believe that a company whose primary purpose is to develop and continuously improve an Internet search engine would require all of its software engineers to have expertise in this field and to perform work on the cutting edge of the

technology. Although the beneficiary's title was "senior" software engineer, it has not been established that he had a leading role or a senior role within the company as a whole.

The letters submitted do not establish that the beneficiary was responsible for the success or standing of [REDACTED] to a degree consistent with the meaning of "essential or critical capacity." The scope of this evidentiary criterion focuses on the beneficiary and the relative importance of his position within the scope of the organizations that have employed him. Therefore, we concur with the director that the beneficiary's employment as a senior software engineer, while of great value to his prior employer, is not considered employment in a "critical or essential capacity" as would be the position of a chief scientist or department head within the company.

Based on the foregoing discussion, the petitioner has not submitted evidence that satisfies the plain language of the criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(7).

6. *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 petitioner stated on Form I-129, Petition for a Nonimmigrant Worker, that the beneficiary will work 12 hours per week, but did not complete the information requested regarding his wages. Where asked to indicate his "other compensation," the petitioner stated that the beneficiary will receive "standard benefits."

The petitioner also provided a copy of its job offer letter to the beneficiary dated May 1, 2009, in which the petitioner stated that the beneficiary would be expected to work 12 hours per week at a salary of [REDACTED] per hour. The petitioner submitted wage data from the Foreign Labor Certification Data Center's "Online Wage Library" showing the median wages of [REDACTED] in the Los Angeles-Long Beach-Glendale, California region. For example, the Level 4 wage (fully competent) for Computer Specialists in this region was \$41.39 per hour. Counsel stated in her letter dated May 18, 2009 that this evidence shows that the beneficiary's offered salary "is the highest level for the job position." However, the petitioner must submit evidence showing that the beneficiary's salary places him among that small percentage at the very top of the field rather than simply in the top half on a regional basis. Thus, median regional wage statistics are not an appropriate basis for comparison in determining "significantly high" earnings in relation to others in the field.

In the RFE issued on May 27, 2009, the director observed that the initial evidence showed that the beneficiary would receive "a standard pay for someone in his field," and advised that additional evidence would be necessary to establish that the beneficiary will command a high salary.

In response, the petitioner submitted the above-referenced letter dated July 6, 2009 from [REDACTED] [REDACTED] is the CEO of the apparently unaffiliated company, Boundless Flight, Inc. and stated in his prior letter that he is an advisory board member of the petitioning company. [REDACTED] stated, in pertinent part, the following:

[The petitioner] values [the beneficiary's] role so much that it is ready to offer him 2% of the company once his O1 gets approved. In comparison, an ordinary senior software architect would receive only 0.02%. The fact that [the beneficiary] will get 100 times the market rate for a senior [sic] software architect in non-salary compensation further indicates that he is extraordinary and invaluable to [the petitioner]. These extra stock options allow the company to conserve on cash while maintaining [the beneficiary's] intensity, focus and dedication.

The director determined that the petitioner failed to submit evidence that the beneficiary meets this criterion. The director reiterated that the beneficiary's proffered salary of \$42.00 per hour is a standard rate for an experienced professional in his field. The director acknowledged [REDACTED] but observed that the petitioner did not submit supporting evidence to indicate that the additional non-salary compensation is high compared to what would be offered to others in the field.

On appeal, counsel asserts that [REDACTED] statements as an expert "clearly support the conclusion that the petitioner submitted some evidence to indicate that the 2% stock grant is high remuneration for an individual in the beneficiary's position." Nevertheless, the petitioner submits additional evidence in support of the appeal, including a letter from its Interim CEO, who states that the company is valued at \$8.33 million, and thus the beneficiary's 2% interest is valued at [REDACTED]. The petitioner's CEO states that, based on his industry experience, a stock grant of 2% to a senior software architect is "extremely high." The petitioner also submits a Salary.com article titled "Understanding Your Options," which discusses stock option grant practices in high-tech companies. The article appears to have been written in 2001.

Upon review, the petitioner has not established that the beneficiary has commanded or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

The AAO notes that the petitioner's statements on Form I-129, counsel's initial letter, and the signed offer letter which was submitted in lieu of a contract between the petitioner and beneficiary, all indicate that the beneficiary's salary will be an hourly wage of \$42.00 and "standard benefits." If the petitioner intended as of the date of filing that the beneficiary is also going to be given stock options valued in excess of [REDACTED] it is unclear why the petitioner would not have mentioned this remuneration in its formal offer letter to the beneficiary or when setting forth its claim of eligibility in the initial filing with USCIS. The petitioner's initial claim that the beneficiary's salary will be high was based solely on his proffered hourly wage.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Here, the petitioner's claim that the beneficiary will be issued a 2% interest in the company was made only after the director advised the petitioner that the beneficiary's hourly salary does not meet the evidentiary criterion at 8 C.F.R. § 214.2(o)(3)(iii)(B)(8). Further, the initial claim that the beneficiary will receive the stock options did not come directly from the petitioner, but from the CEO of Boundless Flight, Inc., who states that he is merely an "advisory board member" of the petitioning company. Although the petitioner's interim CEO now confirms the additional

non-salary remuneration on appeal, the petitioner has not submitted an amended job offer letter or employment contract setting forth the terms of the stock option arrangement. As noted above, the petitioner's claims that the beneficiary will receive a high salary or other remuneration must be supported by contracts or other reliable evidence.

A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The record shows that the beneficiary's terms of employment at the time of filing were twelve hours of work per week at a wage of \$42 per hour, and "standard benefits." Accordingly, the petitioner has not established that the beneficiary's salary would be significantly high in relation to others in his field.

B. Final Merits Determination

Kazarian sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. However, as discussed above, the petitioner established eligibility for only one of the criteria, of which three are required under the regulation at 8 C.F.R. § 214.2(o)(3)(iii)(B).

Notwithstanding the above, a final merits determination 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 her 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 this case, we concur with the director's finding that the petitioner has not established that the beneficiary has "extraordinary ability" in the sciences, which has been demonstrated by sustained national or international acclaim, and whose achievements have been recognized in the field through extensive documentation. Section 101(a)(15)(O)(i) of the Act. The petitioner has not demonstrated that the beneficiary received a major internationally recognized award or that he meets at least three of the criteria that must be satisfied to establish the national or international acclaim necessary to qualify as an alien of extraordinary ability. 8 C.F.R. § 214.2(o)(3)(iii).

The specific 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). The petitioner submitted documentation relating to the beneficiary's achievements. Although the petitioner's evidence meets one of the eight criteria, the submitted evidence is not indicative of the beneficiary's national or international acclaim and there is no indication that his individual achievements have been so recognized in the field or that he met the overall criteria for eligibility at the time his petition was filed.

With regard to the evidence submitted for 8 C.F.R. § 214.2(o)(3)(iii)(B)(3), the evidence submitted has met the plain language of the regulation. The beneficiary's small published body of work includes one article which

has continued to receive citations from other researchers for over a decade. While the AAO acknowledges the petitioner's statement that the beneficiary's article is considered a milestone paper in the field of cooperative mobile robotics, there is no additional evidence to support a claim that this one important published work demonstrates that the beneficiary has achieved a level of expertise and recognition indicating that he is among 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). Eligibility for this classification may be established through a single achievement, but that achievement must be the receipt of a major, internationally recognized award, such as the Nobel prize. *See* 8 C.F.R. § 214.2(o)(3)(iii)(A). Eligibility cannot be established based on the citation statistics for one published article.

Furthermore, our analysis of the importance of the beneficiary's work, the originality of his contribution to the field of science, and the significance of any contributions, is determined by the quantity and quality of supporting evidence submitted. None of the experts who provided recommendation letters have stated how or whether the beneficiary's published works have influenced their own research activities, and there is no evidence that the beneficiary received any individual recognition in the field as a result of his "milestone paper" in cooperative mobile robotics. The testimonial evidence offers glowing praise of the beneficiary's more recent work and its potential impact in the Internet search technology field, however, as discussed, the beneficiary's recently patented inventions and patent-pending technologies have yet to impact the field and have not been shown to have garnered any recognition beyond those who are personally known to the beneficiary.

The AAO acknowledges that the petitioner's rationale for seeking to employ the beneficiary is readily apparent. 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 actual field. The context is much broader than an evaluation for suitability for a particular position.

The conclusion we reach by considering each evidentiary criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the beneficiary as one of the small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 214.2(o)(3)(ii). The beneficiary is undoubtedly a highly successful computer scientist who has achievements that may set him apart from typical software engineers, and who has been considered extremely valuable to employers requiring his expertise. However, 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 at the very top of his field. The evidence is not persuasive that the petitioner'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.

III. Conclusion

Nothing in the decision of the AAO should be seen as an attempt to minimize the accomplishments of the beneficiary. Indeed, as the testimonial letters suggest, the beneficiary's recently patented technologies in Internet search technology may ultimately have a significant impact in the field. This denial does not preclude the petitioner from filing a new immigrant or nonimmigrant visa petition, supported by the required evidence. As always, the burden remains with the petitioner to establish eligibility for the requested visa classification.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.