U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: AUG 25 2015

FILE #:
PETITION RECEIPT #:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Outstanding Professor or Researcher Pursuant to Section 203(b)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(B)

ON BEHALF OF PETITIONER:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner, a nanomanufacturing technology solutions company, seeks to classify the beneficiary as an outstanding researcher pursuant to section 203(b)(1)(B) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(B). According to information in Part 6, "Basic Information About the Proposed Employment," of the Form I-140, Immigrant Petition for Alien Worker (Form I-140), the petitioner seeks to employ the beneficiary in the United States as a servo control engineer. The director determined the petitioner had submitted evidence establishing that the beneficiary satisfied the categories of evidence at 8 C.F.R. § 204.5(i)(3)(i)(D), (E), and (F), but that the beneficiary had not attained the outstanding level of achievement and international recognition required for classification as an outstanding researcher.

On appeal, the petitioner submits a brief with additional documentary evidence. The petitioner asserts that the beneficiary meets three out of the six criteria at 8 C.F.R. § 204.5(i)(3)(i) and that the beneficiary is recognized internationally as outstanding in his field. As the petitioner correctly points out in its appellate brief, the standard of proof in this matter is "preponderance of the evidence."

For the reasons discussed below, we agree that the petitioner has not established his eligibility for the classification sought. Specifically, when we simply "count" the evidence submitted, the petitioner has submitted qualifying evidence for the beneficiary under at least two of the regulatory criteria as required. As explained in our final merits determination, however, the evidence that technically qualifies under these criteria reflects accomplishments in the field that does not, as of the date of filing, demonstrate that the beneficiary is recognized internationally as outstanding in his academic area. Accordingly, we will dismiss the petitioner's appeal.

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
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> * * *
>
> (B) Outstanding professors and researchers. -- An alien is described in this subparagraph if --
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> (i) the alien is recognized internationally as outstanding in a specific academic area,
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> (ii) the alien has at least 3 years of experience in teaching or research in the academic area, and

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

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

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

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

The petitioner filed the Form I-140 on May 15, 2014. The beneficiary earned Master's of Science degrees in mathematics and mechanical engineering, and a Ph.D. in mechanical engineering from . The beneficiary also earned a Bachelor of Technology degree in mechanical engineering from the in India. Therefore, the petitioner must establish that the beneficiary had at least three years of research experience in the field as of the petition's filing date, and that the beneficiary's work has been recognized internationally within the academic field as outstanding.

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

As noted by the petitioner on appeal, the petitioner submitted evidence that the beneficiary meets three of those criteria, more than the required two. The submission of evidence relating to two or more criteria does not, in and of itself, establish eligibility for this classification. *See Matter of Chawathe*, 25 I&N Dec. at 369, 376 (AAO 2010) (holding that the "truth is to be determined not by the quantity of evidence alone but by its quality" and that U.S. Citizenship and Immigration Services (USCIS) examines "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true."); *see also Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the evidence is first counted and then, if satisfying the required number of criteria, considered in the context of a final merits determination).[1] *See generally Dir., Office of Workers' Comp. Programs,*

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

Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 272-80 (1994) (explaining that the term "burden of proof" includes a burden of persuasion).

II. ANALYSIS

A. Evidentiary Criteria[2]

Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation.

The director discussed the evidence submitted for this criterion and found that the petitioner did not establish the beneficiary's eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional discussion. Therefore, the petitioner has abandoned its eligibility claims under this criterion. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, 9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). Accordingly, the petitioner has not submitted qualifying evidence under this criterion. Nevertheless, we will consider this evidence where it relates to other criteria and in the final merits determination.

Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field.

The director determined the petitioner submitted evidence that met the requirements of this criterion. The petitioner has submitted sufficient evidence, including letters from the editors of multiple journals verifying the beneficiary's peer review duties, to establish that he meets this criterion.

Evidence of the alien's original scientific or scholarly research contributions to the academic field.

The director determined the petitioner met the requirements of this criterion. The record supports that conclusion through reference letters; favorably cited articles; and patent applications, including a licensed innovation. For example, the petitioner has submitted confirmation that the beneficiary's method of overcoming limiting factors in fault tolerant control influenced another team to develop new guidelines for researchers in the academic field. Accordingly, the evidence satisfies this criterion.

[2] We have reviewed all of the evidence the petitioner has submitted and will address those criteria the petitioner claims to meet or for which the petitioner has submitted relevant and probative evidence.

Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field.

The director determined the petitioner met the requirements of this criterion. The evidence includes several of the beneficiary's scholarly articles published in internationally circulated scholarly journals in his academic field, such as the This authorship establishes that the beneficiary meets this criterion.

B. Summary

The petitioner has satisfied the antecedent regulatory requirement of at least two types of evidence. Specifically, the petitioner submitted evidence demonstrating that the beneficiary meets the criteria at 8 C.F.R. § 204.5(i)(3)(i)(D), (E), and (F).

C. Final Merits Determination

The next step is a final merits determination that considers whether the evidence is consistent with the statutory standard in this matter, being recognized internationally as outstanding in the academic area. Section 203(b)(1)(B)(i) of the Act. In addition, the controlling purpose of the regulation at 8 C.F.R. § 204.5(i)(3)(i) is to establish that the researcher is recognized internationally as outstanding in the academic field, and any evidence that meets the preceding categories of evidence must therefore be commensurate with international recognition.

Within the appeal brief, counsel cites to *Buletini v. INS,* 860 F. Supp. 1222 (E.D. Mich. 1994), indicating that the director imposed requirements not found in the statutory language by requiring the petitioner to demonstrate the beneficiary's eligibility within a final merits analysis. In contrast to the broad precedential authority of the case law of a United States circuit court (such as with *Kazarian*), we are not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before us; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. Regardless, the court in *Buletini* did not reject the concept of evaluating the quality of the evidence presented. Specifically, the court in *Buletini* acknowledged that "the examiner must evaluate the quality, including the credibility, of the evidence presented to determine if it, in fact, satisfies the criteria." *Buletini*, 860 F. Supp. at 1234. The court continued that a petitioner establishes eligibility through meeting three criteria "unless the INS sets forth specific and substantiated reasons" for finding otherwise. *Id.* Accordingly, the *Buletini* court recognized that meeting the necessary number of criteria does not always establish eligibility.

The evidence relating to the published material criterion at 8 C.F.R. § 204.5(i)(3)(i)(C) is not indicative of the petitioner's international recognition as outstanding. The documentation consists of reports of recent advances on which the beneficiary worked, some of which mention the beneficiary by name. The petitioner did not document the significance of the websites. Moreover, several of the web postings are identical, consistent with a promotional press release. While a press release can result in

international exposure, it does not, by itself, demonstrate that the beneficiary is internationally recognized as outstanding.

With regard to the beneficiary's experience as a judge, pursuant to 8 C.F.R. § 204.5(i)(3)(i)(D), in the final merits determination, the nature of the beneficiary's judging experience is a relevant consideration. *See Kazarian*, 596 F. 3d at 1122.[3] The beneficiary has evaluated the work of others for journals that have varying impact factor rankings in the academic field. The beneficiary has performed such duties for eleven journals reviewing almost 20 articles. He also performed peer review duties for four conferences and was selected to serve as an associate editor for a smaller group within a scientific conference.

Scientific and engineering journals are peer-reviewed and rely on many scientists to consider submitted articles. Normally a journal's editorial staff will enlist the assistance of numerous professionals in the field who agree to evaluate submitted papers. Thus, peer review is routine in the field and not every researcher who performs these services enjoys international recognition. Within the appeal brief, counsel asserts the beneficiary has served as an associate editor for six conferences. The unsupported statements of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984). The record lacks evidence that, as of the date of filing, the beneficiary had served as an associate editor for a conference. Rather, it contains a letter dated February 26, 2014 from Chair of the Editorial Board for Dynamic Systems and Control Division, indicating that the beneficiary has been selected to serve as associate editor, and that after his service, the beneficiary will have served in this position on six occasions. While selection to an associate editorial position is notable, this single example of selection to serve as one of an unknown number of associate editors for a conference in the United States is not indicative of international recognition as outstanding.

The petitioner submitted evidence that the beneficiary has authored several scholarly articles pursuant to the criterion at 8 C.F.R. § 204.5(i)(3)(i)(F). The appellate brief discusses the prestige of the journals that published some of the beneficiary's articles and also indicates that some of the beneficiary's published works were cited at a rate of 250 and 300 percent more than other "papers of the same year, published in the same journal and of the same article type." The petitioner arrives at this figure by selecting four of the beneficiary's articles, and comparing the number of cites each garnered to the number of cites to other selected articles. The petitioner has not established that comparing the beneficiary's articles with a small number of selected articles published the same year is a meaningful comparison. Rather, a more probative comparison would involve a larger pool of articles. The petitioner did provide average citation rates per year, which demonstrate that a small number of the

[3] The regulation at issue in *Kazarian*, 8 C.F.R. § 204.5(h)(3)(iv), is comparable to the regulation at 8 C.F.R. § 204.5(i)(3)(i)(D). As mentioned previously, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. *Kazarian*, 596 F. 3d at 1119-20. *See also Rijal v. USCIS*, 772 F.Supp.2d 1339 (W.D. Wash. 2011) (affirming USCIS' proper application of *Kazarian*), *aff'd*, 683 F.3d. 1030 (9th Cir. 2012); *Visinscaia v. Beers*, 4 F.Supp.3d 126, 131-32 (D.D.C. 2013) (finding that USCIS appropriately applied the two-step review).

beneficiary's recent articles have garnered higher than average citation rates for recent articles. Authorship of a few moderately cited articles that exceed the average for recent articles is not indicative of international recognition as outstanding.[4] Moreover, it does not necessarily follow that, because other articles that have garnered hundreds of citations over a longer period of time show only a small number of citations in the first two years, the petitioner's articles will follow a similar trajectory.

The reference letters submitted under 8 C.F.R. § 204.5(i)(3)(i)(E) describe the beneficiary's original contributions such that he meets that criterion. The level at which his contributions have impacted the academic field, however, is a relevant factor as to whether he "is recognized internationally as outstanding in a specific academic area." *See* section 203(b)(1)(B) of the Act. While some of his published works appear in journals with a high impact factor, the academic field's reaction to the beneficiary's work must be indicative of an impact in the academic field at a level commensurate with being internationally recognized as outstanding. That a publication bears a high impact factor is reflective of the average citation rate of each article within a publication. It does not however, demonstrate the influence of any particular article in that journal. Although the record shows that others in the petitioner's field have cited to his work favorably and found it useful, the limited number of citations for any given article is not indicative of contributions that have garnered the beneficiary international recognition as outstanding.

The petitioner is a listed inventor on three patent applications.[5] While a patent is indicative of the originality of the work, we evaluate the significance of a patent on a case-by-case basis. Dr. the Engineering Director of the assignee of the petitioner's patents, confirms that the beneficiary's innovations helped the company improve the quality of its products, but does not assert a wider impact in the field. The petitioner did not submit evidence that these products are now considered the standard to which others aspire or comparable evidence of the impact of the beneficiary's innovations.

Dr. a professor at discusses the beneficiary's innovation with cervical spine simulator implants. Dr. asserts the work benefitted the university as well as playing a critical role in the standardization of test protocols for similar implants. Dr. Vice President, confirms that the university licensed the patent to

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[4] When discussing the beneficiary's citations in response to the director's notice of intent to deny, the petitioner asserted that the beneficiary's publication record "far exceeds the achievements of his peers," Dr. Editor for asserts that he is "one of the ISI highly cited scientists" in his letter confirming that the beneficiary served as a peer reviewer. The record does not establish the number of citations that qualify a researcher as a highly cited scientist, which might support the petitioner's assertion.

[5] According to the Department of Labor's Occupational Outlook Handbook, http://www.bls.gov/ooh/architecture-and-engineering/mechanical-engineers.htm#tab-2, mechanical engineers typically do the following:

- Analyze problems to see how mechanical and thermal devices might help solve the problem
- Design or redesign mechanical and thermal devices using analysis and computer-aided design
- Develop and test prototypes of devices they design
- Analyze the test results and change the design as needed
- Oversee the manufacturing process for the device

an industrial partner, for which the beneficiary received royalties. While this evidence demonstrates that the beneficiary worked on a useful, marketable product, the beneficiary's impacts must go beyond a university and the patent licensee. The record, however, lacks probative, corroborating evidence, such as media coverage or a compendium of test protocols crediting the beneficiary, demonstrating an impact on the academic field as a whole. Rather, the record contains website postings that are consistent with promotional press releases.

Dr. a Professor at the discusses the beneficiary's influence on his own work and notes that he has cited the beneficiary's work. The list of citations confirms that Dr. cited one of the beneficiary's articles in one of his own articles, and cited another of the beneficiary's articles four times. Dr. explains that that his own results using the beneficiary's designs "serve as guidelines for researchers worldwide and set a much higher standard for achievable performance." While this letter and the supporting citations confirm that Dr. has found the beneficiary's work useful in producing his own valuable results and is a contribution to the field, it does not establish the beneficiary's impact at a level consistent with international recognition as outstanding.

The record does contain letters from outside the United States. For example, Dr. Dean of the College of Automation Engineering at asserts that the beneficiary's work "benefitted" Dr. work. Dr. does not, however, elaborate on the importance of the beneficiary's work to his own work.

Other reference letters indicate that the beneficiary's work has impacted the field, but lack specifics relating to the extent of the impact, and the record lacks corroborating evidence of the assertions within the letters. 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 the petitioner'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 petitioner's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact" but rather is admissible only if it will assist the trier of fact to understand the evidence or to determine a fact in issue). Although the beneficiary's original findings have contributed to the field, they have not done so to the degree that he is internationally recognized as outstanding in the academic field.

In light of the above, our final merits determination reveals that the beneficiary's qualifying evidence, participating in the widespread peer review process; publishing articles, including a few that have garnered moderate citation; and producing useful original results commensurate with the position of a successful engineer is not indicative of the beneficiary's national recognition as outstanding.

III. CONCLUSION

The petitioner has shown that the beneficiary is an experienced research scientist, who has garnered the respect of his colleagues and superiors, while attaining some level of international exposure for his

work. The record, however, stops short of elevating the beneficiary to the level of an individual who is internationally recognized as an outstanding researcher or professor. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

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

ORDER: The appeal is dismissed.