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)

[redacted]

DATE: APR 0 2 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability as an industrial engineer. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of his sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, counsel asserts that the petitioner meets the regulatory categories of evidence at 8 C.F.R. §§ 204.5(h)(3)(iv) – (vi). Counsel also requests that "should the Administrative Appeals Office agree with the Service's handling of the above criteria, the petitioner would like the Administrative Appeals Office to consider [the petitioner's] entire submission" as comparable evidence of his extraordinary ability pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). For the reasons discussed below, the AAO will uphold the director's decision.

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):
>
> > (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien 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,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

> (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, internationally recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 580 F.3d 1030 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. The AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

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[1] Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

II. ANALYSIS

A. Evidentiary Criteria[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 national or international experts in their disciplines or fields.

The director discussed the evidence submitted for this regulatory criterion and found that the petitioner failed to establish his eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (the court found the plaintiff's claims to be abandoned as he failed to raise them on appeal to the AAO). Accordingly, the petitioner has not established that he meets this criterion.

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

The AAO affirms the director's finding that the petitioner's evidence meets this regulatory criterion.

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

In the director's decision, he determined that the petitioner failed to establish eligibility for this regulatory criterion. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of *major significance* in the field." [Emphasis added.] Here, the evidence must be reviewed to see whether it rises to the level of original scientific or business-related contributions "of major significance in the field." The phrase "major significance" is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003).

On appeal, counsel points to various letters of support discussing the petitioner's work and his expertise in the field.

The petitioner submitted an August 1, 2012 letter from [redacted] Partner, [redacted] stating:

> I am an attorney and General Counsel to the [redacted] a major [redacted] labor organization.

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[2] On appeal, the petitioner does not claim to meet any of the regulatory categories of evidence not discussed in this decision.

* * *

I have known [the petitioner] since 2010. As an industrial engineer with a subspecialty in the area of work measurement and time standards, [the petitioner] has already contributed significantly to the dialogue between the and in this area. Indeed, well over 100,000 employees of the are paid on the basis of their individual rural route evaluations, which are determined in large measure on the basis of work measurement and time standards.

For at least the next three years, [the petitioner] will be assisting the in a comprehensive review and study of the more than 40 time standards that comprise the evaluated pay system. The and have committed to undertake this study, the first such study since the establishment of rural delivery more than 100 years ago.

I spent months contacting respected industrial engineers in academia and in the private sector and few possessed the analytical and practical experience of [the petitioner]. The number of industrial engineers qualified to assist on the project described above is extremely limited. Work measurement and time standards experts are in short supply. Few graduate programs focus on this area of industrial engineering. Therefore, the skills [the petitioner] possesses are extremely important.

discusses the petitioner's involvement in dialogue between the and the but fails to provide specific examples of how the petitioner's original work was of major significance in the field of industrial engineering. In addition, states that over "the next three years, [the petitioner] will be assisting the in a comprehensive review and study of the more than 40 time standards" of the pay system. The AAO notes that any impact resulting from the review and study of the time standards post-dates the April 2, 2012 filing date of the petition. Eligibility must be established at the time of filing the petition. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

also asserts that few possess "the analytical and practical experience" of the petitioner, that "[w]ork measurement and time standards experts are in short supply," that "[f]ew graduate programs focus on this area of industrial engineering," and that "the skills [the petitioner] possesses are extremely important." Assuming the petitioner's skills and experience are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment certification process. *See Matter of New York State Department of Transportation*, 22 I&N Dec. 215, 221 (Comm'r 1998). Significantly, unique training and experience do not even qualify an alien for a waiver of the alien employment certification process in the national interest under a lesser classification set forth at section 203(b)(2) of the Act. *Id.* at 221. As such, unique training and experience cannot be considered an original contribution of "major significance" in the field. At issue for this regulatory criterion is how the petitioner's original work has demonstrably impacted the field as a result of his training and experience.

attorney at the law firm of states:

I first began to work with [the petitioner] approximately six years ago in conjunction with a wage and hour collective action in the poultry processing business. That lawsuit was . Our law firm needed an industrial engineer to conduct a time and motion study with respect to claims that plaintiffs were making in the case. More particularly, the plaintiffs (over 1,000 of them) were alleging that they were engaging in certain "donning and doffing" activities that were depriving them of pay for more than 30 minutes each day. My colleagues and I had a difficult time finding an industrial engineer who was capable of conducting such a time and motion study.

* * *

[The petitioner's] work in the case yielded conclusions that directly contradicted the claims of the plaintiffs in the case by showing that the duration of the activities was only a fraction of the time that the plaintiffs claimed.

* * *

Since that time I have worked closely with [the petitioner] on five other wage and hour class actions.

* * *

In each of these cases [the petitioner] took measurements and compiled complex reports setting forth detailed calculations of various donning and doffing activities. Those measurements and reports had a very substantial impact on each case. [The petitioner's] calculations put our client into a position to resolve those cases for much less money than the plaintiffs claimed.

* * *

I am confident that [the petitioner's] work at least in the area of time and motion studies will continue to be important to U.S. employers. Wage and hour class actions in the United States have increased exponentially during the last 20 years. The number of wage and hours lawsuits (including class actions and non-class actions) have increased from 1,457 cases in 1993 to 7,064 cases in 2012. (See Seyfarth Shaw LLP Case Study for 2012). A record number of wage and hour cases was [sic] filed in 2012. [The petitioner] stands in a unique position to help employers and workers not only evaluate and quantify the claims in such actions, but to develop systems and procedures for eliminating or reducing claims for alleged unpaid activities. The value of [the petitioner's] work in such regards easily surpasses tens of millions of dollars that directly affect the U.S. workforce and economy.

While indicates that the petitioner's work for was important to the law firm and its clients, there is no evidence demonstrating that the

petitioner's work on wage and hour class action litigation equates to original contributions of major significance in the field. The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires that the contributions be "of major significance in the field" rather than limited to the affected parties in a class action lawsuit. also comments that the petitioner's work in the area of time and motion studies is important to U.S. employers and valuable to the U.S. workforce and economy. Eligibility for this regulatory criterion, however, requires original contributions of major significance in the field of industrial engineering rather than simply unique expertise in time and motion studies. The supplementary information at 56 Fed. Reg. 60899 (Nov. 29, 1991) states:

> The Service disagrees that all athletes performing at the major league level should automatically meet the "extraordinary ability" standard. . . . A blanket rule for all major league athletes would contravene Congress' intent to reserve this category to "that small percentage of individuals who have risen to the very top of their field of endeavor."

Similarly, a blanket rule for all industrial engineers capable of conducting time and motion studies would be equally problematic. Merely having unique experience in the area of time and motion studies is not an original contribution of major significance in and of itself. Rather, the record must be supported by evidence that the petitioner has already used his skills to impact the field at a significant level in an original way. As previously discussed, assuming the petitioner's skills and experience are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *See Matter of New York State Department of Transportation,* 22 I&N Dec. at 221.

partner in the law firm of , states:

> A significant part of my practice involves advising and defending employers in complex wage and hour lawsuits under federal and state law. The issues typically involve hundreds or thousands of employees and potential liability in the millions of dollars from United States employers.
>
> My defense and advisory work depends heavily on complex issues of work measurement and time standards. I have worked with and relied on [the petitioner] to provide detailed analysis of work measurement and time standards for my clients in his role as an industrial engineer. I have depended heavily on [the petitioner] for multiple cases and clients since 2009.
>
> Since we began working together, [the petitioner] and I have worked closely together on nine lawsuits . . . .
>
> * * *
>
> In each of the cases, [the petitioner] took the lead role in leading an on-site multi-day data gathering project at the clients' facilities to capture the relevant parts of the work activities of statistically valid samples of the hundreds or thousands of employees. I observed that [the petitioner] exhibited a high degree of skill and expertise in executing complex data-gathering projects, including adapting to field conditions and unexpected circumstances as

appropriate. During these on-site data-gathering projects he regularly brought to bear his experience and expertise as an industrial engineer to gather the data necessary as the foundation for reliable analysis.

* * *

The issues surrounding appropriate wage and hour practices of large U.S. employers, such as those involved in the cases I defend, have taken on increasing importance in recent years. The stakes for U.S. employers in these cases can be very high, involving millions or tens of millions of dollars in claims. Wage and hour cases have become one of the predominant types of mass claim lawsuits in the United States. Employers will continue to need to rely heavily on the type of expertise shown by [the petitioner], as the courts continue to issue confusing and contradictory interpretations of the applicable legal standards, and as aggressive plaintiffs' law firms continue to target employers and to assert ever-expanding theories of liability. The kinds of analysis that [the petitioner] has provided and can provide are also of great importance to large U.S. employers, such as my clients, as they evaluate and adapt their work processes and pay policies in light of changing conditions.

While [redacted] states that he "relied on [the petitioner] to provide detailed analysis of work measurement and time standards" for clients that his firm represented, he does not explain how the petitioner's work was either original or of major significance in the field. For instance, [redacted] does not provide specific examples of how the petitioner's original methodologies have substantially advanced the field of industrial engineering or otherwise equate to original contributions of major significance in the field. As previously discussed, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires that the contributions be "of major significance in the field" rather than limited to [redacted] clients in wage and hour lawsuits. [redacted] also comments that the petitioner "exhibited a high degree of skill and expertise in executing complex data-gathering projects" and that the petitioner demonstrated "experience and expertise as an industrial engineer." Again, assuming the petitioner's skills and expertise are unique, the classification sought was not designed merely to alleviate skill shortages in a given field. *Matter of New York State Department of Transportation*, 22 I&N Dec. at 221.

[redacted] a partner with [redacted] states:

I first began to work with [the petitioner] in 2007 in connection with a wage & hour class action that my firm was defending for a leading poultry producer. At the heart of the plaintiffs' claims in that case were allegations that the defendant had not paid line workers for time spent "donning and doffing," that is, putting on and taking off work-related apparel. . . . [The petitioner] and his colleagues at [redacted] a leading industrial engineering firm with respect to such cases, served as our time study experts in that matter.

In that case, [the petitioner] took a leading role in planning and executing time studies for the defense, and monitoring the time studies conducted by the plaintiffs. His work involved complex random sampling analyses, detailed measurements applying industrial engineering principles, exhaustive statistical analyses, assistance with the preparation of written reports to be submitted to the court, and consultation with counsel regarding the presentation of time study evidence and critiques of the plaintiff's time study methodology. He demonstrated

creativity and strong problem-solving abilities in the complex field of industrial engineering. He worked under significant time pressures, and assisted with the production of high-quality expert reports and analyses. I have since worked with [the petitioner] on two additional "donning and doffing" cases in which he has undertaken the same work, although with increasing responsibility in each case.

comments on the petitioner's time study work for "donning and doffing" litigation, but does not provide specific examples of how the petitioner's original work has significantly impacted the field of industrial engineering or otherwise constitutes original contributions of major significance in the field. It is not enough to be knowledgeable and skillful and to have others attest to those talents. An alien must have demonstrably impacted his field in order to meet this regulatory criterion. Vague, solicited letters from colleagues that do not specifically identify original contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian*, 580 F.3d at 1036. In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." *Kazarian*, 596 F.3d at 1122. The record lacks documentary evidence showing that the petitioner has made original contributions that have been of major significance in the industrial engineering field.

Jurisdiction Safety Specialist, states:

> [The petitioner] and his team at worked as experts in the field of . . . for from October 2010 to September 2011.
>
> The study termed aimed to identify employee exposures to ergonomics risk factors and recommend methods to eliminate, reduce, or otherwise control or protect against these ergonomics exposures. [The petitioner] and his colleagues reviewed and analyzed thirty-five tasks performed by the skilled serving in the six functional work groups and observed them during each of the four climactic seasons from October 1, 2010 to September 30, 2011.
>
> During the entire duration of the study, [the petitioner] and his colleagues with their extensive Industrial Engineering expertise compared the documented Standard Operating Procedures at the with current work practices, analyzed common and unique requirements for tasks, unique seasonal conditions and exposures, and general work environment and exposures; and to notify any serious safety discrepancies and/or IDHL conditions to the and the jurisdiction superintendent's office on an immediate basis. . . . I observed that [the petitioner] exhibited tremendous skill and expertise in not only implementing ergonomic principles but also excellent application while dealing with the employees while collecting survey and study data. He collected and analyzed data and compared the task parameters to applicable ergonomic guidelines, industry standards, and management best practices. The data collection stages of the study brought forth his experience and expertise as an industrial engineer to gather the data to improve work conditions and increase productivity.

> U.S. Bureau of Labor Statistics reports 650,000 work-related musculosketetal disorders (WRMSDs), resulting in costs to employers of over 20 billion dollars. These costs include Workers Compensation and medical expenses, the latter of which are increasing 2.5 times faster than benefit costs. Indirect costs are 3 to 5 times higher, reaching approximately $150 billion per year. These include absenteeism, staff replacement and retraining, productivity, and/or quality. Hence, individuals who possess the skill and industrial engineering expertise to improve working conditions at workplace [sic] with a reactive and proactive approach are in a great need in the U.S. As an industrial engineer, [the petitioner] provides the necessary expertise to employers to address these cost and productivity issues. . . . [The petitioner] and his colleagues at have provided industrial engineering expertise not only to U.S. employers in the manufacturing and service sector but also to government agencies like the etc. This indicates that the skills and expertise [the petitioner] possesses are of great importance to the U.S. employers.

While states that the petitioner worked on a study entitled "Ergonomic Evaluation of Tasks at the " there is no documentary evidence showing that the study is frequently cited by others in the field or otherwise constitutes an original contribution of major significance in industrial engineering. r also comments that the petitioner "exhibited tremendous skill and expertise" in conducting the study, but fails to provide specific examples of how the petitioner's findings are being utilized by others in the field, so as to demonstrate that the petitioner's contribution has been of major significance. In addition, asserts that "individuals who possess the skill and industrial engineering expertise to improve working conditions at workplace [sic] with a reactive and proactive approach are in a great need in the U.S." It cannot suffice, however, to state that the petitioner possesses useful skills, or a unique background. Special or unusual knowledge alone does not equate to original contributions of major significance in the field. Once again, the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Matter of New York State Department of Transportation*, 22 I&N Dec. at 221. Eligibility for this regulatory criterion is demonstrated by making original contributions of major significance in the field rather than by simply having expertise in a particular field. The AAO is not persuaded that a given skillset is so important that any individual qualified to perform work requiring that skillset automatically meets this criterion. At issue for this criterion is whether the petitioner's original contributions are of major significance in the field of industrial engineering.

Senior Attorney for states:

> I have known [the petitioner] since 2008. As an industrial engineer with a subspecialty in the area of work measurement and time standards, [the petitioner] has performed several Time and Motion studies on behalf of The data compiled by [the petitioner] was generated for litigation purposes, and was instrumental to properly evaluate potential defenses related to that litigation.
>
> In my experience as an attorney, I have worked with a variety of respected industrial engineers in academia and in the private sector and few possessed the analytical and practical experience of [the petitioner]. Time and Motion experts are in short supply. The

number of industrial engineers qualified to conduct such studies are extremely limited. Few graduate programs focus on this area of industrial engineering.

states that the petitioner performed time and motion studies for and that few industrial engineers possess "the analytical and practical experience of [the petitioner]," but does not provide specific examples demonstrating the impact of the petitioner's original work at a level indicative of contributions of major significance in the field. also asserts that industrial engineers qualified to perform time and motion studies are in "short supply" and "extremely limited in number." Once more, the issue of whether similarly trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor through the alien employment certification process. *See Matter of New York State Department of Transportation*, 22 I&N Dec. at 221. There is no documentary evidence showing that the petitioner's original contributions have been of major significance in the field of industrial engineering.

The opinions of the petitioner's references are not without weight and have been considered above. The AAO notes that all of the preceding letters are from individuals who have directly utilized the petitioner's services. While such letters are important in providing details about the petitioner's role in various legal actions and time and motion studies, they fail to demonstrate that his work rises to the level of original contributions of "major significance" in the field of industrial engineering. 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 reference letters 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 references' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence that one would expect of an industrial engineer who has made original contributions of major significance in the field. Without additional, specific evidence showing that the petitioner's original work has been unusually influential, has substantially impacted his field, or has otherwise risen to the level of contributions of major significance, the AAO cannot conclude that he meets this regulatory criterion.

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

The AAO affirms the director's finding that the petitioner's evidence meets this regulatory criterion.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

The director discussed the evidence submitted for this regulatory criterion and found that the petitioner failed to establish his eligibility. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The AAO, therefore, considers this issue

to be abandoned. *Sepulveda*, 401 F.3d at 1228 n.2; *Hristov*, 2011 WL 4711885, at *9. Accordingly, the petitioner has not established that he meets this regulatory criterion.

B. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence.

C. Comparable Evidence Under 8 C.F.R. § 204.5(h)(4)

On appeal, counsel requests that the petitioner's entire submission be considered as comparable evidence of his extraordinary ability pursuant to the regulation at 8 C.F.R. § 204.5(h)(4). The regulation at 8 C.F.R. § 204.5(h)(4) allows for the submission of "comparable evidence" only if the ten categories of evidence "do not readily apply to the beneficiary's occupation." Thus, it is the petitioner's burden to demonstrate why the regulatory criteria at 8 C.F.R. § 204.5(h)(3) are not readily applicable to the alien's occupation and how the evidence submitted is "comparable" to the specific objective evidence required at 8 C.F.R. §§ 204.5(h)(3)(i) – (x). The regulatory language precludes the consideration of comparable evidence in this case, as there is no indication that eligibility for visa preference in the petitioner's occupation cannot be established by the ten criteria specified by the regulation at 8 C.F.R. § 204.5(h)(3). In fact, as indicated in this decision, the petitioner submitted evidence that specifically addressed five of the categories of evidence set forth in the regulation at 8 C.F.R. § 204.5(h)(3). Where an alien is simply unable to satisfy the plain language requirements of at least three categories of evidence at 8 C.F.R. § 204.5(h)(3), the regulation at 8 C.F.R. § 204.5(h)(4) does not allow for the submission of comparable evidence. Counsel's appellate brief does not explain why the regulatory criteria are not readily applicable to the petitioner's occupation. For instance, the petitioner has not established that the high salary criterion at 8 C.F.R. § 204.5(h)(3)(ix) is not applicable to industrial engineers. Moreover, counsel fails to specifically identify the petitioner's documentary evidence that is "comparable" to any specific objective evidence required at 8 C.F.R. §§ 204.5(h)(3)(i) – (x).

The petitioner's appellate submission includes a March 2010 article in *Industrial Engineer* entitled "Don't Abandon Your Work Measurement Cap," but the article does not mention the petitioner or his specific achievements in the field. Instead, the article discusses the importance of work measurement training and the lack of industrial engineering graduates with that particular skillset. Counsel states that the article is "evidence that [the petitioner] has skills in short supply and clearly required in the United States." Assuming that industrial engineers with work measurement skills are in short supply in the United States, the classification sought was not designed merely to alleviate skill shortages in a given field. As previously discussed, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment certification process. *See Matter of New York State Department of Transportation*, 22 I&N Dec. at 221. Furthermore, with regard to the issue of the petitioner's skills being required in the United States, the statute and regulations require that the petitioner seeks to continue work in his area of expertise in the United States. *See* section 203(b)(1)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(1)(A)(ii); 8 C.F.R. § 204.5(h)(5). As the petitioner submitted an August 15, 2012 letter from the president of demonstrating that the petitioner will continue to work in his area of expertise in the United States

as required by the regulation at 8 C.F.R. § 204.5(h)(5), the petitioner has already resolved the issue of his work measurement skills being required in the United States.

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Even if the petitioner had submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) 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" and (2) "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)(2) and (3); *see also Kazarian,* 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.[3] Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three categories of evidence. *Id.* at 1122.

The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.

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