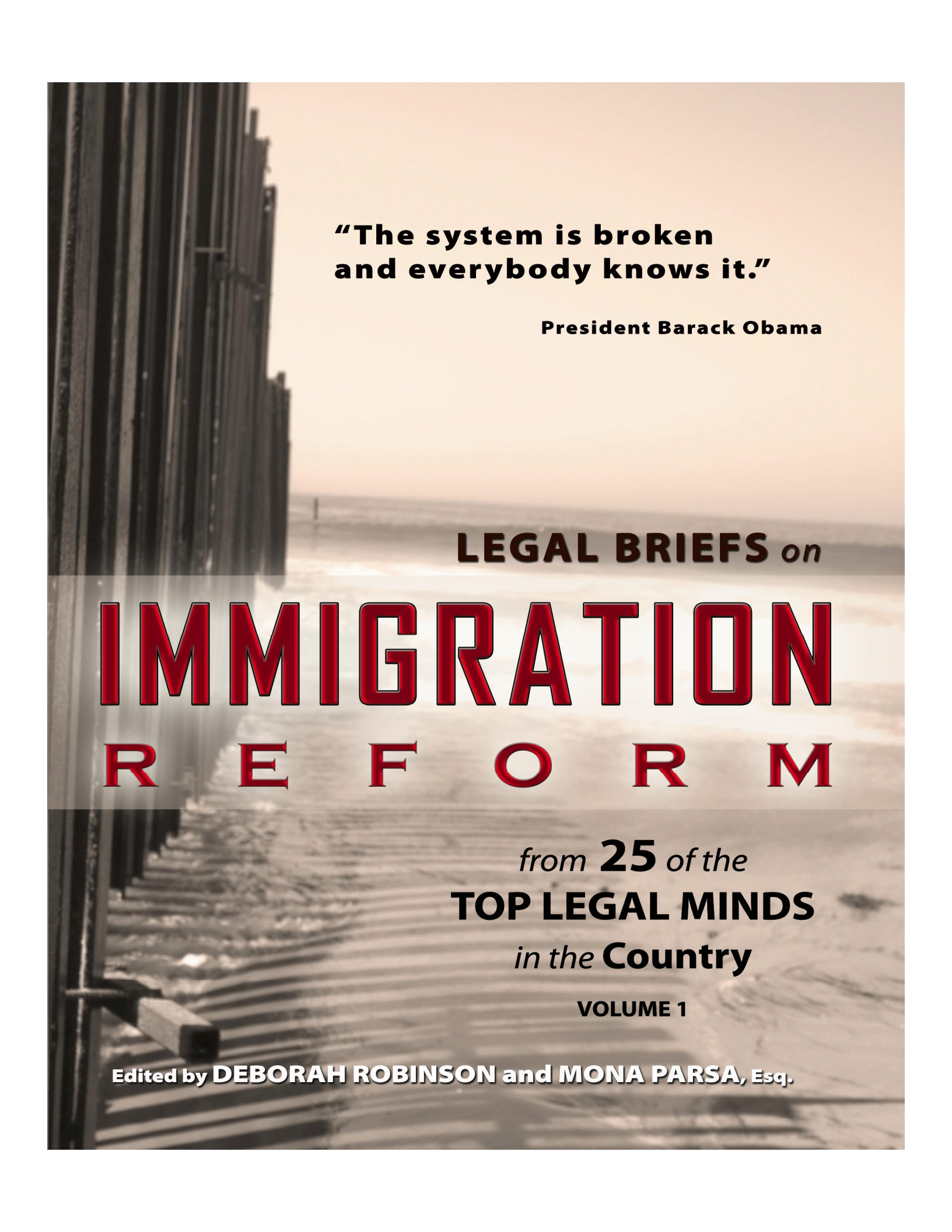




**"The system is broken
and everybody knows it."**

President Barack Obama

LEGAL BRIEFS *on*

IMMIGRATION REFORM

from **25** *of the*
TOP LEGAL MINDS
in the **Country**

VOLUME 1

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“How is today’s science to benefit from the strict application of a 20-year old legal document, which was written before Google, the iPhone, and the Prius, possibly created by the very scientists whom it seeks to restrict from permanent residence?”

Rita Sostrin, Esq.

LEGAL BRIEF MAKING A CASE FOR THE EXTRAORDINARY SCIENTIST

Rita Sostrin, Esq.

ABSTRACT: The U.S. is currently lagging behind several other countries in various scientific fields, yet the path to permanent residence for individuals practicing these professions is complex. As this Legal Brief explains, the immigrant visa classification for individuals of extraordinary ability is a vehicle that can be effectively used in order to bring in the best and brightest minds from around the world. However, the application of the legal standard for petitions of extraordinary ability has been so subjective and restrictive that it has precluded many eligible candidates from qualifying. Because of the inconsistent and often arbitrary adjudication practices, many petitions by deserving individuals have been denied or delayed. The extraordinary ability classification should be used to enhance our country's ability to advance in science and technology by attracting international talent, and immigration reform should implement appropriate changes.

LEGAL BRIEF Page 381

An approach, which would most effectively serve the interests of our country's quest to lead the world's science and technology efforts, is to allow professionals in these fields an easier path to immigration.

Whatever the final result of this debate may be, the current state of the extraordinary ability law presents a restrictive environment that severely limits immigration options for international scientists. If we, as a nation, want to maintain our position of scientific leadership in today's world, this must be changed.

LEGAL BRIEF
MAKING A CASE FOR
THE EXTRAORDINARY SCIENTIST

Rita Sostrin, Esq.

The National Science Foundation reports a growing concern about the condition of U.S. education in science, technology, engineering and mathematics (STEM), stating that U.S. students continue to slip behind their international peers.¹ A study recently conducted by Rutgers, the State University of New Jersey, concluded that science and technology firms are having trouble attracting the best and the brightest graduates to work for them.² Foreign-born professionals, as well as their children, are an important force in advancing our science, education, economy, and culture.³ Yet, our current immigration laws and policies make it difficult to retain them on a permanent basis because of restrictions on per-

manent residence. Qualifying for U.S. permanent residence on the basis of employment has turned into a marathon which involves a combination of skill, luck, endurance, and being in the right job at the right time. So, by erecting enough obstacles to ensure that only a select number of individuals reaches the finish line and receives the coveted green card, our country has been rejecting qualified professionals in the fields that we desperately need to fill, simply in the name of following outdated laws and regulations.

The Immigration Act of 1990 (IMMACT90) has significantly changed the immigration system by establishing classifications of employment-based

immigrant visas and placing a cap on immigration.⁴ The law, created 20 years ago, is still the controlling legislation for issuance of immigration benefits. And, while 20 years may not seem like a long time, it was a different world back then. 1990 was the year when the Cold War ended, Seinfeld hit the small screen for the first time, and the cost of a gallon of gas was \$1.16.⁵ Much has changed in the world since then, but the system of granting permanent residence has remained largely intact.

Current U.S. immigration laws do acknowledge the importance of professionals in certain fields or at certain educational levels in the nonimmigrant context. For instance, holders of the F-1 Optional Practical Training who obtained a degree in a STEM field are eligible for a 17-month extension beyond the standard 12-month OPT.⁶ Holders of U.S.-issued advanced degrees (master's or above) qualify for an additional set-aside of 20,000 H-1B visas above and beyond the standard H-1B annual cap of 65,000.⁷ So, if we recognize the need for these individuals and their talents on a temporary basis, why not offer them the ability to remain in the U.S. to continue to contribute to its advancement on a permanent basis?

Sure, there is the PERM process that puts an employee on a path to permanent residence, if the sponsoring employer successfully demonstrates to the Department of Labor that, after extensive recruitment efforts, it was unable to locate a minimally qualified U.S. worker.⁸ But, if the goal is to ensure that we have the best and the brightest at the helm, the PERM process yields exactly the opposite result by reducing the job requirements to the bare minimum. Also, it commits the foreign national to the sponsoring employer, thereby limiting his employment options and, possibly, stunting professional growth.

For these reasons, many scientists choose to pursue permanent residence through the classification of Alien of Extraordinary Ability.⁹ Individuals applying for immigrant visas as aliens of extraordinary ability (EB-11)¹⁰ must show that they possess a level of expertise indicating that the beneficiary is one of that small percentage who have risen to the very top of the field of endeavor.¹¹ This standard is met by establishing the alien's sustained national or international acclaim and that the alien's achievements have been recognized in the field of expertise.¹² The petitioner, which can be the foreign national or his employer,¹³

must either demonstrate that the alien has won a major nationally or internationally recognized award,¹⁴ such as a Nobel Prize, or meet at least three of ten enumerated criteria:¹⁵

1. The alien has received lesser nationally or internationally recognized prizes or awards for excellence in the field. Citizenship and Immigration Services (USCIS) often rejects prizes for academic achievements, fellowships and grant funding, even if issued by highly competitive sources.
2. The alien is a member of professional associations that require outstanding achievements of their members, as judged by recognized national or international experts. Membership in professional societies where the only requirement is good standing in the field and payment of membership dues will be rejected by the USCIS. However, membership in a society such as the National

Academy of Sciences would undoubtedly suffice to meet this criterion, as members are elected in recognition of their distinguished and continuing achievements in original research.

3. Published material about the alien's work that has appeared in professional or major trade publications or other major media. Mere citations of the alien's research articles will not adequately address this point. Here, it is important to demonstrate that the articles about the alien actually discuss his or her work and do not simply reference it.
4. The alien has participated, either individually or on a panel, as a judge of the work of others in the field. Usually, serving as a reviewer or editor of professional journals will meet this requirement.
5. The alien has made original scientific or scholarly contributions of major significance in the field.

6. The alien has authored scholarly articles in the field in professional or major trade publications or other major media.
 7. The alien has displayed his or her work at artistic exhibitions or showcases. USCIS often argues that, because this criterion was designed for the field of the arts, it cannot be utilized by professionals of other fields. However, the author submits that scientists should be able to meet it through presentation of comparable evidence if they can show that they have showcased their work by lecturing or exhibiting posters at professional conferences.
 8. The alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. Service as chairperson of a university department would provide sufficient proof of this criterion, assuming that the university has a distinguished reputation. Alternatively, where an alien does not hold a formal position of leadership, it is important to detail his role within the distinguished organization and show what specific contributions make his presence critical.
 9. The alien has commanded a high salary or other remuneration for services.
 10. Commercial successes of the alien. This could be demonstrated by patents that are yielding commercial revenues.
- The law also allows petitioners for this classification to submit “comparable evidence” to establish eligibility. Overall, the main advantage of utilizing the extraordinary ability category is that the “extraordinary” alien is not obligated to hold an employment offer and may self-petition. Beneficiaries must, however, demonstrate that they are planning to work in their field of expertise.¹⁹
- Over the years, there has been much debate about whether meeting three regulatory criteria is enough to qualify as extraordinary, and several years

back, USCIS issued a number of decisions out of its Administrative Appeals Office recognizing that it is, indeed, sufficient.²⁰ This legal standard has been explained in detail in a district court case which unequivocally concluded that meeting three regulatory criteria satisfies the burden of proof for extraordinary ability. In *Buletini v. INS*, the court stated:

Proof that an alien meets three of the criteria of the regulation is intended to constitute evidence that the alien has extraordinary ability. ... It is an abuse of discretion for an agency to deviate from the criteria of its own regulation. Once it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 CFR §204.5(h)(3), the alien must be deemed to have extraordinary ability unless the INS sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard.²¹

This case was decided in 1994, and we have since seen a number of conflicting adjudications of this issue.

The issue of how to actually meet the criteria has also been reviewed. For instance, the courts agreed that it is unnecessary to prove each regulatory criterion through a showing of extraordinary ability. In *Muni v. INS*, the District Court for the Northern District of Illinois discussed the AAO's decision, which dismissed articles about the beneficiary because they "did not report anything of great significance."²²

The *Muni* court said:

[T]he INS gave short shrift to the articles Muni submitted to support his petition. These articles do not establish that Muni is one of the stars of the NHL, but that is not the applicable standard. **Under the INS' own regulations, all Muni need show is that there is "published material about [him] in professional or major trade publications or other major media ..."**²³

The *Muni* case follows the reasoning in *Racine v. INS*, which criticized the legacy INS has for not following its own regulations. The *Racine* court held that none of the articles about the beneficiary said that he was "one of the best in his field." It said that "under the

Act, he need not be one of the best, he need be only one who is in that small percentage at the top of his field.”²⁴ As for the articles about the alien, the court said:

... [T]here is no requirement under the Act that the articles need to state that he is one of the best or even that the articles describe him at the top of his field. The articles need to demonstrate his work within the field. The INS has not only inserted a new qualification ... , it has also altered its own definition of extraordinary ability ...²⁵

This is a particularly relevant issue in the field of sciences. While it is common to have articles with interviews and photos of individuals of extraordinary ability in the fields of arts, entertainment, athletics and even business, extraordinary scientists do not receive similar treatment from the general population and remain largely unknown.

This was addressed even more clearly in *Buletini v. INS*, providing a more detailed explanation of how a person can qualify as extraordinary:²⁶

The Director also augments the fourth criterion of the regulation by requiring plaintiff to demonstrate not only that he participated as a judge of the work of other doctors but also that his participation on the commission “required or involved extraordinary ability.” The fourth criterion, however, only requires evidence that the alien participated as a judge of others in his field; it does not include a requirement that an alien also demonstrate that such participation was the result of his having extraordinary ability. Such a requirement would be a circular exercise: the criterion is designed to serve as proof that plaintiff is a doctor of extraordinary ability; the Director’s requirement would mean that plaintiff must prove that he is a doctor of extraordinary ability in order to prove that he is a doctor of extraordinary ability.

Most recently, the issue resurfaced again after the controversial decision by the United States Court of Appeals for the Ninth Circuit, *Kazarian v. USCIS*.²⁷

In this case, the court reversed its previous decision confirming that USCIS may not unilaterally and arbitrarily change regulations and qualifying criteria. However, the case raised more questions than it offered answers and left practitioners and adjudicators wondering how exactly to apply the extraordinary ability law. The unwelcome legacy of this case is that, in addition to meeting three regulatory criteria, a qualitative analysis of the entire body of evidence must now be conducted to determine whether the alien meets the level of sustained acclaim and recognition. And while *Kazarian* requires this qualitative analysis, it provides no guidance on how to conduct it. USCIS, which subsequently issued a lengthy Policy Memorandum²⁸ discussing the application of the case, offered no such guidance either.

There is no question that the legal standard of extraordinary ability is high. However, according to all pre-*Kazarian* laws and guidance, once the three criteria were satisfied, sustained acclaim was deemed established, which then had to lead to a finding of extraordinary ability. Thus, petitioners need not demonstrate all three legal standards (i.e., three regulatory criteria, plus sustained national or international acclaim, plus belonging to the small percent-

age at the top of the field). If the petitioner meets the three criteria, then he meets the level of national or international acclaim, and thus belongs to the small percentage at the top of the field. Of course, *meeting* three regulatory criteria is not the same as merely *presenting evidence* toward three regulatory criteria, and the regulations establish appropriate safeguards to ensure that only those who rise to the level of extraordinary can meet three criteria. However, once the three criteria are successfully satisfied, the alien has met the standard for extraordinary ability and should not be required to demonstrate anything else.

The *Kazarian* court, however, disagreed. It stated that while certain evidence is "... not relevant to the *antecedent procedural question*" of whether Dr. Kazarian met the evidentiary requirements of the regulations, it "... might be relevant to the *final merits determination*" (emphasis added). The Court made similar statements in the context of another regulatory criterion: "[n]othing ... suggests that whether judging university dissertations counts as evidence turns on which university the judge is affiliated with. Again, while the Administrative Appeals Office's (AAO's) *analysis might be relevant to a final merits determination*, the AAO may

not unilaterally impose a novel evidentiary requirement” (emphasis added).²⁹ Thus, according to this Court, providing evidence to satisfy the USCIS criteria as a matter of an “antecedent procedural question” is one thing. Meeting the criteria is another, and the Court is silent about how to actually meet the criteria, once the evidence has been accepted for consideration.

The *Kazarian* court makes the following statement about the general application of the legal standard of extraordinary ability:³⁰

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’ ..., and ‘that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise.’

This contradicts the author’s reading of the regulations. The petitioner does not have to demonstrate *both* belong-

ing to the small percentage at the top of the field and sustained acclaim. Demonstrating one also demonstrates the other, according to the regulations. In fact, meeting three criteria demonstrates sustained national or international acclaim which, in turn, demonstrates that the alien belongs to the small percentage at the very top of the field, which means the alien is extraordinary. *Kazarian* ultimately brings us back to the problem of “circular reasoning,” which was discussed and rejected in the *Buletini* case.

The *Kazarian* debate is to be continued, ironing out the fine details of extraordinary ability law. But, looking at the big picture, how is today’s science to benefit from the strict application of a 20-year-old legal document, which was written before Google, the iPhone, and the Prius, possibly created by the very scientists whom it seeks to restrict from permanent residence?

An approach, which would most effectively serve the interests of our country’s quest to lead the world’s science and technology efforts, is to allow professionals in these fields an easier path to immigration. This could mean revising the restrictive position that is currently in place for adjudicating extraordinary ability petitions. It could mean

creating a new immigrant classification for STEM professionals that would enable them to spend their efforts on scientific research instead of researching immigration laws. Whatever the final result of this debate may be, the current state of the extraordinary ability law presents a restrictive environment that severely limits immigration options for international scientists. If we, as a nation, want to maintain our position of scientific leadership in today's world, this must be changed.

END NOTES

¹ National Science Board, *America's Pressing Challenge – Building a Stronger Foundation* (National Science Foundation 2006).

² L. Lowell, H. Salzman, H. Bernstein, E. Henderson, *Steady as She Goes? Three Generations of Students through the Science and Engineering Pipeline* (Oct. 2009).

³ See S. Anderson, *The Multiplier Effect*, *International Educator* (Summer 2004), 14–21.

⁴ Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), 1990 S.358.

⁵ Information Please, Year: 1990, <http://www.infoplease.com/year/1990.html>.

⁶ 8 CFR §214.2(f)(10)(ii)(C).

⁷ INA §214(g)(5)(C), 8 U.S.C. 1184(g)(5)(C).

⁸ 20 CFR §656.

⁹ INA §203(b)(1)(A), 8 CFR §204.5(h).

¹⁰ INA §203(b)(1)(A).

¹¹ 8 CFR §204.5(h)(2).

¹² 8 CFR §204.5(h)(3).

¹³ 8 CFR §204.5(h)(5).

¹⁴ 8 CFR §204.5(h)(3).

¹⁵ 8 CFR §204.5(h)(3)(i)–(x).

¹⁶ See National Academy of Sciences, <http://www.nas.edu/nas/> for membership criteria.

¹⁷ 8 CFR §204.5(h)(4).

¹⁸ 8 CFR §204.5(h)(5).

¹⁹ *Id.*

²⁰ Matter of [name not provided], WAC 02 070 52665 (AAO Feb. 27, 2003); Matter of [name not provided], WAC 01 109 53910 (AAO Apr. 11, 2003); Matter of [name not provided], WAC (AAO Aug. 19, 2003); Matter of [name not provided], NSC (AAO Sept. 10, 2003).

²¹ *Buletini v. INSI*, 860 F. Supp. 1222, 1231, 1234 (E.D. Mich. 1994).

²² 891 F. Supp. 440, 445 (N.D. Ill. 1995).

²³ *Id.*, emphasis added.

²⁴ 1995 U.S. Dist. LEXIS 4336.

²⁵ *Racine v. INS*, 1995 U.S. Dist. LEXIS 4336, emphasis added.

²⁶ *Buletini v. INS*, 860 F. Supp. 1222, 1229 (E.D.Mich. 1994).

²⁷ *Kazarian v. USCIS*, 580 F.3d 1030 (9th Cir. 2009), rev'd no. 07-56774, D.C. No. CV-07-03522-R-E, available at <http://www.ca9.uscourts.gov/datastore/opinions/2010/03/04/07-56774.pdf>, 3429-44 (2010).

²⁸ U.S. Citizenship and Immigration Services, Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions (AFM Update AD 10-41), Policy Memorandum (Aug.18, 2010).

²⁹ *Id.* at 3437 (emphasis added).

³⁰ *Id.*

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ACKNOWLEDGMENTS

The author wishes to extend special thanks to Alexander Dgebuadze for his invaluable contributions.