The Mystery of Comparable Evidence

by Rita Sostrin

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When it comes to demonstrating extraordinary ability, whether to meet the immigrant visa (EB-1)[1] or the nonimmigrant (O-1)[2] standard, both sets of regulations allow petitioners to submit "comparable evidence"[3] to supplement other evidence and qualify as extraordinary. The regulations do not explain what constitutes acceptable comparable evidence and, more importantly, they are vague about the circumstances that would legitimately allow the submission of comparable evidence. This practice pointer explores some of the unanswered questions about comparable evidence regulations and proposes potential strategies to practitioners.

The policy memorandum[4] issued by U.S. Citizenship and Immigration Services (USCIS) to address EB-1 adjudications provides some guidance on the use of comparable evidence, but it falls short of articulating a clear adjudicatory standard. For instance, it states that comparable evidence may be used only if the petitioner explains why the standard regulatory criteria do not apply. It also confirms that, if that threshold is cleared, the petitioner must prove how the submitted evidence is, in fact, comparable to a particular regulatory criterion. This raises a few questions. First, the memorandum does not make clear what would suffice as a valid explanation of why the standard criteria do not apply. Second, it does not address whether the petitioner is required to demonstrate that none of the criteria apply, or simply a few do not apply. It is silent about what would generally constitute acceptable comparable evidence. Lastly, why is a petitioner required to provide evidence that is comparable to a specific criterion? The regulations simply ask for "comparable evidence in order to establish eligibility"[5] and do not require that the evidence be comparable to evidence that would address a particular criterion. Although the memorandum offers two very specific examples of what could constitute acceptable comparable evidence, it is difficult to generalize them into use outside of the context of those two examples. Given the limited guidance available, practitioners still face uncertainty in using comparable evidence.

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[1] INA §203(b)(1)(A), 8 CFR §204.5(h).
[2] INA §101(a)(15)(O), 8 CFR §214.2(o).
[3] 8 CFR §204.5(h)(4), 8 CFR §214.2(o)(3)(iii)(C), 8 CFR §214.2(o)(3)(iv)(C).
[4] USCIS Memorandum, "Evaluation of Evidentiary Criteria in Certain I-140 Petitions" (Dec. 22, 2010), *published on* AILA InfoNet at Doc. No. 11020231 (*posted* Feb. 2, 2011).
[5] 8 CFR §204.5(h)(4), 8 CFR §214.2(o)(3)(iii)(C), 8 CFR §214.2(o)(3)(iv)(C).

Under the regulations, a petition for the immigrant classification of extraordinary ability must be accompanied by evidence of a one-time achievement, i.e., "a major, internationally recognized award," or at least three of the 10 regulatory criteria.[6] Likewise, for the O-1 classifications in the sciences, education, business, athletics and arts, extraordinary ability is demonstrated by either a one-time achievement or meeting at least three criteria from a relevant list.[7] In other words, an alien who has not won a major, internationally recognized award may select three (or more) criteria out of a number of available options in order to prove eligibility for extraordinary ability. However, some of the listed criteria are field-specific and do not readily apply to every occupation. This disqualifies aliens who do not work in those specific fields or occupations from using these criteria and limits such aliens to a smaller list of available criteria. We will use the EB-1 regulations as an example to demonstrate that three of the 10 regulatory criteria apply only to particular occupations:

- 8 CFR §204.5(h)(3)(vi) (evidence of authorship of *scholarly* articles) applies only to scholars;
- 8 CFR §204.5(h)(3(vii) (evidence of display of the alien's work at *artistic* exhibitions or showcases) applies only to artists; and
- 8 CFR §204.5(h)(3)(x) (evidence of commercial successes in the *performing arts*) applies only to performing artists.

Thus, a foreign national who is not a scholar, an artist or a performing artist (*e.g.*, a physician) would have a choice of only seven regulatory criteria (instead of all 10) in order to prove eligibility for extraordinary ability. At the same time, a scholar would have to choose among the eight regulatory criteria applicable to his occupation. Likewise, an artist working in the non-performing arts would have a choice of evidence that is limited to eight criteria. The fact that these three criteria are drafted so narrowly that each of them readily applies only to a specific occupation and excludes all other fields of human endeavor, automatically disadvantages individuals working in these other fields from having a full choice of 10 criteria.

Additionally, individuals working in certain fields, although practicing at the very top of the profession and thus, extraordinary, may find that the enumerated regulations do not readily apply to their occupations. This is specifically relevant, among others, to individuals who would normally publish in scholarly publications, major trade publications or other major media, but due to national security, trade secret or other proprietary reasons, are unable to publish in the public domain. It also applies to unusual or novel occupations which were not contemplated by the regulations that were created almost quarter of a century ago (e.g., internet security, artificial intelligence, multimedia, social networking, "green" systems design, telemedicine, technology usability, planetary protection, etc.). Foreign nationals working in these occupations, which came into existence in the past several years and after the regulations were drafted, may not be accurately assessed for extraordinary ability by the 10 available regulatory criteria. Similar arguments can be made about the O-1 regulatory criteria which may not easily apply to certain professions.

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[6] 8 CFR §204.5(h)(3)(i) – (x).
[7] 8 CFR §214.2(o)(3)(iii)(B)(1)–(8), 8 CFR §214.2(o)(3)(iv)(B)(1)–(6).

Where regulatory criteria do not readily apply, the comparable evidence regulations provide much-needed relief. By not giving petitioners a realistic way use comparable evidence, USCIS is restricting extraordinary individuals to choosing from a limited number of available criteria, which is fewer than the standard number of criteria allowed by the regulations. Such uneven applicability of the regulations appears to prejudice certain professions, which was not contemplated by Congress.

Therefore, it is important to consider submitting comparable evidence where certain criteria do not readily apply to a beneficiary's occupation. First and foremost, the three regulatory criteria identified above that specify the occupations to which they apply and do not readily apply to any other occupations, should allow the use of comparable evidence, if submitted. Also, if a foreign national can demonstrate that certain criteria do not readily apply to his occupation (e.g., inability to publish due to proprietary reasons, or new and emerging occupations), comparable evidence should be considered in order to allow for a fair evaluation of eligibility. Since regulations offer a specific number of possible criteria to choose from (i.e., 10 for EB-1s, eight for O-1s in science, business, education or athletics, and six for O-1s in the arts), a foreign national engaged in any occupation should be allowed the possibility of submission of up to that maximum number of criteria. This is because, in addition to meeting the minimum number of criteria, the petitioner is required to satisfy the "final merits" analysis. Thus, being able to meet more than the minimum number of criteria, including providing comparable evidence of extraordinary ability, would have a direct impact on the final merits review and, therefore, the viability of the entire petition.

In the past, USCIS has taken the position that it would allow the submission of comparable evidence only if none of the regulatory criteria applied to the beneficiary's occupation. See *Matter of [name not provided]*, EAC 04 033 50279 (AAO May 25, 2007). However, this renders the "comparable evidence" criterion practically unusable. The author believes that this is an inappropriate application of the comparable evidence regulation. To conclude that the threshold for eligibility under the "comparable evidence" regulation is establishing that none of the criteria apply to the beneficiary's occupation is to strip this regulation of any meaning. The list of regulatory criteria is sufficiently diverse that it can, at least partially, apply to most existing occupations. Thus, under this reasoning, the "comparable evidence" regulation would be used only for the most obscure fields in extremely rare circumstances. This interpretation of the regulations is unlikely, as nothing suggests that the "comparable evidence" regulation is reserved only for such extreme scenarios. The submission of comparable evidence is allowed in three different parts of the regulations (*i.e.*, in the EB-1 context, and twice in the O-1 regulations), which suggests that its inclusion in the law is not accidental. Congress intended to expand the ability of extraordinary individuals to qualify for immigration benefits, and restricting the use of comparable evidence only in very unusual situations is incongruent with this intent.

The regulatory language specifies that comparable evidence may be submitted if the other regulatory standards do not "readily" apply.[8] The word "readily" is specifically used to temper this criterion and create a standard for its correct application. "Readily" is defined as: 1) by choice or preference; or 2) without difficulty, suggesting that comparable evidence may be submitted if other standards are less preferable or present difficulty in application. See

[8] 8 CFR §204.5(h)(4), 8 CFR §214.2(o)(3)(iii)(C), 8 CFR §214.2(o)(3)(iv)(C).

www.merriam-webster.com/thesaurus/readily. Thus, it is the author's position that comparable evidence may be submitted where one or more (and not necessarily all) regulatory criteria are not readily applicable to a foreign national's occupation.

USCIS often rejects evidence submitted under the "comparable evidence" regulation" where it contests its comparability to the specific criterion suggested by the petitioner. This occurs, for instance, where a scholar submits evidence of invited presentations and lectures at conferences as comparable to the criterion of "display of the alien's work in the field at artistic exhibitions or showcases".[9]

In a few Administrative Appeals Office (AAO) decisions, USCIS concluded that "conference presentations are far more comparable to published articles" rather than display of the beneficiary's work in the field.[10] This conclusion was made with no further explanation of why scholarly presentations in front of an audience are more similar to written publications in journals than to artistic presentations in front of an audience. This interpretation limits the petitioner's option of adducing evidence applicable to his occupation *and* comparable to the most logical criterion.

By its terms, the "display" criterion[11] applies to the arts, and no other criterion specifically calls for evidence of lectures and presentations, which is how scholars and academics "display" their work. "Display of work" at scholarly exhibitions is comparable to the "display of work at artistic exhibitions" because, in both cases, the alien demonstrates his work to an audience; may participate by invitation only; and invitations to display one's work are granted based on merit of achievement and competitive selection. Consequently, a scholar's display of work at a prestigious international conference is comparable to an artist's display at a widely anticipated artistic exhibition and should be admissible evidence to satisfy the "display" criterion under the "comparable evidence" regulation.

Further, scholars lecture at conferences and publish articles as two separate functions of academic work. Indeed, lectures and conference presentations are distinct from authorship of scholarly articles and merit separate consideration in assessing a scholar's abilities. Additionally, there is no regulation compelling the position that lectures and conference presentations should be considered specifically under the authorship criterion. Therefore, it is this author's view that USCIS should review and, if properly submitted, accept evidence of scholarly lectures and presentations at conferences as comparable to evidence of artistic exhibitions, as it most closely matches the parameters of this criterion.

In conclusion, the "comparable evidence" regulation is ameliorative as it permits the use of evidence which does not naturally fall into one or more of the standard regulatory criteria and expands the beneficiary's options for proving extraordinary ability. The logical construction of the regulation, therefore, is that if the foreign national does not readily meet at least one of the enumerated criteria, he may provide comparable evidence. Any other interpretation of the

[9] 8 CFR §204.5(h)(3)(vi).
[10] *Matter of [name not provided]*, LIN 08 158 52452 (AAO May 29, 2009), *Matter of [name not provided]*, SRC 01 069 52458 (AAO Nov. 25, 2009).
[11] 8 CFR §204.5(h)(3)(vii).

interplay between the regulatory criteria and the "comparable evidence" regulation would render the latter meaningless.