QUALIFYING SCHOLARS, PROFESSORS, & RESEARCHERS FOR IMMIGRANT VISAS UNDER THE FIRST PREFERENCE CATEGORY:

PUTTING THE "EXTRA" IN EXTRAORDINARY AND GIVING THE OUTSTANDING "STANDING"

by Rita Kushner Sostrin[*]

INTRODUCTION

It is difficult to find a university or a research laboratory in the United States that does not have some portion of its faculty or staff populated by scholars, professors, or researchers who are foreign nationals. Those international professors and researchers who arrive to join U.S. universities, labs, and companies and stay long-term will likely eventually initiate planning their permanent residence process using the first preference category of employment-based immigration. This category comprises three subcategories, two of which are relevant to professors and researchers: (1) aliens with extraordinary ability; and (2) outstanding professors and researchers.

This article will address issues related to handling immigrant visas most frequently utilized by international academics, professors and researchers, namely the first employment-based category. It will highlight commonly issued Requests for Evidence (RFEs) issued by the INS and discuss strategies to successfully overcome them. Finally, the article will give an overview of recent decisions by the Office of Administrative Appeals (AAO) on cases filed under the first preference employment-based category by scientists, professors, and researchers.

Extraordinary Ability Standards

Individuals applying for immigrant visas as aliens of extraordinary ability (EB-11)[1] must show that they possess a level of expertise in the sciences, arts, education, business, or athletics indicating that the beneficiary is one of that small percentage who have risen to the very top of the field of endeavor.[2] This standard can be 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.[3] The petitioner, which can be the foreign scholar or his or her employer or prospective employer,[4] must either demonstrate that the alien has won a major nationally or internationally recognized award,[5] such as a Nobel Prize, or meet at least three of 10 enumerated criteria:[6]

(1) The alien has received lesser nationally or internationally recognized prizes or awards for excellence in the field. The INS has repeatedly advised in its RFEs that prizes for academic achievements or student awards do not satisfy this category. Professional awards in recognition of the alien's excellent achievements can successfully satisfy this criterion.

(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

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[*] **Rita Kushner Sostrin** RITA SOSTRIN is a founding partner of Sostrin Immigration Lawyers, LLP. Ms. Sostrin focuses her practice on immigration of individuals of extraordinary abilities as well as international physicians and researchers. Throughout her professional career, Ms. Sostrin has represented a diverse array of clients across the United States and abroad, handling all aspects of employment-based immigration for leading academic institutions, hospitals, and scientific laboratories. She frequently receives invitations to speak at national and regional con-ferences and to write for legal publications. Ms. Sostrin is included in The International Who's Who of Cor-porate Immigration Lawyers and Chambers USA. She was honored by AILA's Presidential Award for her service as chair of the California Service Center Liaison Committee in 2008. She currently serves as the vice-chair of AILA's Health Care Professionals/Physicians Committee, member of AILA's Board of Publications, and editor of AILA's annual conference handbook.

[1] INA §203(b)(1)(A)

[2] 8 CFR §204.5(h)(2)

[3] 8 CFR §204.5(h)(3)

[4] 8 CFR §204.5(h)(5)

[5] *See* note 3, *supra*

[6] 8 CFR §204.5(h)(3)(i)–(x)

field and payment of membership dues will be discounted by the INS. 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.[7]

(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 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 major 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. While this criterion was designed for the field of the arts, it can be utilized by professors and researchers practicing in other fields 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, given that the university has a distinguished reputation. Alternatively, when aliens do not hold official positions of leadership, it is important to detail their role within the organization and show what specific contributions make their presence critical.

(9) The alien has commanded a high salary or other remuneration for services. This criterion rarely applies to the field of academia, as academics' salaries are traditionally lower than those of their counterparts working in private industry.

(10) Commercial successes of the alien. Again, this requirement is irrelevant to most professors and researchers, with the exception of those holding patents that are yielding commercial revenues.

Meeting only three criteria is a recipe for denial, despite the language of the law, unless the evidence submitted is extremely strong and the practitioner is able to show that most of the evidentiary criteria do not apply to the alien's profession. The law allows petitioners for this classification to submit "comparable evidence" to establish eligibility.[8]

Those professors and researchers who already hold the nonimmigrant version of this classification, the O-1 visa, can usually qualify for this first-preference immigrant category, as the criteria for both are essentially the same.[9] This, of course, only applies to the O-1 holders in the field of science, education or business, as the O-1s in the arts are held to a lower standard.

Overall, the main advantage of utilizing the extraordinary ability category, compared to the outstanding professor or researcher classification discussed below, is that the "extraordinary" alien is not obligated to hold an employment offer and may self-petition.[10] Beneficiaries must, however, demonstrate that they are planning to work in their field of expertise. Further, an extraordinary ability alien who was sponsored by an employer may take advantage of an approved immigrant visa petition under this classification even if he or she chooses to change employers, as long as the alien can prove that he or she plans to work in the same field.[11] This, essentially, allows freedom of movement to those scholars who are being lured by recruiters and wish to keep open their employment options.

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[7] *See http://www.nas.edu/nas/* for membership criteria.

[8] 8 CFR §204.5(h)(4)

[9] 8 CFR §214.2(o)(3)(iii)

[10] *See* note 4, *supra*

[11] Letter from Edward H. Skerrett, Director, INS Immigrant Branch for Adjudications, to Mark Nerenberg, Esq., January 25, 1993, *posted on* AILA InfoNet (Mar. 10, 1993)

Outstanding Professor or Researcher Standards

Employers may qualify professors and researchers for immigrant visas (EB-12)[12] by showing that the professor or researcher is recognized internationally as outstanding in the field.[13] Such international recognition is established by showing at least two of the following six enumerated criteria.[14] These closely resemble the first six criteria of the extraordinary ability immigrant visas:

(1) The alien has received lesser major prizes or awards for outstanding achievement in the field.

(2) The alien is a member in professional associations that require outstanding achievements of their members.

(3) Published material about the alien's work has appeared in professional publications.

(4) The alien has participated, either individually or on a panel, as a judge of the work of others in the field.

(5) The alien has made original scientific or scholarly contributions to the field.

(6) The alien has authored scholarly books or articles in the field in scholarly journals with international circulation.

The professor or researcher is further required to possess at least three years of teaching or research experience.[15]

This classification, unlike that for the extraordinary ability alien, does not allow the professor or researcher to self-petition. A permanent offer of employment is required, which in an academic setting is defined as a tenured or tenure-track position.[16] If the petitioner is a private employer, as opposed to a university, it must demonstrate that it employs at least three full-time researchers and that it has achieved documented accomplishments in the field.[17] Those academics or researchers whose employers will petition for them may take advantage of this category, which requires satisfying only two regulatory criteria and, hence, is regarded as a lower and easier standard to meet.

COMMON REQUESTS FOR EVIDENCE GENERATED BY EB-12 FILINGS

In the past few years, immigration law practitioners have noticed a significant increase in INS scrutiny when adjudicating extraordinary ability and outstanding professor/researcher cases. There have been some common trends in requests for evidence (RFEs) issued by the Service, some of which misinterpret the law and impose inappropriate requirements on petitioners. Below is a review of frequently seen RFEs and potential arguments that can be used to rebut them.

Requests to Rank the Alien Among the Top Five or Ten Persons in the Field

In EB-11 cases, the Service has been regularly issuing RFEs requesting that the petitioner "provide a list of five to ten names of people who are at the very top of the alien's field of endeavor worldwide, rank the names and place the alien's name appropriately among the ranking." Such requests are inappropriate and contradict the specific language of the regulations. Furthermore, at the August 2, 2000 AILA/CSC Liaison meeting, the California Service Center agreed that petitioners should not be required to present such evidence.[18] Nevertheless, we continue to see RFEs requiring a ranking of the alien among the top five to ten individuals in the field.

Applicable regulations state at 8 CFR §204.5(h)(2):

> Extraordinary ability means a level of expertise indicating that the individual is one of that *small percentage* who have risen to the very top of *the field of endeavor*. [emphasis added]

A "small percentage" has varying numerical value, depending on the total number of people in the field of endeavor. It is for this reason that the Service must assess the total population in the field of endeavor. This is because an accurate assessment of whether the alien is part of that small, elite percentage must take into account the total number of professionals practicing in the field worldwide and the alien's relative stature within that total population.

[12] INA §203(b)(1)(B)

[13] 8 CFR §204.5(i)(3)(i)

[14] 8 CFR §204.5(i)(3)(i)(A)–(F)

[15] 8 CFR §204.5(i)(3)(ii) & (iii)

[16] 8 CFR §204.5(i)(2)

[17] 8 CFR §204.5(i)(3)(iii)(C)

[18] AILA/CSC Quarterly Meeting Minutes (Aug.1, 2000), *posted on* AILA InfoNet at Doc. No. 00090804 (Sept. 8, 2000).

The immigration of extraordinary aliens was engineered by the U.S. government not to serve the individual career interests of a few aliens, but to achieve the effect of improving the field of endeavor as practiced in the United States and ensuring U.S. leadership in the field and its related industries. The term "small percentage" that have risen to the top was deliberately used instead of a specific number precisely to take into account the vastly differing sizes of various fields of endeavor and to ensure that the immigration of extraordinary aliens would have the consequence of actually affecting and improving the field. Some fields, such as computer engineering or medicine, are enormous, their size a reflection of society's demand (and the United States' demand) for their skills and product. The U.S. government realized that if it limited the extraordinary ability category to a specific number, such as the "top 10," in any field of endeavor, the category would have little or no effect on large fields of endeavor and defeat the very purpose of the legislation, which is to ensure U.S. leadership amid advancing technology and an increasingly competitive global economy.

The extraordinary ability category has served its purpose since its implementation, with many prominent aliens contributing seminally to U.S. science, business, education, and culture. A "small percentage" will vary in numerical size, depending on the total number of people in the field of endeavor. For instance, if the beneficiary's field of endeavor was rocket science and was composed of only 100 individuals in total, then the top five to ten individuals would constitute 5 to 10 percent, a small percentage, and the Service would be legitimately entitled to a list of the top five to ten in the field. However, the field of metallurgical engineering, for instance, is composed of at least 90,000 people, according to membership records of the American Institute of Mining, Metallurgical and Petroleum Engineers.[19] This is an extremely conservative estimate, as it is probable that there are numerous professionals in the field who are not members of that institute but are members of other societies, or who choose not to acquire membership in professional societies at all. Thus, the top five to ten metallurgical engineers out of 90,000 would constitute a percentage of 0.006 to 0.009—not even 1 percent, but, rather, a tiny fraction of a percent. Although the regulations do not define "small" percentage, there is a substantive distinction between "small" and "infinitesimal," and 0.006 percent does not meet any reasonable definition of "small." Such a restrictive approach effectively means that the Service should have already closed down consideration of extraordinary ability classification for metallurgical engineers since the top five would probably include some American citizens, while more than five aliens have already been approved for this classification.

Furthermore, any request of the top five to ten individuals in a large field of professionals is likely to be an inaccurate and subjective shot in the dark, since opinions regarding which individuals would rank as the very top five to ten professionals could significantly vary among different experts. It is precisely in deference to these types of analytical problems that the law does not specify a *number or percentage* when it refers to those who have reached the top of their fields. Instead, the law simply refers to a "small percentage."

Fields of endeavor can be defined in many ways, and practitioners must take the lead in defining the field to their clients' advantage. In some cases, a broader definition is more appropriate because it creates a numerically larger elite pool in which to place the client. In the above-referenced example, the metallurgical engineer would need to be among the top 4,500 to 9,000 people in the field to qualify as being among that top small percentage. By contrast, if an alien is doing unusual and important interdisciplinary work, it may be more useful to narrow the field to a smaller cross-disciplinary specialization in which the alien stands out as a leader.

Therefore, a truthful and accurate assessment of whether an alien is part of the small, elite percentage in his or her field must first take into account the approximate number of professionals practicing in the field worldwide, and then assess the alien's relative stature within that group. This provides the only logical framework for the Service to correctly administer the law, particularly in highly specialized fields of endeavor where the evidence is difficult to assess.

Requests To Prove Specific Evidentiary Criteria

Most RFEs issued in connection with extraordinary ability and outstanding professor/researcher immigrant visa cases include a request to submit additional evidence relating to particular evidentiary criteria, which the Service lists in the RFE. In other words, the Service singles out the specific criteria it wishes the petitioner to meet.

[19] *http://www.aimeny.org.*

The regulations require evidence of "at least three" criteria for the extraordinary ability petitions[20] and "at least two" criteria for the outstanding professor/researcher petitions.[21] They do not require a showing that the beneficiary meets all of the regulatory criteria or that the beneficiary meets specific criteria. Furthermore, all criteria must carry equal evidentiary value. The Service cannot require the petitioner to provide evidence of specific criteria and disregard evidence provided to prove other criteria. Thus, while it is prudent to present evidence addressing more than the minimum two or three criteria required, asking the petitioner to submit evidence substantiating *specific criteria* is beyond the requirements of the law.

Requests for Lists of Potential Employers

In self-sponsored extraordinary ability cases, practitioners often encounter RFEs asking for a list of potential employers willing to hire the alien. This is the case even in matters where the alien is employed within her field of endeavor and lists the current place of employment on Form I-140 in Part 6. In one such RFE, the Service stated that "a reason for exemption of the requirement of obtaining a labor certification for the prospective beneficiary is because the expertise is so great that any employer involved in the prospective beneficiary's field of endeavor would be willing to hire that individual."

While sponsorship by a U.S. employer is required for outstanding professor/researcher immigrant visa petitions,[22] no offer of employment is necessary to qualify for an extraordinary ability immigrant visa,[23] and the alien may self-petition for an immigrant visa under this category. There is no statutory or regulatory requirement that the petitioner demonstrate that any employer in the field is willing to hire him. There is, however, a requirement that the alien will benefit prospectively the United States and that he will be working in the field of his expertise.

This is usually easy to demonstrate in cases of extraordinary ability aliens, since they normally have extensive experience in their fields of endeavor. Aliens who have reached such a high level of accomplishment are usually notable figures in their fields who, having dedicated themselves to the field for many years, would be unlikely to leave it immediately after they secure an immigrant visa. Besides, many petitioners seeking this classification are already employed in their area of endeavor in a nonimmigrant status. The fact that the petitioner is currently employed in his area of expertise should serve as sufficient evidence of his intention to continue working in the field. Presenting a letter from the alien's employer will satisfy this requirement. Those who are self-employed may submit documentation such as current publications in press, correspondence with collaborators or job offers from potential employers as evidence of intention to continue working in the field of endeavor.

Requests for Advisory Opinions from Government Organizations or Research Institutions

In handling both extraordinary ability and outstanding professor/researcher cases, practitioners often receive requests from the Service for "an advisory opinion regarding the petitioner/beneficiary's qualifications … from recognized government or research organizations." Frequently, such a statement is followed by a list of specific government organizations that the INS finds appropriate for issuing reference letters within the beneficiary's field. When filing such petitions, practitioners routinely submit support letters from experts in the field testifying to the beneficiary's extraordinary or outstanding abilities, depending on the classification sought. By issuing such an RFE, the INS essentially discounts the letters of reference provided in the petition and imposes on the petitioner the duty to provide letters from specific entities.

There is no statement in the governing regulations that letters of recommendation constitute the sole evidentiary means of demonstrating international acclaim or recognition. In fact, the regulations for extraordinary ability aliens list 10 evidentiary criteria that could demonstrate such extraordinary ability.[24] Similarly, the outstanding professor and researcher regulations provide six different evidentiary categories through which to demonstrate international recognition.[25] The law does not require proving regulatory criteria in any specific manner (*e.g.*, advisory opinions from recognized govern-

[20] *See* note 3, *supra*

[21] *See* note 13, *supra*

[22] 8 CFR §204.5(i)(3)(iii)

[23] *See* note 4, *supra*

[24] *See* note 6, *supra*

[25] *See* note 14, *supra*

ment of research organizations) and leaves the selection of proper evidence up to petitioner.

The Service frequently argues that "letters from professors, fellow co-workers, and other colleagues" do not constitute convincing evidence of international acclaim or recognition. The AAO, as discussed below, often agrees. This argument may be successfully disputed by showing that the "professors, fellow co-workers, or colleagues" who submitted written testimony in support of the alien beneficiary are considered experts in the field themselves and are appropriate individuals to render opinions about the alien's qualifications. The fact that some of them are employed at the same institution as the alien is not a valid basis to automatically disqualify their opinions regarding the alien's qualifications. The implied bias that the Service claims will vitiate a colleague's assessment of the beneficiary can be countered by establishing that these individuals possess international reputations in their respective fields and are considered to be leading experts. Consequently, it is unlikely that they would be willing to jeopardize their standing by issuing letters of recommendation simply to accommodate a colleague without having a basis for recommending the person.

This list of issues is by no means exhaustive, as the Service continues to raise the bar for what it considers extraordinary and outstanding. As the quality of the evidence presented almost solely affects the final decision, practitioners should keep in mind the increasingly high standards and file cases seeking these classifications selectively.

ANALYSIS OF AAO DECISIONS

Review and analysis of recent decisions issued by the AAO reveals a number of tendencies in current adjudication patterns and provides guidance for preparing successful EB-11 and EB-12 cases. In almost every AAO decision reviewed, the overall reason for denying extraordinary ability and outstanding professor/researcher petitions was the fact that the petitioner failed to establish national or international acclaim or international recognition, respectively.

Several recent AAO decisions were analyzed and the commentary organized according to conclusions that emerged from the decisions:

Academic Awards Are Not Acceptable

Scholars seeking immigrant visas based on extraordinary or outstanding abilities may present awards for excellent or outstanding achievements as part of evidence qualifying them for the immigrant visa.[26] The INS takes the position that academic awards earned while the beneficiary was a student will not be considered sufficient for the purposes of EB-11 and EB-12 adjudication. The AAO has consistently concurred with the service centers on this point and has been dismissing appeals based on this issue. Even where the academic award is given to the beneficiary in recognition of his or her excellent or outstanding achievements and the award truly acknowledged her as such an individual, it is not sufficient to meet this criterion for EB-11 or EB-12 classification. The AAO bases its view on the reasoning that "university study is not a field of endeavor."[27] Outstanding achievements by students, the Service reasons, are not at the level of those fully engaged in the profession. The AAO concluded in a recent decision that "what may be an outstanding achievement for a high school or undergraduate student may be well within the abilities of individuals who have completed their training."[28] In other words, it is the view of the AAO that it is simply too early to judge one's accomplishments during academic studies for the purposes of qualifying one for these categories, as they are reserved only for the individuals who have reached the very top.

Amazingly, the Service takes a similar position with research grants. The ability to acquire funding, particularly highly competitive, peer-reviewed government grants, is a matter of pride and professional credibility to most researchers. In fact, many scholars are recruited by distinguished institutions based on their capacity to generate grant money, which speaks to their national or international acclaim and the impact of their research results. However, the AAO has flatly rejected the fact that research grants are considered prizes or awards for achievements.[29] Still, grants may be used as evidence of the importance of the beneficiary's contributions to the field.

Beneficiary Must Qualify at the Time of Filing

As immigration advocates, we strive to maximize the evidence in support of our clients' petitions. In this regard, we try to submit all relevant evidence at the time of filing of the petition and when respond-

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[26] 8 CFR §204.5(h)(3)(i), (i)(3)(i)(A)

[27] *Matter of [name not provided]*, EAC 99 059 53191 (AAO Aug. 9, 2000)

[28] *Matter of [name not provided]*, EAC 99 081 50490 (AAO Apr. 13, 2001)

[29] *Id.*

ing to an RFE. What happens when new evidence becomes available only after the initial petition is filed? Is it possible to supplement the initial filing at the RFE stage with documentation such as new publications or awards obtained by the alien after the petition was filed?

Case law very clearly precludes such filings and dictates that "beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition."[30] The AAO has been adhering to this rule and consistently has not allowed presentation of any new evidence or qualifications obtained at the RFE stage.[31]

Interestingly, the AAO will admit some evidence, including new publications, that was not available at the time of filing of the petition:[32]

> We note that many of these developments took place after the filing of the petition. At the same time, developments arising from the petitioner's earlier work are fairly considered if those developments were reasonably and demonstrably foreseen prior to the filing of the petition. The petitioner has not, on appeal, attempted to establish eligibility based on an entirely new project which had not even commenced as of the petition's filing date.

Thus, evidence of the alien's new accomplishments that took place after the initial filing of the petition may be accepted if it arose from the alien's previous work and was reasonably foreseeable.

Reference Letters from Experts Must Prove National/ International Acclaim or International Recognition

In addition to presenting documentary evidence in support of EB-11 and EB-12 cases consisting of the confirmation of beneficiary's professional credentials and accomplishments (e.g., diplomas, publications, presentations, citations, awards, memberships, reviewing activities, etc.), many practitioners also provide testimonial letters from experts in the field attesting to the alien's accomplishments and recognition in the field. Instinctively, we choose those persons who most closely know the alien's work, such as the alien's colleagues or mentors, and, thus, are able to accurately comment on it.

The AAO, however, rejects this approach. While it has acknowledged that persons who have worked directly with the alien beneficiary are in the best position to describe the beneficiary's work, the AAO questions whether this necessarily serves as evidence that national or international experts in the field consider the beneficiary's contributions extraordinary or outstanding. This issue would be best addressed by establishing the credibility of the referees and showing that they are, in fact, national or international experts, in addition to the fact that they happen to have worked with the beneficiary. This argument, of course, would lose some of its strength if all reference letters were written by the beneficiary's former or present co-workers. The AAO has stated that just because the beneficiary's mentors and collaborators hold the beneficiary's work in high esteem, it does not necessarily follow that the international scientific community at large shares these appraisals.[33]

In yet another decision, the AAO provides a more expanded explanation of its reasoning:[34]

> While we acknowledge the expertise of the witnesses, the petitioner has not shown that the opinions of those witnesses are shared by experts who have not directly worked with the beneficiary. If the beneficiary's reputation is largely limited to those who have supervised or collaborated with him, then he is not internationally recognized. … Regardless of their obvious expertise, these witnesses clearly do not constitute a representative cross-section of the field.

The AAO holds the view that an alien claiming extraordinary ability or outstanding professorial or research capacity must be able to show that his work is "broadly known outside of laboratories and universities where he has actually worked."[35] Therefore, objective evidence, such as citations of the alien's publications, must supplement the reference

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[30] *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971)

[31] *See* note 27*, supra*

[32] *Matter of [name not provided]*, NSC (AAO Oct. 18, 2001). *See also* R. Wada, "Note on Recent AAO Decisions in National Interest Waiver Cases," 7 *Bender's Immigration Bulletin* 374 (Apr. 1, 2003)

[33] *Matter of [name not provided]*, EAC 99 081 50490 (AAO Apr. 13, 2001)

[34] *Matter of [name not provided]*, WAC 99 107 50056 (AAO Dec. 13, 2000)

[35] *Matter of [name not provided]*, WAC 98 193 53702 (AAO Aug. 10, 2000)

letters in order to show that the alien's recognition is not limited to his colleagues.

Further, the AAO has opined that even where reference letters are generated by individuals living and working in different international locations, it is irrelevant if the referees previously knew or worked with the beneficiary. In a 2001 decision, the AAO rejected the argument that the alien's petition was supported by experts from around the world simply because most of them, although currently practicing in different parts of the world, were the beneficiary's former compatriots. "The dispersal of the beneficiary's former collaborators to several countries does not make the beneficiary's reputation 'international' in any meaningful sense."[36]

Therefore, when selecting individuals to author reference letters, close consideration should be given to their backgrounds and credentials, which must be carefully regarded on their own merits and also in comparison to those of the beneficiary. In a recent decision, the AAO openly belittled the alien's qualifications when it compared them to those of the referees:

> The credentials of many witnesses of record are undeniably impressive; some of these individuals hold positions of national importance. Those very qualifications, however, indicate that it is they, rather than the petitioner, who stand at the top of the field…[37]

This creates a delicate dilemma. While the quality of the expert opinions should not be compromised, the practitioner must try to ensure that the beneficiary's own credentials do not appear to pale in comparison to those of the referees.

Finally, all reference letters must voice national or international acclaim or international recognition, depending on the classification sought. "[A]ssertion that the petitioner will, eventually, 'become a leading neuroscience researcher' does not constitute objective evidence that the petitioner is now a leader in that field, which he must be to qualify for this highly restrictive visa classification."[38] Any reference to the alien as a promising scholar will be regarded as a statement rejecting his eligibility, since one who is "promising," by definition, has not reached the top.

Alien's Scholarly Publications Must Stand Above Others

Most academics publish their work in professional journals. Both the service centers and the AAO realize that fact and do not regard the very act of publication as automatic indication of extraordinary or outstanding ability. In order to successfully meet the criterion of "scholarly publications," the alien must compare her publications to those of others in the field and demonstrate that her publications stand above the rest or have won recognition.[39] The AAO considers citations by other researchers appropriate evidence to establish such recognition.

However, those same citations may not support a related criterion: "published material about the alien." The AAO states that "a given article is not 'about' the petitioner simply because the petitioner is one of dozens of researchers named in the bibliographical footnotes."[40] It states in another decision that "such citations are simply a matter of academic honesty, acknowledging the source of information upon which the authors have based their own findings."[41] This, of course, would not be the case if papers referring to the alien's work, in addition to citing it, also provided a lengthy discussion regarding its scientific merit.

Citations, however, are regarded by the AAO as more appropriate to demonstrate the impact of the alien's published work in the field,[42] and, consequently, whether or not the alien's published record meets the tests of "national or international acclaim" or "international recognition." Specifically, citations originating from different countries may demonstrate the international circulation of the beneficiary's publications,[43] a key element in the EB-12 classification.[44] When using citations to show the impact of the alien's work, it is advisable to present a qualitative analysis, which includes the overall number of citations in a given period of time, the types of journals where the alien's papers are cited, or the number of citations generated by a particularly successful article.

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[36] *See* note 28*, supra*

[37] *See* note 27*, supra*

[38] *See* note 35*, supra*

[39] *Matter of [name not provided]*, WAC 98 230 52249 (AAO Aug. 15, 2000), *Matter of [name not provided]*, EAC 99 081 50490 (AAO Apr. 13, 2001)

[40] *See* note 35*, supra*

[41] *See* note 34*, supra*

[42] *See* note 27*, supra*

[43] *See* note 34*, supra*

[44] 8 CFR §204.5(i)(3)(F)

A simple listing of citations will not guarantee the desired result:

> The citations of the beneficiary's work show that his work has value to other researchers, but does not necessarily demonstrate that the citing researchers regard the beneficiary as outstanding. … There is no indication that the petitioner or the beneficiary consider every one of the cited authors to be outstanding in the field, nor is there any evidence that only outstanding, internationally recognized authors are cited by other researchers in journal articles.[45]

Further, when providing an analysis of citations to the alien's publications, practitioners should be mindful not to count the alien's own citations of his work. Self-citation is a common and appropriate practice in the academic world. However, if a large portion of the citations is self-generated, it will deflate the argument that the alien's work has strongly impacted the field at large.

Additionally, requests for reprints may be submitted as credible evidence of the impact of the alien's publications. Specifically, the AAO ruled that where the beneficiary had published 12 papers, three books, and received international requests for reprints of his work, the criterion was deemed satisfied.[46] Above all, when arguing the "scholarly publications" criterion, it is important to provide an analysis of the alien's publications and include an account of the alien's involvement in their authorship. As scholarly publication is a collaborative process, most academic papers customarily list authors in the order of importance to the project, with the leading researcher listed first. Clearly, if the majority of the alien's publications list her as first author, this fact must be highlighted in the petition.

Not Every Research Project Constitutes an Original Contribution

The law asks for a showing of original contributions to the field as a criterion for qualifying as either an extraordinary alien or outstanding professor/researcher. This requires a thorough examination of the alien's work and his actual academic input in the field.

It is the AAO's position that simply listing the beneficiary's research projects and showing that they were "original" in that they did not duplicate prior research will not satisfy this requirement. The AAO further argues:

> Research work that is unoriginal would be unlikely to secure the beneficiary a master's degree, let alone classification as outstanding researcher. Because the goal of the regulatory criteria is to demonstrate that the beneficiary has won international recognition as an outstanding researcher, it stands to reason that the beneficiary's research contributions have won comparable recognition. To argue that all original research is, by definition, "outstanding" is to weaken that adjective beyond any useful meaning, or to presume that most research is "unoriginal."[47]

This reasoning, obviously, likewise applies to the extraordinary ability classification, which also calls for a showing of original contributions.

Additionally, while it may seem that classifying the alien beneficiary as an individual with an unusual set of skills may qualify him as one making original contributions to the field, it is not always the case. In addressing this issue, the AAO concluded:

> The petitioner's accomplishments do not assume major significance merely because they have practical applications; the petitioner must establish that his overall impact in the field has exceeded that of almost all others in that field.[48]

As such, the AAO is strongly predisposed to denying cases filed on behalf of individuals still pursuing academic studies, whether graduate or postgraduate, as it considers their contributions to the field to be insufficient.[49]

"National" and "International" Defined

The EB-11 requires a showing of sustained national or international acclaim, and EB-12 calls for a demonstration of international recognition.

In the context of the extraordinary ability petitions, the beneficiary may qualify by demonstrating either national *or* international acclaim. The Service frequently seems to misunderstand this concept by

[45] *See* note 34*, supra*

[46] *Matter of [name not provided]*, (AAO Aug. 10, 2000)

[47] *Matter of [name not provided]*, EAC 99 081 50490 (AAO Apr. 13, 2001), *Matter of [name not provided]*, WAC 98 217 52965 (AAO Apr. 23, 2001)

[48] *See* note 27*, supra*

[49] *Matter of [name not provided]*, WAC 98 230 52249 (AAO Aug. 15, 2000)

requiring alien beneficiaries seeking this classification to demonstrate both. In a 2000 case, the AAO dismissed a district director's decision and remanded the petition for further consideration where the district director denied the petition by holding that only internationally known individuals have reached the top of the field.[50] The AAO rejected this conclusion:

> [T]here is no statutory or regulatory support for the contention that 'international' fields of endeavor require a higher standard of proof than 'national' fields, nor is it clear how finely one could draw a distinction between the 'national' and the 'international.' . . . An alien who has reached the top of the field in a given country can, therefore, qualify for this classification…[51]

The AAO further addressed the question of what exactly constitutes international recognition in a subsequent decision:

> 'International' need not necessarily mean 'worldwide,' nor need it apply to every single nation or a majority of nations. . . . We interpret the phrase 'international recognition' as referring to 'national recognition' in more than one country, rather than limited recognition by small groups that happen to be in more than one country. To hold otherwise would render the term 'international recognition' almost meaningless, because everyone who seeks this visa classification is, by definition, an alien with a job offer from a U.S. institution. To use a loose definition of 'international recognition' would encompass virtually every foreign-born scholar who seeks employment in the United States…"[52]

This definition goes hand-in-hand with the statement in another AAO decision discussed earlier holding that the mere fact that the alien obtained reference letters from individuals residing in different countries does not constitute international recognition.[53] In other words, the beneficiary is required to demonstrate the international impact of his or her work as a scholar by presenting objective evidence (international publications, citations, lecture invitations, etc.).

The Burden of Proof Is on the Petitioner

When preparing EB-11 and EB-12 petitions, it is up to the petitioner to demonstrate that the beneficiary meets enough of the required criteria to qualify for an immigrant visa. When discussing various regulatory criteria, it is imperative to explain the evidence presented and how it qualifies the beneficiary. For instance, when arguing that the alien serves in a leading capacity for distinguished institutions, it is crucial to define the alien's specific role and qualify it as leading or critical by presenting a statement from a ranking official.[54]

Simply going on record and stating that the alien serves in a leading capacity without supporting documentary evidence is not sufficient to meet the burden of proof. Assertions of counsel do not constitute evidence.[55] While this may seem elementary, most AAO decisions analyzed in this article dismissed the claims that the beneficiary met various criteria because they were not adequately explained and evidence was not presented demonstrating satisfaction of the criteria. Throughout these cases, the AAO cited numerous examples where the petition simply stated that the beneficiary was, for instance, a member of organizations requiring outstanding achievement or had received awards for excellence in the field and provided membership certificates or copies of awards as evidence. These documents alone, without further explanation, do not conclusively establish the significance of the memberships or the awards and, thus, do not adequately establish eligibility.

CONCLUSION

Review of recent RFEs issued by the service centers and the decisions of the AAO leads to the conclusion that the standards for attaining extraordinary or outstanding status have been raised significantly. This has resulted in uncertainty for petitioners and beneficiaries seeking immigrant visas through these categories. Several of the recent AAO decisions quoted harsh statements by frustrated counsel accusing the Service of ignoring evidence or offending the

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[50] *See* note 46*, supra*

[51] *Id.*

[52] *Matter of [name not provided]*, WAC 98 217 52965 (AAO Apr. 23, 2001)

[53] *See* note 28*, supra*

[54] *See* note 49*, supra*

[55] *Matter of [name not provided]*, EAC 99 081 50490 (AAO Apr. 13, 2001), *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972), *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983) *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988), *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

beneficiaries by not accepting their qualifications. Regrettably, while the AAO appears to acknowledge the high incidence of Service error in the adjudication of EB-11 and EB-12 cases, such reproaches are usually unsuccessful. Instead, it is advisable to adjust our approach to case selection and preparation in order to minimize the impact of this often unpredictable adjudication. Clients need to know that, despite the regulatory attempt to offer objective criteria in adjudicating extraordinary and outstanding cases, the subjective factors continue to provide for inconsistent decision-making. Unfortunately, there are no guarantees in life, even for the extraordinary and the outstanding.