

TACKLING O-1, EB-1, AND NIW RFEs/NOIDs: MAKING THE LAW YOUR FRIEND, NOT YOUR FRENEMY

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The practice of immigration law has had its ups and downs, but one thing remained constant through the various administrations and iterations of the immigration agency over the years. From the INS to USCIS, the VSC, CSC, NSC, or TSC, from Obama to Trump to Biden, practitioners dread receiving blue, yellow, or white paper in the mail with the words “Request for Evidence” (RFE) or worse yet, “Notice of Intent to Deny” (NOID). One of the most frustrating aspects of receiving an RFE or NOID is that it often contains misstatements of law. Either the RFE/NOID reframes the regulatory language in a manner that raises the bar or alters the requirement, or it cites to a federal court or a USCIS Administrative Appeals Office (AAO) decision in support of a false proposition; more simply, the case does not say what USCIS claims it does.

This article will address some of the most common issues that arise in RFEs and NOIDs, with a focus on RFEs for O-1, EB-1, and National Interest Waiver (NIW) petitions for academics and researchers. We also provide an analysis of the most relevant case law, with strategies to prepare successful responses and deliver approvals to our clients.

WHAT TO KNOW TO BEGIN

RFE vs. NOID: What’s the Difference?

If the evidence submitted at the time of filing did not establish eligibility for the benefit sought, an adjudicator may either deny the petition or issue an RFE or NOID.¹ In 2018, to discourage frivolous

filings, USCIS issued a policy providing the adjudicator with full discretion to deny applications, petitions, and requests without first issuing an RFE or a NOID, if they found it appropriate.² Under this policy, a USCIS officer had discretion to deny a benefit for failure to establish eligibility, if all required initial evidence was not submitted with the benefit request. Instead of eradicating fraud, this resulted in USCIS denying immigration benefits in situations where applicants or petitioners could have demonstrated eligibility if given a chance to provide additional evidence. On June 9, 2021, USCIS rescinded the 2018 memorandum and now allows USCIS officers to issue RFEs and NOIDs when additional evidence could demonstrate eligibility.³ While the authors certainly do not advocate for unnecessary RFEs and NOIDs, this policy gives an opportunity to correct inadvertent mistakes or omissions.

If a filing contains the initial evidence required by the form and regulations, but USCIS requires further clarification or additional information, the adjudicator will issue an RFE. The maximum response time is 12 weeks (84 days) for an RFE. When an RFE is served by mail, the response is considered timely filed if it

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¹ 8 CFR §103.2(b)(8).

² USCIS Policy Memorandum, *Issuance of Certain RFEs and NOIDs* (July 13, 2018), AILA Doc. No. 18071377.

³ USCIS Policy Alert, *Requests for Evidence and Notices of Intent to Deny* (June 9, 2021), AILA Doc. No. 21060937.a

is received within an additional three days after the due date.⁴

A NOID may be based on evidence of ineligibility or on derogatory information known to USCIS. Also, USCIS can issue a NOID rather than a RFE when initial evidence is predominantly present, but the filing does not appear to establish eligibility by the preponderance of the evidence.⁵ Specifically, when adjudicating petitions where there is a discretionary component to the adjudication, USCIS may issue a NOID if a petitioner has met the eligibility requirements but has not established that they warrant a favorable exercise of discretion.⁶ This happens in petitions involving an officer's subjective evaluation of evidence (e.g., O-1s, EB-1s, NIWs), particularly where officers are required to "count" regulatory criteria (i.e., three for O-1s and EB-1As, or two for EB-1Bs) as the minimum threshold for eligibility or to apply the *Kazarian*⁷ "final merits" analysis. If a petitioner meets the minimum number of criteria, but the officer is still not convinced, a NOID will be issued for the technical reason that initial evidence is present, but eligibility is still being questioned. Does that mean a NOID is "better" than an RFE? Not so fast. When a NOID is not based on lack of initial evidence or a statutory denial, the adjudicator must issue a written NOID providing up to a maximum of only 30 days to respond.

Whether an RFE or NOID, it should not be simply a fishing expedition. RFEs and NOIDs that contain no discussion of the materials included with the original submission or provide no analysis as to how or why such materials are insufficient are contrary to longstanding USCIS guidance. The Yates Memorandum *Requests for Evidence and Notices of Intent to Deny*, dated February 16, 2005,⁸ and the Neufeld Memorandum *Removal of the Standardized Request for Evidence Processing Timeframe Final Rule*, 8 CFR 103.2(b), dated June 1, 2007,⁹ require "a clearly drawn RFE" that "give[s] applicant or petitioner a reasonable chance to resolve

adjudicator's concerns about lack of evidence or about apparent ineligibility," by "articulat[ing] how and why information already submitted is not sufficient or persuasive on a particular issue." In responding to such an RFE or NOID, it is certainly permissible to ask for an additional opportunity to address the adjudicator's concerns. *But*, be careful what you ask for...

The Standard of Proof Is "Preponderance of the Evidence"

Whether responding to a NOID or an RFE, it is helpful to refresh the concept of the standard of proof. Unquestionably, the burden of proof always falls on the petitioner. While an RFE/NOID usually states that it is applying the preponderance of evidence standard, more often, it appears that it is applying a "clear and convincing" or even "beyond a reasonable doubt" evidence standard. Application of these standards in the context of an O-1/EB-1/NIW is an abuse of discretion. Therefore, it may be beneficial to remind USCIS of the standard of proof.

The *USCIS Policy Manual* states that officers are to adjudicate petitions under the preponderance-of-the-evidence standard.¹⁰ The *Manual* explains that pursuant to the preponderance-of-the-evidence standard, once the petitioner submits relevant, probative, and credible evidence that leads the examiner to believe that the claim is "probably true" or "more likely than not" true, then the applicant or petitioner has satisfied the standard of proof.¹¹ This was also addressed in the Yates Memorandum and the Neufeld Memorandum mentioned above, which outline the standard of proof to be met by the petitioner. The memoranda confirm that the correct standard of proof by petitioners seeking immigration benefits is "preponderance of the evidence" and not the standard of "beyond a reasonable doubt."

[A]djudicators too often issue a RFE for additional types of evidence that could tend to eliminate all doubt and all possibility for fraud The standard to be met by the petitioner . . . is "preponderance of the evidence," which means that the matter asserted is more likely than not to be true.

⁴ 8 CFR §103.5a(b).

⁵ USCIS Interoffice Memorandum, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)* (Feb. 16, 2005), AILA Doc. No. 05021810.

⁶ 1 *USCIS Policy Manual*, pt. E, ch. 6.F.4.

⁷ *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010).

⁸ AILA Doc. No. 05021810.

⁹ AILA Doc. No. 07062171.

¹⁰ 1 *USCIS Policy Manual*, pt. E, ch. 4.B.

¹¹ *Id.*

Filings are not required to demonstrate eligibility beyond a reasonable doubt.¹²

In *Matter of Chawathe*,¹³ the appeal was sustained based in part on the USCIS's initial failure to correctly administer the preponderance-of-the-evidence standard. This decision stated:

The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant’s claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “more likely than not” or “probably” true, the applicant or petitioner has satisfied this standard of proof

USCIS confirmed this in a 2010 policy memorandum that addressed the adjudication of extraordinary ability and outstanding professor/researcher immigrant visa petitions (EB-1).¹⁴ In the memorandum, USCIS stated:

USCIS officers are reminded that the standard of proof for most administrative immigration proceedings, including petitions filed for Aliens of Extraordinary Ability . . . is the “preponderance of the evidence” standard

If a petitioner provides initial evidence (including but not limited to articles, publications, reference letters, expert testimony, support letters) that is probative (*e.g.*, does not merely recite the regulations) and credible, USCIS officers should objectively evaluate such initial evidence under a preponderance of the evidence standard to determine whether or not it is acceptable. In other words, USCIS officers may not unilaterally

impose novel substantive or evidentiary requirements beyond those set forth in the regulations, but instead should evaluate the evidence to determine if it falls within the parameters of the regulations applicable to that type of evidence by a preponderance of the evidence standard.¹⁵

As such, where an officer issues an RFE seemingly seeking to “eliminate all doubt,” they are not applying the correct standard of proof.

Solicited Letters from Experts Are Admissible Evidence

Testimonial letters provide background and context to understand an individual’s accomplishments and expertise, often translating the all-too-technical language into something more familiar and accessible. Such letters may also be used to address issues that cannot be easily presented through other evidence. Depending on who signs them, testimonial letters may also frame a beneficiary’s reputation among other experts in the field. In *Muni v. INS*, the court held with regard to expert letters that “*better evidence of an alien’s extraordinary ability would be difficult to find.*”¹⁶ In other words, who better than established experts to opine on whether original contributions were of major significance in the field? Nevertheless, USCIS frequently disregards such expert opinions.

RFEs often dismiss “solicited” letters in favor of “preexisting” evidence. However, there is no basis in law to require “preexisting” evidence, and further no basis in law to reject “probative evidence.” The court in *Chursov v. Miller* addressed this precise issue:

Chursov submitted letters from professors and researchers in the field The sum and substance of USCIS’s consideration of the letters consisted of a determination that the letters were “not presumptive evidence of eligibility” and that an original contribution “must be demonstrated by preexisting, independent, and corroborating evidence.”

¹² Yates Memorandum, AILA Doc. No. 05021810, at 3.

¹³ 25 I&N Dec. 369 (AAO 2010).

¹⁴ USCIS Policy Memorandum, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions* (Dec. 22, 2010), AILA Doc. No. 11020231.

¹⁵ *Id.* at 4.

¹⁶ *Muni v. INS*, 891 F. Supp 440, 445 (N.D. Ill. 1995).

The submission when reviewed as a whole, including the letters, appears to have some evidence of an original contribution. . . .

Rather than considering Chursov's submission as a whole, the agency's review excessively focused on the significance of individual components of the submission. The failure to adequately consider the totality of the submission was arbitrary and capricious.¹⁷

As recognized in *Chursov*, testimonial letters are usually not submitted in isolation, and it is incumbent on the adjudicator to review the materials in their entirety. While expert testimonial letters often provide in-depth discussions of the major significance of a beneficiary's original contributions, they are almost always accompanied by other evidence, such as proof of publications, presentations, and citations. In other words, the letters do not stand alone. In fact, the now-retired USCIS *Adjudicator's Field Manual* (AFM) recognizes that "evidence submitted to establish one criterion may be sufficient to satisfy more than one of the criteria set forth" in the regulations.¹⁸

USCIS frequently cites *Matter of Caron International, Inc.* as justification to disregard expert testimony. In that case, the INS commissioner held:

This Service may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. Nevertheless, since the Service is responsible for making the final determination regarding a beneficiary's eligibility for the benefit sought, **where an opinion is not in accord with other information or is in any way questionable**, the Service is not required to accept or may give less weight to that evidence.¹⁹

It is the bolded phrase that is typically omitted from an RFE or NOID, as USCIS relies on *Matter of Caron*

International as blanket permission to disregard or dismiss all testimonial evidence. However, this is not the holding of *Matter of Caron International*, as was made clear in the AAO precedent decision *Matter of Skirball*.²⁰ Specifically, *Skirball* states that, where the Service does not question the credentials of the experts, take issue with their knowledge, or otherwise find reason to doubt the veracity of their testimony, it has no basis to reject the reliability and relevance of testimony to the specific facts in issue. In fact, *Skirball* holds that a claim that the beneficiary's work is important to the community, if made by a recognized expert whose testimony USCIS finds no cogent reason to doubt, is sufficient to show that beneficiary's work has impacted the field.

Finally, it may be helpful to remind adjudicators that the *USCIS Policy Manual* clearly cautions them not to "predetermine the kind of evidence you think the alien should be able to submit **Approval or denial of a petition must be based on the type and quality of evidence that is submitted rather than assumptions about the failure to address different criteria.**"²¹

WORKING WITH THE REGULATORY CRITERIA: EB-1 & O-1

Meeting the Plain Language of the Criterion

The regulations are clear that sustained acclaim or recognition as outstanding is established by evidence that beneficiary meets at least three²² (or two²³) of the relevant criteria. Yet, particularly with O-1s, USCIS appears to have renewed its quest to require each criterion to independently support the conclusion that beneficiary is one of a small percentage at the top of her field. The language, as it is written in RFEs, is something like this:

To satisfy this criterion, the record must contain sufficient evidence to establish not only the plain language of this criterion, but also show how, through [the criterion], the beneficiary's achievements

¹⁷ *Chursov v. Miller*, No. 18-cv-2886 PKC (S.D.N.Y. May 13, 2019), at 6–7.

¹⁸ AFM ch. 22.2(i)(1)(A).

¹⁹ *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988).

²⁰ *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (AAO 2012).

²¹ 6 *USCIS Policy Manual*, pt. F, ch. 2.B.2.

²² 8 CFR §214.2(o)(1), 204.5(h)(3).

²³ 8 CFR §204.5(i)(3)(i).

are outstanding, show that she has a record of sustained national recognition, and is acknowledged as one of the small percentage of the top of the field.

This language, while intimidating, has no basis in law. The court in *Buletini v. INS* provides the clearest analysis:

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.²⁴

In fact, the regulations do provide a path to qualifying for the extraordinary ability standard through a singular accomplishment: the receipt of a major, internationally recognized award.²⁵ If beneficiaries are unable to meet the entire extraordinary-ability standard through such a one-time achievement, they have the option of meeting the legal standard through satisfying three regulatory criteria (or two criteria, in case of an EB-1B petition) and are not required to meet it through a single criterion.

Several other courts also held that satisfying the individual criterion means satisfying the plain language of that criterion and nothing more. For example, both *Kazarian v. USCIS*²⁶ and *Love Korean Church v. Chertoff*²⁷ stand for the proposition

that “if the agency intended to impose a threshold requirement . . . such records would have been included among the detailed substantive and evidentiary requirements set forth.” Moreover, *Kazarian*, which was formally adopted by USCIS in a 2010 policy memorandum,²⁸ cautions adjudicators against “unilaterally imposing novel substantive or evidentiary requirements beyond those set forth in the regulations” and reminds adjudicators that it is the **totality of the evidence** that must be considered to evaluate eligibility for the benefit sought.

Leading Role Can Be for an Entire Organization or Not

Relevant case law holds that to meet the “leading role” criterion for an O-1 or EB-1A petition, a petitioner is not required to demonstrate a leading role for an entire employing organization, but rather may demonstrate it for an “establishment,” which could be a part of an organization. In *Chursov v. Miller*, the court determined:

USCIS has not adequately explained why these details are not enough to constitute substantial evidence of a leading role in an organization with a distinguished reputation. USCIS required Chursov to prove a leading role at MSK (requiring Chursov to show a leading role for MSK “as a whole”). But the regulation requires Chursov to demonstrate a leading role within an “organization or establishment” that enjoys a distinguished reputation. 8 C.F.R. § 405.2(h)(3)(viii). USCIS made no determination as to whether Mayr’s research group constitutes an organization or establishment with a distinguished reputation. This was arbitrary and capricious.

...

Allowing Chursov to submit evidence of a leading role within a research group of MSK and the group’s distinguished reputation as an organization or establishment is consistent with USCIS’s

²⁴ *Buletini v. INS*, 860 F. Supp. 1222, 1229 (E.D. Mich. 1994).

²⁵ 8 CFR §214.2(o)(3)(iii)(a); 8 CFR §204.5(h)(3).

²⁶ 596 F. 3d 1115 (9th Cir. 2010).

²⁷ *Love Korean Church v. Chertoff*, 549 F. 3d 749 (9th Cir. 2008).

²⁸ USCIS Policy Memorandum, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions* (Dec. 22, 2010), AILA Doc. No. 11020231.

Policy Manual, which states that “USCIS officers should keep in mind that the relative size or longevity of an organization . . . is not in and of itself a determining factor.” AFM ch. 22.2; Doc 39-1 at 11.²⁹

Therefore, petitioners are not required to demonstrate that they will play a leading or critical role for the entire organization, as long as they show their critical role for a part of it, such as a laboratory, research group, or department.

“Publications About” Do Not Have to Be Primarily About the Beneficiary, nor Do They Need to Say That the Beneficiary Is Great

The “publications about” criterion is often targeted by RFEs for more. “More what?,” you may ask. More anything! It is here that RFEs frequently demand that publications about beneficiaries demonstrate their stature in the field. However, this request is contradictory to case law and the regulations themselves. It is similar to the “circular reasoning” we discussed in the “meeting the plain language of the criterion” section above.

If the Service’s own regulations had intended for each regulatory criterion, standing on its own, to be sufficient to demonstrate sustained national or international acclaim or recognition as outstanding, then meeting one criterion could qualify a person as an individual of extraordinary or outstanding ability. There would be no need to meet at least three or at least two, as required by the regulations.

Applicable case law fully supports this. In *Muni v. INS*, the District Court for the Northern District of Illinois discussed the exact issue debated in the AAO decision that dismissed articles about the beneficiary because they “did not report anything of great significance.”³⁰ 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 . . . , 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”³¹

Thus, the *Muni* court confirmed that it is unnecessary to establish sustained acclaim to meet the “publications about” criterion. It is the reverse that is true: by satisfying three criteria through meeting the plain language of the regulations, a beneficiary is deemed to have sustained acclaim and, therefore, deemed to be extraordinary.

The *Muni* case echoes an earlier decision by the same court in *Racine v. INS*,³² which criticized the INS for not following its own regulations when it held that none of the articles about the beneficiary said that he was “one of the best in his field.” The *Racine* court held 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.” As for the articles about the beneficiary, the court said:

There 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 had not only inserted a new qualification . . . , it has also altered its own definition of extraordinary ability

As indicated by the courts’ decisions, the appropriate analysis for published material about the beneficiary is whether there is: (1) published material; (2) about the beneficiary; (3) in professional or major trade publications; and (4) relating to beneficiary’s work. Going beyond that is going beyond the plain language of the criterion.

Internet Publications Are Admissible Evidence

USCIS has regularly issued RFEs dismissing evidence, such as publications about a beneficiary, because they were published on the internet.

²⁹ *Chursov v. Miller*, No. 18-cv-2886 PKC (S.D.N.Y. May 13, 2019), at 13–14.

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

³¹ *Id.*

³² *Racine v. INS*, 1995 U.S. Dist. LEXIS 4336, 1995 WL 153319 (N.D. Ill. Feb. 16, 1995).

The Service often cites *Lamilem Badasa v. Mukasey*,³³ which rejected Wikipedia articles as acceptable evidence. In *Lamilem Badasa*, petitioner, an Ethiopian citizen, entered the United States illegally using a fraudulent Italian passport, applied for asylum, and then presented an Ethiopian-issued document to prove identity. In response, DHS presented evidence from Wikipedia to demonstrate that petitioner's new identity documentation was not valid, and the court held that Wikipedia is not a reliable source because it can be edited by the public. The court did not conclude that all internet sources are unreliable, but specifically focused on Wikipedia's "radical openness" and "pervasive and . . . disturbing set of disclaimers" confirming that it is not an authoritative source. In other words, the court's decision was specifically based on the fact that, upon review of the evidence, it questioned its accuracy.

However, where a petitioner submits evidence from internet sources that cannot be edited by the public and that are published by reliable and credible publications, they should be accepted by USCIS. Unless the Service questions the accuracy or credibility of the evidence, it may not ignore it solely because on the fact that it was sourced from the internet.

Another USCIS favorite tactic to dismiss internet sources is by stating something like this, now a standard part of some RFE templates:

[T]he following issues are inherent in internet publishing making them less probative than documents published by a publishing house or major news organization: dates of publication and timeliness of information are questionable on the Internet; dates listed on Web sites could be the date posted, date updated, or may not be listed at all; this material is not guaranteed to go through a fact-check or review process by editors which will ensure the quality of the publication and information; the internet site may have an undisclosed bias or be used to market products; and if authors are names, there is no way to verify if they are journalists or qualified sources. See [https://owl.](https://owl.english.purdue.edu/owl/resource/552/04)

[english.purdue.edu/owl/resource/552/04](https://owl.english.purdue.edu/owl/resource/552/04). Therefore, the information submitted from the bulk of the websites have little probative value.

In a logic-defying exercise, USCIS dismisses evidence that comes from online sources *by citing an online source as the basis for dismissing it!* Providing no specific deficiencies of the submitted evidence, the RFE simply references a webpage published by the Online Writing Lab (OWL) of Purdue University. The Purdue OWL is an online resource developed by Purdue University to assist students (in junior high school through college), teachers (for in-class and out-of-class instructions of students), and literacy initiatives (programs for illiterate individuals) in basic writing skills. It is not an authoritative source for adjudication of immigration benefits. The OWL website includes ample information about internet and other sources, and how students should use them in their research. It instructs students:

When writing research papers, not only will you be searching for information, but you will be evaluating the sources for credibility. You have to decide where to look, how to recognize credible sources, and how to cross-check your information. Learning how to evaluate effectively is a skill you need both for your course papers and for your life.³⁴

Modern media is rapidly moving away from the print format, with all mainstream major media and professional publications either completely abandoning it or prioritizing online formats. Websites are a legitimate source of publication, given the ubiquity of the internet. The internet has been widely used as a source of information since the mid-1990s, with many print publications evolving into digital platforms over the course of the last 25 years. Trade and industry publications are now often available exclusively online, and many readers of such media expect to receive content digitally, as print is viewed as antiquated and outdated. As such, it is incumbent upon USCIS to enter the modern world and acknowledge internet publications as valid evidence, provided that they otherwise meet the regulatory definition of "publications."

³³ 540 F.3d 909, 901–11 (8th Cir. 2008).

³⁴ https://owl.purdue.edu/owl/research_and_citation/conducting_research/evaluating_sources_of_information/index.html.

“Associations,” “Organizations,” “Establishments,” or “Awards” Do Not Necessarily Mean More Than One

The regulations describing O-1 and EB-1 criteria often use the plural tense. This refers to national or international “prizes or awards,” memberships in “associations” that require outstanding achievements, leading role in “organizations or establishments,” among others. And, while some RFEs have taken this literally and demanded evidence of multiple sets of accomplishments for each criterion, that is not necessary.

In fact, USCIS’s own interpretation does not support this. Specifically, the USCIS Policy Manual states that “although some of the regulatory language relating to evidence occasionally uses plurals, it is entirely possible that the presentation of a single piece of evidence in a specific evidentiary criteria may be sufficient.”³⁵ The *Buletini* court similarly found that a single award satisfied the “prizes and awards” criterion.³⁶

Following this logic, the AAO has sustained a number of appeals, where it disagreed with the Service Centers’ interpretation of the “plurality” issue. In a relevant case, the AAO stated:

While 8 C.F.R. §204.5(h)(3)(ii) expressly references a plurality of “associations,” we construe this criterion broadly as inclusive of a singular “association.” A narrower construction unnecessarily complicates matters and could preclude individuals with extraordinary ability from establishing eligibility if their work is in a field in which only one relevant association exists.³⁷

The AAO went on to state: “By way of analogy, were we to ask if one has *children*, we’d reasonably expect a parent of one *child* to answer affirmatively.” Point well taken.

The Meaning of “Original Contributions” and “Major Significance”

One of the commonly used phrases in EB-1 and O-1 RFEs and NOIDs is “[t]he term ‘original’ and the phrase ‘major significance’ are not superfluous and therefore have some meaning,” citing *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3d Cir. 1995), and *APWU v. Potter*, 343 F. 3d 619, 626 (2d Cir. 2003). The authors agree that the terms “original” and “major significance” are meaningful. However, upon review of the *Silverman* and *APWU* cases, we challenge their relevance.

The *Silverman* case reviewed a claim of violations of the Equal Credit Opportunity Act (ECOA) by the spouse of an individual who defaulted on a \$10,000,000 loan. The *APWU* case, brought by the New York Metro Area Postal Union, alleged insufficient action by the U.S. Postal Service in the investigation and cleanup of an anthrax contamination. Neither case had anything to do with adjudicating extraordinary abilities or original contributions of major significance. In fact, when searching the terms “original” or “major significance” in the *Silverman* and *APWU* decisions, we are unable to find them at all in *APWU* and found only the term “original” in *Silverman*. However, while the word “original” appears in *Silverman* three times, in each instance, it was in the context of the “original loan” or “original guaranty” (i.e., “original” meaning “initial,” not “unique”). While these two matters are regularly cited by USCIS as authority to define the term “original contributions of major significance,” no such definition or even reference to the term exists in these cases. It appears that the RFE and NOID templates need a reboot.

Even when recognizing a beneficiary’s contributions as “original,” RFEs often resist acknowledging their “major significance,” and in fact, most RFEs misstate the plain language of 8 CFR §204.5(h)(3)(v) and 8 CFR §214.2(o)(3)(iii). Both of these regulations require major significance “*in the field*,” but RFEs, the AFM, and even the *USCIS Policy Manual* all misstate it as major significance “*to the field*” (with some adding their own special twist such as “*at large*” or “*as a whole*”). This is a subtle yet significant difference. While the regulations require important contribution within the field, RFEs require a contribution that dramatically impacts the field “*at*

³⁵ 6 *USCIS Policy Manual*, pt. F, ch. 2.B.

³⁶ See *Buletini v. INS*, 860 F. Supp. 1222, 1230–31 (E.D. Mich. 1994).

³⁷ *Matter of [name and file number redacted]* (AAO Mar. 27, 2015), AILA Doc. No. 15040763.

large” or “as a whole.” This is clearly imposing a novel substantive requirement, as prohibited by *Kazarian*.

In addition, RFEs often cite *Visinscaia v. Beers*³⁸ for the proposition that “major significance” requires “influence on the field as a whole.” This is an incorrect reading of *Visinscaia*, in which Svetlana Visinscaia, a dancer from Moldova, vied to meet the EB-1A standard by claiming that she created an original dance technique. While the court in *Visinscaia* found that Ms. Visinscaia’s original contribution failed to rise to the level of “major significance,” it was because her dance technique was just her own; it was not adopted or used by anyone else. In fact, none of the evidence, including expert letters, offered information as to whether other studios, academies, or dancers use this technique. While reference letters were specifically acknowledged in *Visinscaia* as admissible evidence, they lacked confirmation that her technique had *any* influence on the field. The court in *Visinscaia* did not hold that to meet “major significance,” every dancer would have to adopt her technique; rather, it suggested that adoption by some studios, academies, or other professional dancers would suffice to meet “major significance.”

The idea that an original contribution must be adopted or implemented to be of “major significance” is a slippery slope. USCIS clearly struggles with this criterion, as it is very rare to receive an acknowledgement that they find it has been met. In addition to requiring adoption or implementation, RFEs will also suggest that a certain number of citations is required to demonstrate “major significance,” or that the beneficiary’s work must have “provoked widespread commentary.” None of these are regulatory requirements, but “major significance” is, and practitioners must clearly make their case to demonstrate that an original contribution rises to the level of major significance.

High Salary Does Not Have to Be the Highest Salary

The criteria at 8 CFR §204.5(h)(3)(ix) and 8 CFR §214.2(o)(3)(B)(8) require “[e]vidence that the alien has commanded a high salary . . . in relation to others in the field.” They do not, as is often claimed in RFEs,

require that “their salary place them at the very top of their field.” As recognized by the court in *Eguchi v. Kelly*,³⁹ such a requirement

. . . impermissibly conflates its step one analysis with step two. At step one, [the beneficiary] is not obligated to prove that his salary illustrates that he is one of a small percentage who have risen to the very top of the field of endeavor and enjoy sustained national or international acclaim. Rather, [he] need only provide documentation showing that he has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

Along these same lines, RFEs are prone to dismiss salary surveys that provide averages, as they fail to establish that a beneficiary’s salary is “at the very top of the field rather than simply above average.” However, by definition, average salaries provide a benchmark for comparison of one person’s salary against a representative sampling of the rest of the field. Average salary surveys thus provide the most encompassing reflection of whether an individual commands a high salary “in relation to others in the field.”

The U.S. Department of Labor (DOL) is the government agency empowered to annually establish prevailing wages by surveying employers across the U.S. precisely to determine what constitutes prevailing (i.e., usual or predominant) remuneration. Salaries that are significantly higher than the DOL prevailing wage should rightfully be considered “high remuneration,” as this is the only logical definition of the term. In addition, the USCIS policy memorandum regarding EB-1 adjudications specifically lists the DOL’s Office of Foreign Labor Certification Online Wage Library (i.e., the prevailing wage library) as a legitimate source for evaluating this regulatory criterion.⁴⁰

Moreover, the federal courts have consistently upheld the use of average salary indicators as a means for

³⁸ *Visinscaia v. Beers*, 4 F. Supp. 3d 126 (D.D.C. 2013).

³⁹ *Eguchi v. Kelly*, No. 3:16-CV-1286-D, 2017 WL 2902667, at *4 (N.D. Tex. July 7, 2017).

⁴⁰ USCIS Policy Memorandum, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions* (Dec. 22, 2010), AILA Doc. No. 11020231, at 11.

measuring whether a beneficiary commands a high salary “in relation to others in the field.” As held in *Muni v. INS*, 891 F. Supp. 440, 444 (N.D. Ill. 1995), “since a few very highly paid [individuals] can skew the average salary upward, it is reasonable to assume that a [beneficiary] making even the average salary is making more than most other[s]” in the field. The *Muni* Court also held that “... the median salary would probably be a more useful figure for the INS to consider,” granting the “high remuneration” criterion even though the beneficiary made less than other NHL hockey players.

Also, *Grimson* has an extensive discussion of how to properly adjudicate the “high remuneration” criterion:

In affirming the denial of plaintiff’s petition for the second time, the AAU completely rejected all of his submissions. It first found that plaintiff’s salary (\$300,000) was below the average NHL salary, and therefore did not qualify as a high salary in the field of endeavor. This, of course, presupposes that plaintiff’s field of endeavor is as an NHL player (which plaintiff disputes) as opposed to a hockey player in general or even a professional hockey player. In any event, it is not reasonable simply to compare plaintiff’s salary to the average NHL salary, without any indication of how that average is determined. Obviously, the superstars of the NHL make tremendously high salaries, and that can skew any average. This court does not believe (and INS has not argued) that only superstars can qualify as having extraordinary ability.⁴¹

As such, it is critical to define the beneficiary’s field when presenting evidence of high remuneration.

MATTER OF DHANASAR AND THE NATIONAL INTEREST WAIVER

In contrast to the rich federal case law available in the EB-1 and O-1 context, there is almost no federal case law relating to NIWs. Apparently, this is because the two federal cases on point both held that federal courts do not have jurisdiction to review

a denial of a national interest waiver.⁴² Rather, both the Ninth Circuit and the D.C. Circuit held that the granting of an NIW is inherently discretionary, and therefore, such decisions are not subject to review by courts.⁴³ Whether these cases were decided correctly, or there is room for further challenge, is beyond the scope of this article. Nevertheless, there are many unpublished AAO decisions on point, and it may be useful to peruse these,⁴⁴ in addition to *Matter of Dhanasar*⁴⁵ itself, when responding to an RFE for an NIW.

Fortunately (knock on wood), the experience of both authors is that there are far fewer RFEs on NIWs. This limits the feedback we can offer on NIW RFEs. Yet, there have been some, and hopefully, this experience can provide some insight for other practitioners.

Unlike the criteria-driven EB-1 and O-1 petitions, NIWs are far more loosely defined. The current framework for NIW adjudications is the precedent decision *Matter of Dhanasar*, which established that the following conditions should be met to waive the requirement of a labor certification:

1. The proposed endeavor has both substantial merit and national importance;
2. The beneficiary is well-positioned to advance the proposed endeavor; and
3. It would be beneficial to the United States to waive the requirements of a job offer and of a labor certification.
4. Much like the RFEs for EB-1 and O-1s track the regulatory criteria, RFEs for NIWs track these three prongs, indicating which were met and which require additional information. Our analysis will follow this same structure.

Substantial Merit and National Importance

Whereas the previous framework for NIWs, *Matter of New York State Department of Transportation*

⁴² *Zhu v. Gonzales*, 411 F.3d 292 (D.C. Cir. 2005); *Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (9th Cir. 2019).

⁴³ *Zhu v. Gonzales*; *Poursina v. USCIS*.

⁴⁴ For AAO decisions, see www.uscis.gov/administrative-appeals/aao-decisions.

⁴⁵ 26 I&N Dec. 884 (AAO 2016).

⁴¹ *Grimson v. INS*, 934 F. Supp. 965 (N.D. Ill. 1996).

(NYSDOT),⁴⁶ focused on the beneficiary’s “area of intended employment,” *Matter of Dhanasar* introduced a new concept, the “proposed endeavor.” According to *Matter of Dhanasar*, “the first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake.” However, nowhere in *Dhanasar* is the term “endeavor” explicitly defined, nor is there any guidance about what constitutes a “proposed endeavor.” In the absence of a clear definition of “endeavor” in *Dhanasar*, we turn to the plain language of the term. According to the online *Oxford Dictionary*, “endeavor” is an “attempt to achieve a goal.” Substituting the term “goal” for “endeavor” fits within the rubric of the *Dhanasar* test without changing its meaning, to wit:

1. The proposed “goal” has both substantial merit and national importance;
2. The beneficiary is well-positioned to advance the proposed “goal”; and
3. It would be beneficial to the United States to waive the requirements of a job offer and of a labor certification.

Thus, it would seem that the “proposed endeavor” is a description of the work the beneficiary intends to do to achieve a specific goal. Distinguishing between the job title and the beneficiary’s proposed endeavor is important, as RFEs often conflate the two. This is particularly critical where the job title on Form I-140 does not comport with USCIS’s preconceived notions of the jobs that could qualify for an NIW. (E.g., USCIS does not believe that most teachers and clinical physicians make the cut.) This was based on the following language in *Dhanasar*:

[T]he petitioner proposes to support teaching activities in science, technology, engineering, and math (“STEM”) disciplines While STEM teaching has substantial merit in relation to U.S. educational interests, the record does not indicate by a preponderance of the evidence that the petitioner would be engaged in activities that would impact the field of STEM education **more broadly**. Accordingly, as the petitioner

has not established by a preponderance of the evidence that his proposed teaching activities meet the “national importance” element of the first prong of the new framework, we do not address the remaining prongs in relation to the petitioner’s teaching activities.⁴⁷

Dhanasar further reinforced this point by holding that “[i]n determining whether the proposed endeavor has national importance, we consider its potential prospective impact We look for broader implications.”⁴⁸ As a result, RFEs will often render a split decision; acknowledging “substantial merit” but questioning “national importance” due to a lack of evidence regarding the impact made by someone in a teaching or clinical field, for instance. While we may advocate on behalf of an excellent teacher or exceptional clinician, at present these are likely to be a hard sell. To the extent the excellent teacher or exceptional clinician published or presented their work, it would be useful to cite the numerous AAO decision that hold that “broader implications” are established where the beneficiary’s “results are disseminated to others in the field through . . . journals and conferences.”⁴⁹

RFEs have also misstated and misapplied the national-importance subprong, claiming, for example, that “the national importance of a proposed endeavor [is inferred] . . . from the potential prospective impact the petitioner’s activities will have on the socio-economic well-being of the nation, particularly in economic depressed areas.” However, this directly contradicts *Dhanasar*, which holds that “evidence that the endeavor has the potential to create a significant economic impact . . . is not required.”⁵⁰ Indeed, *Dhanasar* clearly recognizes that “endeavors related to research, pure science, and the furtherance of human knowledge may qualify, whether or not it will translate into economic benefits for the U.S.”⁵¹

⁴⁷ *Matter of Dhanasar*, 26 I&N Dec. at 893 (emphasis added).

⁴⁸ *Id.* at 889.

⁴⁹ *Matter of S-A-K-* (AAO June 5, 2018) at 4; *see also Matter of S-B-* (AAO Aug. 8, 2018) at 4; *Matter of R-M-T-* (AAO Mar. 30, 2018) at 5; *Matter of O-F-O-* (AAO June 20, 2018) at 4; *Matter of D-I-R-* (AAO Aug. 7, 2018) at 4; and *Matter of A-D-* (AOO May 19, 2017) at 4.

⁵⁰ *Matter of Dhanasar*, 26 I&N Dec. at 889.

⁵¹ *Id.*

⁴⁶ 22 I&N Dec 215 (Assoc. Comm’r 1998).

Therefore, there is no requirement to demonstrate an economic benefit to the United States.

Well-Positioned to Advance the Proposed Endeavor

The second prong “shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well-positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual’s education, skills, knowledge and record of success in related or similar efforts . . . plan for future activities . . . progress towards achieving the proposed endeavor.”⁵² In addition to unique skills or education, where applicable, it may be useful to incorporate EB-1 or O-1 criteria and to use the federal case law where such qualifications and criteria are addressed.

AAO decisions also provide some insight into meeting this second prong. In general, these decisions indicate that it is not enough to add to the pool of knowledge. Rather, there must be progress towards achieving the goals, a record of success in similar efforts, or generation of interest among relevant parties. For example, where a surgeon claimed to have developed new techniques but did not identify any surgical centers that have adopted the technique (nor evidence that he actually developed it), he could not be said to be “well-positioned to advance the proposed endeavor,” even though he published and presented research during his medical career. Specifically, the AAO found that if “petitioner has not shown that his plastic surgery research has been frequently cited . . . otherwise served as an impetus for progress in the field . . . or generated substantial positive discourse,” it does not constitute a record of success in his area of research.⁵³

In addition, the AAO confirms that being well-positioned means being well-positioned at the time of initial filing. For example, having experience as a multicultural educator and a plan to improve student retention rates for culturally diverse populations was not sufficient to be “well-positioned to advance the endeavor.”⁵⁴ The fact that beneficiary’s work was published *after* the NIW was filed precluded it

from consideration.⁵⁵ In addition, being listed as a researcher in study protocols without further details of the beneficiary’s specific role failed to satisfy the “well-positioned” prong.⁵⁶

While not as high a threshold as EB-1, the NIW clearly requires more than just good intentions.

It Is Beneficial to the United States to Waive the Requirement of a Job Offer

The third prong of *Dhanasar* requires the petitioner to demonstrate that:

. . . on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification [B]y creating the national interest waiver, Congress recognized that in certain cases the benefits inherent in the labor certification can be outweighed by other factors that are also deemed to be in the national interest.⁵⁷

Where the individual seeking an NIW is the beneficiary of a certified PERM, RFEs may question why an NIW is warranted. However, nowhere in *Dhanasar* is there a requirement that a labor certification be unavailable or impossible to acquire. In fact, where petitioners have established that their proposed endeavor is of “substantial merit and national importance” (prong 1) and that they have a “record of success in past endeavors” (prong 2), it may be useful to remind USCIS of the constrictions of a labor certification. Namely, that the petitioner may not be able to pursue the proposed endeavor if limited to the duties described on the ETA 9089.

The regulatory matrix that governs the labor certification process clearly requires a “permanent” job offer in which the “job requirements . . . adhere to what is customarily required for the occupation . . . and may not be tailored to the foreign worker’s qualification.”⁵⁸ The employer is limited to the “actual minimum requirements for the job opportunity,”⁵⁹ which must conform to the standard

⁵² *Id.* at 890.

⁵³ *Matter of H-C-C-* (AAO July 26, 2017); see also *Matter of A-D-* (AAO May 19, 2017).

⁵⁴ *Matter of N-K-* (AAO Apr. 14, 2017).

⁵⁵ *Id.*

⁵⁶ *Matter of C-W-K-* (AAO June 13, 2017).

⁵⁷ *Matter of Dhanasar*, 26 I&N Dec. at 890.

⁵⁸ www.foreignlaborcert.doleta.gov/perm_detail.cfm.

⁵⁹ 20 CFR §656.17(i)(1).

job classifications established by the Standard Occupation Classification (SOC) Occupational Information System (O*NET). An employer may try to justify requirements beyond what is normal for the occupation by documenting “business necessity,” but any and all requirements must be quantifiable. In other words, they must be measurable by objective standards such as “two years of experience” or “proof of licensure or certification.” Moreover, in accordance with the Board of Alien Labor Certifications Appeals, subjective requirements such as “excellent” are not permitted.

It is precisely for this reason that *Dhanasar* did not restrict NIW eligibility to those who could not obtain a labor certificate. Rather, *Dhanasar* explicitly recognized that the NIW would be appropriate where “the national interest in the foreign national’s contributions is sufficiently urgent to warrant forgoing the labor certification process.”⁶⁰ The beneficiary in *Dhanasar* was approved for the NIW “because of his record of successful research in an area that furthers U.S. interests [T]his petitioner offers contributions of such value that, on balance, they would benefit the United States even assuming that other qualified U.S. workers are available.”⁶¹

CONCLUSION

As immigration lawyers, RFEs and NOIDs are a fact of our lives that are not likely to go away anytime soon. Even the strongest, most well-documented case may raise objections. However, knowledge is power, and knowing the law, USCIS’s positions, and AAO decisions should provide winning solutions.

⁶⁰ *Matter of Dhanasar*, 26 I&N Dec. at 891.

⁶¹ *Id.* at 893.