Business Immigration, Workforce and Compliance Law

Benjamin N. Cardozo School of Law

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Supplemental Materials

Class #6

class 6

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

POGHOS KAZARIAN, *Plaintiff-Appellant,* v. US CITIZENSHIP AND IMMIGRATION SERVICES, a Bureau of the Department of Homeland Security; JOHN DOES, 1 through 10, *Defendants-Appellees.*	No. 07-56774 D.C. No. CV-07-03522-R-E ORDER AND OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted
December 9, 2008—Pasadena, California

Filed March 4, 2010

Before: Harry Pregerson, Dorothy W. Nelson and
David R. Thompson, Circuit Judges.

Opinion by Judge D.W. Nelson;
Concurrence by Judge Pregerson

COUNSEL

Ruben N. Sarkisian, Glendale, California, for plaintiff-appellant Poghos Kazarian.

Craig W. Kuhn and Elizabeth J. Stevens, Office of Immigration Litigation, Department of Justice, Washington, D.C.; for defendant-appellee U.S. Citizenship & Immigration Services.

ORDER

The opinion with dissent filed on September 4, 2009, and published at 580 F.3d 1030 (9th Cir. 2009), is withdrawn and superceded by the opinion filed concurrently herewith.

With the filing of the new opinion, appellant's pending petition for rehearing/petition for rehearing en banc is DENIED as moot, without prejudice to refiling a subsequent petition for rehearing and/or petition for rehearing en banc. *See* 9th Cir. G.O. 5.3(a).

OPINION

D.W. NELSON, Senior Circuit Judge:

Poghos Kazarian appeals the District Court's grant of summary judgment to the United States Citizenship and Immigration Service ("USCIS"), finding that the USCIS's denial of an "extraordinary ability" visa was not arbitrary, capricious, or contrary to law. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 31, 2003, Poghos Kazarian, a thirty-four-year-old native and citizen of Armenia, filed an application for an employment-based immigrant visa for "aliens of extraordinary ability" (Form I-140) contending that he was an alien with extraordinary ability as a theoretical physicist.

Kazarian received a Ph.D in Theoretical Physics from Yerevan State University ("YSU") in Yerevan, Armenia, in 1997. From 1997 to 2000, he remained at YSU as a Research Associate, where, among other things, he "reviewe[d] [the] diploma works of the Department's graduates."

At YSU, Kazarian specialized in non-Einsteinian theories of gravitation. According to a colleague, "[t]his work offered a mechanism for the control of solutions' accuracy, which guarantees the accuracy of calculations in many theories of gravitation." Kazarian "solve[d] [the] more than 20 year[ ] old problem of construction of the theory, satisfying the cosmogony conception of worldwide acknowledged scientist, academician V.A. Hambartsumian."

Since 2000, Kazarian has served as a Physics / Math / Programming Tutor, an Adjunct Physics and Mathematics Instructor, and a Science Lecture Series speaker at Glendale

Community College ("GCC"). Between 2000 and 2004, Kazarian's work at GCC was on a volunteer basis.

In support of his application, Kazarian submitted several letters of reference. The first reference was a letter from Dr. Kip S. Thorne, the Feynman Professor of Theoretical Physics at California's Institute of Technology. Dr. Thorne, who worked in the same research group as Kazarian, stated that he had "formed a good opinion of Dr. Kazarian's research. It is of the caliber that one would expect from a young professor at a strong research-oriented university in the United States." Kazarian also provided letters from professors at YSU, stating that Kazarian "possesse[d] great ability and considerable potency in science," was "a young scientist with enough scientific potential," had "high professionalism," and had "displayed himself as exceptionally diligent, hard-working, [and] highly qualified." Finally, Kazarian submitted three letters from colleagues at GCC praising his hard work and active participation at GCC.

Kazarian also noted that he had authored a self-published textbook, titled "Concepts in Physics: Classical Mechanics." According to one of his colleagues at GCC, the book "is certain to be required reading in many secondary schools, colleges and universities throughout the country." Kazarian, however, presented no evidence that the book was actually used in any class. Kazarian also submitted two scholarly articles where the authors acknowledged him for his useful scientific discussions. Kazarian also submitted his resume, which listed six publications in *Astrophysics* that he had authored or co-authored, as well as one e-print published in the public web archives of the Los Alamos National Laboratory.

Finally, Kazarian presented evidence of his Science Lecture Series at GCC. His resume also listed lectures at the 17th and 20th Pacific Coast Gravity Meetings, the Conference on Strong Gravitational Fields at UC Santa Barbara, the 8th International Symposium on the Science and Technology of

Light Sources, and the Foundations of Gravitation and Cosmology, International School-Seminar.

In August 2005, the USCIS denied the petition. Kazarian appealed the denial to the Administrative Appeals Office ("AAO"). The AAO dismissed the appeal, finding that Kazarian failed to satisfy any of the evidentiary criteria set forth in the relevant "extraordinary ability" visa regulations. Having exhausted his administrative remedies, Kazarian filed a complaint in the Central District of California. The District Court granted the USCIS's motion for summary judgment, and Kazarian timely appealed to this court.

STANDARD OF REVIEW

This court "review[s] the entry of summary judgment *de novo*." *Family Inc. v. U.S. Citizenship & Immigration Servs.*, 469 F.3d 1313, 1315 (9th Cir. 2006). "However, the underlying agency action may be set aside only if 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Id.* (quoting 5 U.S.C. § 706(2)(A)). "We have held it an abuse of discretion for the Service to act if there is no evidence to support the decision or if the decision was based on an improper understanding of the law." *Tongatapu Woodcraft Hawaii Ltd. v. Feldman*, 736 F.2d 1305, 1308 (9th Cir. 1984) (internal quotations omitted).

"In circumstances where an agency errs, we may evaluate whether such an error was harmless." *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004); *see* 5 U.S.C. § 706. "In the context of agency review, the role of harmless error is constrained. The doctrine may be employed only 'when a mistake of the administrative body is one that *clearly* had *no bearing* on the procedure used or the substance of decision reached.' " *Gifford Pinchot*, 378 F.3d at 1071 (citing *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982)) (emphasis added by the *Gifford Pinchot* court). "We will not usually overturn agency action unless

there is a showing of prejudice to the petitioner." *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150 (9th Cir. 2002).

DISCUSSION

A. THE "EXTRAORDINARY ABILITY" VISA

[1] Pursuant to 8 U.S.C. § 1153(b)(1)(A), aliens may apply for a visa on the basis of "extraordinary ability." An alien can prove an extraordinary ability in one of two ways. The first is "evidence of a one-time achievement (that is, a major, international recognized award)." 8 C.F.R. § 204.5(h)(3). Receipt of the Nobel prize is the quintessential example of a major award. H.R. Rep. No. 101-723(I & II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6739. Kazarian concedes that he has won no such prize.

The second way to prove extraordinary ability is to provide evidence of at least three of the following:

> (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
>
> (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
>
> (iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
>
> (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of oth-

> ers in the same or an allied field of specification for which classification is sought;
>
> (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
>
> (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
>
> (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
>
> (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;
>
> (ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or
>
> (x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

8 C.F.R. § 204.5(h)(3). If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

The "extraordinary ability" visa can be better understood in context. Under the Immigration Act of 1990, thousands of employment-based visas were created according to three employment preferences. Pub. L. No. 101-649, 101 Stat. 4978. "Aliens with extraordinary ability" are "priority workers" and have the first preference. 8 U.S.C. § 1153(b)(1).

"*Extraordinary* ability" is distinct from "*exceptional* ability," however, which receives second preference. *Compare id.* § 1153(b)(1)(A) (emphasis added), *with id.* § 1153(b)(2) (emphasis added).[1] To qualify for the "exceptional ability" visa, a petitioner must make a lesser showing of ability, and need only show three of the following:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or

[1]Skilled workers, professionals, and "other workers" make up the third preference. *Id.* § 1153(b)(3).

> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

8 C.F.R. § 204.5(k)(3)(ii).

[2] To qualify for an "exceptional ability" visa, however, the alien must also provide evidence that his services are sought by a United States employer. *Id.* The "extraordinary ability" visa thus has considerable advantages. Unlike the "exceptional ability" visa petition, the "extraordinary ability" petition is not dependent on an actual offer for employment in the United States, and is exempt from the time-consuming labor certification process, which requires that employers first test the marketplace for existing qualified domestic workers. *Compare id.* § 204.5(h)(3)(5), *with id.* § 204.5(k)(4).

[3] Interpretation of the statutory and regulatory requirements for the "extraordinary ability" visa presents a question of first impression for this court. The scant caselaw indicates that "[t]he regulations regarding this preference classification are extremely restrictive." *Lee v. Ziglar*, 237 F. Supp.2d 914, 918 (N.D. Ill.2002) (finding that "arguably one of the most famous baseball players in Korean history" did not qualify for the visa as a baseball coach for the Chicago White Sox because his acclaim was limited to his skills as a player and not as a coach); *cf. Grimson v. INS*, 934 F.Supp. 965, 969 (N.D. Ill. 1996) (finding denial arbitrary and capricious where NHL hockey enforcer was one of the top three players in the world and agency improperly discounted the importance of the enforcer position); *Muni v. INS*, 891 F.Supp. 440 (N.D. Ill. 1995) (finding the agency improperly discounted evidence for an NHL hockey player who won the Stanley Cup three times, won "most underrated defenseman," was paid more than the average NHL player, submitted numerous articles establishing his stature in the hockey world, and provided affidavits from eight renowned hockey players stating that he was highly

regarded); *Buletini v. INS*, 860 F.Supp. 1222 (E.D. Mich. 1994) (finding denial was arbitrary and capricious where Albanian physician won a national award, published a medical dictionary and numerous articles, was responsible for general health projects, and served as an adjunct professor); *Matter of Price*, 20 I. & N. Dec. 953, 955-56 (BIA 1994) (granting the visa petition to a professional golfer who won the 1983 World Series of Golf and the 1991 Canadian Open, ranked 10th in the 1989 PGA Tour, collected $714,389 in 1991, provided numerous affidavits from well-known and celebrated golfers, and received widespread major media coverage).

B. APPLICATION TO KAZARIAN

The AAO found that Kazarian did not meet any of the regulatory criteria. Only four of the ten are at issue in this appeal. We find that the AAO erred in its consideration of two of these issues.

1. Authorship of Scholarly Articles in the Field of Endeavor

Pursuant to 8 C.F.R. § 204.5(h)(3)(vi), Kazarian submitted proof of his six articles in *Astrophysics* and his e-print in the Los Alamos National Laboratory archives, but did not demonstrate that other scholars had cited to his publications. The AAO held that without evidence of such citations, Kazarian's articles did not meet the regulatory definition of evidence, because "publication of scholarly articles is not automatically evidence of sustained acclaim" and "we must consider the research community's reaction to these articles."

[4] The AAO's conclusion rests on an improper understanding of 8 C.F.R. § 204.5(h)(3)(vi). Nothing in that provision requires a petitioner to demonstrate the research community's reaction to his published articles before those articles can be considered as evidence, and neither USCIS nor

an AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008). While other authors' citations (or a lack thereof) might be relevant to the final merits determination of whether a petitioner is at the very top of his or her field of endeavor, they are not relevant to the antecedent procedural question of whether the petitioner has provided at least three types of evidence. 8 C.F.R. § 204.5(h)(3). "If the agency intended to impose [peer citations] as a threshold requirement, we have little doubt that such records would have been included among the detailed substantive and evidentiary requirements set forth at 8 C.F.R. § 204.5[(h)(3)(i)-(x)]." *Love Korean Church*, 549 F.3d at 758.

2. Participation as a Judge of the Work of Others

Pursuant to 8 C.F.R. § 204.5(h)(3)(iv), Kazarian submitted proof that he was a judge of graduate-level diploma works at Yerevan State University. The AAO held that "reviewing 'diploma works' for fellow students at one's own university is not persuasive evidence of acclaim beyond that university," and that absent "evidence that the petitioner served as an external dissertation reviewer for a university with which he is not otherwise affiliated," Kazarian's submission did not meet the regulatory definition of evidence.

[5] The AAO's conclusion rests on an improper understanding of 8 C.F.R. § 204.5(h)(3)(iv). Nothing in that provision suggests that whether judging university dissertations counts as evidence turns on which university the judge is affiliated with. Again, while the AAO's analysis might be relevant to a final merits determination, the AAO may not unilaterally impose a novel evidentiary requirement. *Love Korean Church*, 549 F.3d at 758.

3. Evidence of Original Scientific or Scholarly Contributions of Major Significance in the Field of Endeavor

[6] Pursuant to 8 C.F.R. § 204.5(h)(3)(v), Kazarian submitted letters from physics professors attesting to his contributions in the field. The AAO found that his contributions were not major, and thus did not meet the regulatory definition of evidence. The AAO's analysis here is consistent with the relevant regulatory language, and the AAO's determination that Kazarian did not submit material that met the regulatory definition of evidence set forth at 8 C.F.R. § 204.5(h)(3)(v) is neither arbitrary, capricious, nor an abuse of discretion.

4. Display of the Alien's Work at Artistic Exhibitions or Showcases

[7] Pursuant to 8 C.F.R. § 204.5(h)(3)(vii), Kazarian submitted proof that he had self-published a textbook, had given lectures at a community college, and had made presentations at conferences. The AAO found that none of these activities were displays at artistic exhibitions or showcases. The AAO's analysis here is again consistent with the relevant regulatory language, and the AAO's determination that Kazarian did not submit evidence as defined at 8 C.F.R. § 204.5(h)(3)(vii) is neither arbitrary, capricious, nor an abuse of discretion.

C. HARMLESSNESS

Having found that the AAO erred by unilaterally introducing new evidentiary requirements into 8 C.F.R. § 204.5(h)(3)(iv) and (vi), we must now determine whether these errors were prejudicial. 5 U.S.C. § 706; *Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 879-80 (9th Cir. 2009). They were not.

The AAO held that Kazarian provided zero of the ten types of evidence set forth at 8 C.F.R. § 204.5(h)(3)(i)-(x). The

AAO should have held that Kazarian presented two types of evidence. The regulation requires three types of evidence. 8 C.F.R. § 204.5(h)(3).

[8] Whether an applicant for an extraordinary visa presents two types of evidence or none, the proper procedure is to count the types of evidence provided (which the AAO did), and the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded). 8 C.F.R. § 204.5(h)(3). Here, although the AAO committed clear legal error, that error "clearly had no bearing" on either "the procedure used or the substance of decision reached." *Gifford Pinchot*, 378 F.3d at 1071 (quotations omitted).

CONCLUSION

[9] Although Kazarian appears to be a well-respected, promising physicist, who may well have been able to qualify for an "exceptional ability" visa, he instead applied for an "extraordinary ability" visa, and presented only two of the types of evidence set forth at 8 C.F.R. § 204.5(h)(3)(i)-(x), and the "extraordinary ability" visa regulations require three. The AAO's conclusion that Kazarian presented zero types of evidence was in error, but the error was harmless. Kazarian failed to establish his eligibility for an "extraordinary ability" visa, and the District Court correctly granted USCIS' summary judgment motion.

AFFIRMED.

PREGERSON, Circuit Judge, concurring:

I am pleased to concur in Judge Nelson's opinion. I write separately, however, to emphasize the injustice perpetrated by our immigration laws and system in this case. Dr. Poghos

Kazarian received his Ph.D. in the field of theoretical physics from Yerevan State University and, since arriving in the United States, has continued to research and teach in this challenging field. Starting around 2000, Dr. Kazarian participated in a research group headed by Dr. Kip Thorne at the California Institute of Technology. Dr. Thorne, among others, submitted a letter in support of Dr. Kazarian's visa application. Dr. Kazarian volunteers his teaching services at Glendale Community College and has authored and published his own physics textbook. Dr. Kazarian has received strong words of praise from colleagues at Yerevan State University, Glendale Community College, and the California Institute of Technology. Dr. Kazarian's contributions in the United States have been undoubtedly valuable. Forcing Dr. Kazarian to depart from our country would be undoubtedly wasteful and make one think that there is something haywire in our system. Although, as the opinion points out, Dr. Kazarian did not submit three of the types of evidence required for the "extraordinary visa," he would have been an excellent candidate for an "exceptional ability" visa. Indeed, it was likely the error of an ineffective lawyer that led Kazarian to apply for the wrong visa in the first place.[1]

[1]At oral argument, Dr. Kazarian's current counsel represented to the court that the attorney who started Dr. Kazarian on the path of applying for this "extraordinary ability" visa was George Verdin. Verdin is listed as being indefinitely suspended from practice before the Immigration Service, the Immigration Courts, and the Board of Immigration Appeals. Executive Office for Immigration Review, Office of General Counsel, List of Currently Disciplined Practitioners (Aug. 11, 2009), http://www.usdoj.gov/eoir/profcond/chart.htm. Verdin has also been disbarred by the Supreme Court of Hawai'i. *Office of Disciplinary Counsel v. Verdin*, No. 22349 (Haw. Sept. 27, 2001). It is distressing how many good people—including the highly educated and the minimally educated—fall prey to disreputable lawyers known to the immigration system.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

July 20, 2010

PM-602-0003

Policy Memorandum

SUBJECT: Clarifying Guidance on *"O" Petition Validity Period*
Revisions to the *Adjudicator's Field Manual (AFM)* Chapter 33.4(e)(2)
AFM Update AD10-36

Purpose
This Policy Memorandum (PM) provides guidance for processing and adjudicating Form I-129, Petition for Nonimmigrant Worker, filed on behalf of O nonimmigrants, with regard to determining the appropriate validity period of an approvable petition when a gap exists between two or more events reflected in the itinerary.

Scope
Unless specifically exempted herein, this PM applies to all USCIS employees who adjudicate O-1 visa petitions.

Authority
INA 101(a)(15)(O); INA 214(a)(2)(A); 8 CFR 214.2(O).

Background
The validity dates for the O-1 visa classification are defined by the specific period of time required to perform or participate in a specific event(s). When reviewing an O-1 petition, the length of time between the scheduled events, also known as a "gap," has sometimes been viewed as a gauge to determine whether an itinerary represented one continuous "event" or separate events requiring separate petitions.

In certain cases where there has been a significant "gap" between events, adjudicators have sometimes concluded that a single petition was filed for separate events rather than a continuous event. In such cases, the petition may have been approved only for a validity period equal to the length of time needed to accomplish what appeared to be the initial specific event rather than the continuous event as represented by the petition. There is no statutory or regulatory authority for the proposition that a gap of a certain number of days in an itinerary automatically indicates a new event. The regulations speak in terms of tours and multiple appearances as meeting the "event" definition.

Policy

The statutory and regulatory background provides flexibility on the length of validity period that may be granted. The statute and regulations allow for an approval of an O-1 petition for a period necessary to accomplish the event or activity, not to exceed 3 years. Adjudicators should evaluate the totality of the evidence submitted to determine if the activities described in the itinerary are related in such a way that they would be considered an "event" for purposes of the validity period. When the validity period requested is established though the submission of appropriate evidence, Service Centers should approve a petition for the length of the validity period requested where the law and regulations permit.

The AFM is updated accordingly.

Implementation

AFM Update, Chapter 33.4(e)

Chapter 33.4(e) is revised as follows:

(e)(1) Approval. If the petition is approvable from the evidence submitted, endorse the approval block and issue Form I-797 (through CLAIMS) showing the period of validity and the alien beneficiary's name and classification. If the petition is approved after the date the petitioner indicated services would begin, the approved petition will show a validity period commencing with the date of approval and ending with the date requested by the petitioner, not to exceed the period determined by the director to be necessary to complete the event or activity, and not to exceed 3 years.

A beneficiary may be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may engage in employment only during the validity period of the petition. An extension of stay may be authorized in increments of up to 1 year to continue or complete the same event or activity for which he or she was admitted plus an additional 10 days to allow the beneficiary to get his or her personal affairs in order.

Chapter 33.4(e)(2) is added as follows:

(e)(2) Validity Period. There is no statutory or regulatory authority for the proposition that a gap of certain of number of days in an itinerary automatically indicates a "new event."

Nonimmigrants described in the O classification are "seek[ing] to enter the United States to continue to work in the area of extraordinary ability," INA 101(a)(15)(O), and may be authorized for a period of stay necessary "to provide for the event (or events) for which the nonimmigrant is admitted," INA 214(a)(2)(A). There is no requirement for a "single" event in the statute. Rather, the focus is on whether the alien will work in the

area of extraordinary ability. 8 CFR 214.2(O)(1)(ii)(1) mirrors this language. Further, 8 CFR 214.2(O)(1)(i) states that the O classification is for an alien coming to the U.S. "to perform services relating to an event or events." Thus, there is a clear indication in the regulations that a petition may be approved to cover not only the actual event or events but also services and/or activities in connection with that event or events. 8 CFR 214.2(o)(2)(ii)(C) defines the evidentiary standard for identifying the event or activity relating to the events by requiring "an explanation of the nature of the events or activities, the beginning and ending dates for the events or activities and a copy of any itinerary for the events or activities." Unlike other nonimmigrant categories that have a specified time limit, a temporal period is not specified for the Os. The regulations state that the validity period shall be that which is "necessary to accomplish the event or activity, not to exceed 3 years." 8 CFR 214.2(o)(6)(iii).

Under 8 CFR 214.2(o)(3)(ii) an event is defined as an activity such as, but not limited to, a scientific project, conference, convention, lecture, series, tour, exhibit, business project, academic year, or engagement. In addition, a job which may not have a specific engagement or project may also fall under this definition if the job is the "activity" within the alien's area of extraordinary ability. Activities such as these may include short vacations, promotional appearances, and stopovers which are incidental and/or related to the event.

A group of related activities may also be considered to be an event. However, speculative employment and/or freelancing are not allowed.[1] A petitioner must establish that there are events or activities in the alien's field of extraordinary ability for the validity period requested, e.g. an itinerary for a tour, contract or summary of the terms of the oral agreement under which the beneficiary will be employed, contracts between the beneficiary and employers if an agent is being utilized in order to establish the events.

If the activities on the itinerary are related in such a way that they could be considered an "event," the petition should be approved for the requested validity period. For example, a series of events that involve the same performers and the same or similar performance, such as a tour by a performing artist in venues around the United States, would constitute an "event." In another example, if there is a break in between events in the United States and the petitioner indicates the beneficiary will be returning abroad to engage in activities which are incidental and /or related to the work performed in the United States it does not necessarily interrupt the original "event." The burden is on the petitioner to demonstrate that the activities listed on the itinerary are related to the event despite gaps in which the beneficiary may travel abroad and return to the United States. Those gaps may include time in which the beneficiary attends seminars, vacations,

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[1] Pursuant to 8 CFR 214.2(o)(2)(iv)(D), in the case of a petition filed for an artist or entertainer, a petitioner may add additional performances or engagements during the validity period of the petition without filing an amended petition, provided the additional performances or engagements require an alien of O-1 caliber.

travels between engagements, etc.[2] Those gaps would not be considered to interrupt the original "event," and the full period of time requested may be granted as the gaps are incidental to the original "event." If a review of the itinerary does not establish an event or activity, or a series of connected events and activities which would allow the validity period requested, or if the petitioner is requesting a validity period beyond the last established event or activity, the adjudicator may, in his or her discretion, issue a Request for Evidence (RFE) so that the petitioner has an opportunity to provide additional documentation to establish the requested validity period.

Adjudicators should evaluate the totality of the evidence submitted under the pertinent statute and regulations to determine if the events and activities on the itinerary are connected in such a way that they would be considered an "event" for purposes of the validity period. If the evidence establishes that the activities or events are related in such a way that they could be considered an "event," the adjudicator should approve the petition for the length of the established validity period.

The AFM Transmittal Memoranda table is updated as follows:

AD10-36 [date memo signed]	Chapter 33.4(e)	This memorandum revises AFM Chapter 33.4(e)(1) and adds 33.4(e)(2) to provide guidance for processing and adjudicating Form I 129, Petition for Nonimmigrant Worker, filed on behalf of O nonimmigrants.

Use

This Policy Memorandum is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Business Employment Services Team of the Service Center Operations Directorate.

[2] Activities engaged in during the beneficiary's trips outside the U.S. should not by themselves be used to limit a validity period. An adjudicator should primarily focus on the relatedness of the activities inside the U.S. to determine whether the beneficiary is engaged in an "event" for purposes of the validity period.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Domestic Operations
Washington, DC 20529-2110

U.S. Citizenship and Immigration Services

HQ 70/6.2.18
HQ 70/6.2.19

NOV 2 0 2009

Memorandum

TO: Service Center Directors

FROM: Donald Neufeld
Acting Associate Director, Domestic Operations

SUBJECT: Requirements for Agents and Sponsors Filing as Petitioners for the O and P Visa Classifications

Purpose

This memorandum clarifies the standards for adjudicating O and P petitions filed by a petitioner acting as a U.S. agent for a beneficiary or beneficiaries who will be working for more than one employer within the same time period. This guidance applies only to O and P petitions where the petitioner is filing on behalf of multiple employers. This memorandum also reaffirms the definition of a U.S. sponsoring organization for the P Visa Classification.

Background[1]

The O visa program is available to non-immigrants with extraordinary ability in the sciences, arts, education, business or athletics, or in the motion picture and television field. O-1 and O-2 petitions may only be filed by a U.S. employer, a U.S. agent, or a foreign employer through a U.S. agent.[2]

The P-1 visa program is available to non-immigrants who are internationally recognized athletes, individually or part of a team, or a member of an internationally recognized entertainment group. P-1 petitions may only be filed by a U.S. employer, a U.S. sponsoring organization, a U.S. agent, or a foreign employer through a U.S. agent.[3]

[1] Currently, O and P petitions are adjudicated at the California Service Center (CSC) or at the Vermont Service Center (VSC) depending on the location of the proposed employment. The VSC has sole jurisdiction over all P-1 Major League Sports petitions.
[2] See 8 CFR 214.2(o)(2)(i).
[3] See 8 CFR 214.2(p)(2)(i).

Both the O and P regulations provide that if the beneficiary will work concurrently for more than one employer within the same time period, each employer must file a separate petition with the Service Center that has jurisdiction over the area where the alien will perform services, unless a U.S. agent files the O or P-1 petition. [1]

Guidance for O and P-1 Petitions Filed by a U.S. Agent

A petition filed by an agent is subject to several conditions. A petition involving *multiple* employers may be filed by a person or company in business as an agent that acts as an agent for both the employers and the beneficiary, if[2]:

- The supporting documentation includes a complete itinerary of the event or events (for "O") or services or engagements (for "P").
- The itinerary specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues, or locations where the services will be performed.
- The contracts between the employers and the beneficiary are submitted; and
- The agent explains the terms and conditions of the employment and provides any required documentation.

An agent may be the actual employer of the beneficiary. In order to be eligible to file a petition on behalf of the beneficiary as his or her agent and on behalf of other (multiple) employers of the beneficiary, the petitioning employer must meet the conditions described above and establish that it is "in business as an agent" (as described below).

The regulations do not specify the evidence for establishing that the petitioner of multiple employers is "in business as an agent." Adjudicators should consider evidence that shows that it is more likely than not that the petitioner is in business as an agent for the series of events, services, or engagements that is the subject of the petition. The focus should be on whether the petitioner can establish that it is authorized to act as an agent for the other employers *for purposes of filing the petition*. This means that the petitioner does not have to demonstrate that it normally serves as an agent outside the context of this petition.

The petitioner/employer, seeking to serve as an agent for the beneficiary and/or for other employers, must establish that the petitioner is duly authorized to act as their agent. An adjudicator may determine that this requirement has been satisfied if, for example, the petitioner/agent presents a document signed by the beneficiary's other employer(s) which states that the petitioner is authorized to act in that employer's place as an agent for the limited purpose of filing the O or P (whichever is applicable) petition with USCIS.[3]

[1] See 8 CFR 214.2(o)(2)(iv)(B) and 8 CFR 214.2(p)(2)(iv)(B).
[2] See 8 CFR 214.2(o)(2)(iv)(B) and (E)(2) and 8 CFR 214.2(p)(2)(iv)(B) and (E)(2). All O petitions must include contracts between the employers and the beneficiary. 8 CFR 214.2(o)(2)(iv)(B)(2). Contracts may be required for P petitions only in questionable cases. 8 CFR 214.2(p)(2)(iv)(C)(2).
[3] Note, no particular form or specific language is required to be submitted with a petition to establish agency. Nor should an RFE be issued requiring a particular form or specific language in the agency agreement. Instead,

Other examples of probative evidence that may demonstrate that the petitioner "is in business as an agent" may include: a statement confirming the relevant information [itinerary, names and addresses of the series of employers] signed by the petitioner and the series of employers); other types of agency representation contracts; fee arrangements; or statements from the other employers regarding the nature of the petitioner's representation of the employers and beneficiary. While evidence of compensation could help establish that the petitioner is in business as an agent, compensation is not a requirement to establish an agency. Again, each case must be evaluated based on the specific facts presented.

Assuming that the petition is approvable and the petitioner has established that it is authorized to act as an agent in order to file the petition on behalf of the other employers, the validity period should last for the duration of the qualifying events not to exceed the maximum allowable validity period for the classification being sought.[7] If the petition is approvable but the petitioner has not established that it is authorized by the other employers to file the petition on behalf of the other employers (after a Request for Evidence, if documentation was not provided with the filing), the validity period should be limited to the qualifying events for which the petitioner will be directly employing the beneficiary not to exceed the maximum allowable validity period for the classification being sought.

P Petitions Filed by a U.S. Sponsoring Organization

A P petition filed by a U.S. sponsoring organization is subject to specific guidelines. A sponsor is defined as:

> "...an established organization in the United States which will not directly employ a P-1, P-2, or P-3 alien but will assume responsibility for the accuracy of the terms and conditions specified in the petition."[8]

A sponsoring organization can qualify as a petitioner if it can provide evidence, such as a written contract between it and the beneficiary, that although it will not directly employ the beneficiary, it will guarantee the terms and conditions of employment of the beneficiary, such as a written contract between it and the beneficiary. A company or organization that is directly employing the beneficiary may not file a petition as a sponsoring organization.

This guidance applies only to P petitions where the petitioner indicates that it is a U.S. sponsoring organization. Under existing regulations, petitioners may not file as a sponsoring organization for O petitions.

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adjudicators should focus on whether the petitioner/agent has shown that it has obtained authorization from the other employer(s) to file a petition on their behalf.

[7] See 8 CFR 214.2(o)(6)(iii) and (o)(12)(ii) and 8 CFR 214.2(p)(8)(iii) and (p)(14)(ii). See also Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS "Procedures for Applying the Period of Authorized Stay for P-1 Nonimmigrant Individual Athletes" HQ 70/6.2.9 (March 6, 2009); and "Procedures for Applying the Period of Authorized Stay for P-1S Nonimmigrant Individual Athletes/Essential Support Personnel" HQ 70/6.2.19 (July 14, 2009).

[8] See 8 CFR 214.2(p)(2)(i) and (3)

Use

This memorandum is intended solely for the instruction and guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner. In addition, the instructions and guidance in this memorandum are in no way intended to and do not prohibit enforcement of the immigration laws of the United States.

Questions regarding this guidance should be directed through appropriate channels to the Business Employment Services Team of the Office of Service Center Operations.

class 4

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

December 22, 2010 **PM-602-0005.1**

Policy Memorandum

SUBJECT: Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the *Adjudicator's Field Manual* (*AFM*) Chapter 22.2, *AFM* Update AD11-14

Purpose
This Policy Memorandum (PM) provides guidance regarding the analysis that U.S. Citizenship and Immigration Service (USCIS) officers who adjudicate these petitions should use when evaluating evidence submitted in support of Form I-140, Immigrant Petition for Alien Worker, filed for:

- Aliens of Extraordinary Ability under section 203(b)(1)(A) of the Immigration and Nationality Act (INA);
- Outstanding Professors or Researchers under section 203(b)(1)(B) INA; and
- Aliens of Exceptional Ability under section 203(b)(2) INA.

The purpose of this PM is to ensure that USCIS processes Form I-140 petitions filed under these employment-based immigrant classifications with a consistent standard.

In addition, this PM revises *AFM* Chapter 22.2 to clarify that USCIS will make successor-in-interest (SII) determinations in Form I-140 petitions supported by an approved labor certification application if the transfer of ownership took place anytime while such application for labor certification was still pending or after the labor certification was approved by the Department of Labor (DOL).[1]

Lastly, this PM revises *AFM* Chapter 22.2 to update the DOL e-mail address for USCIS officers to use when making duplicate labor certification application requests.

Scope
This PM rescinds and supersedes all previously published policy guidance[2] issued by USCIS and the legacy Immigration and Naturalization Service (INS) specific to the evaluation of required

[1] *See* USCIS memorandum, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)*, dated August 6, 2009. It is noted on page 7 of that memorandum that SII determinations could only be made in cases where the labor certification application had been approved prior to the transfer of ownership.

initial evidence submitted in support of Form I-140 petitions under Title 8 Code of Federal Regulations (8 CFR) sections 204.5(h)(3) and (4), 204.5(i)(3)(i), and 204.5(k)(3)(ii). Unless specifically exempted herein, this PM applies to all USCIS officers adjudicating these petitions.

Authority
The Department of Homeland Security (DHS) has delegated to USCIS the authority to make determinations of eligibility in immigrant petitions filed under INA 203(b) and 8 CFR 204.5. *See* INA 103(a) generally.

Background
USCIS and INS have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant classifications as aliens of extraordinary ability.[3] In order to qualify for admission in this classification, an alien must, among other things, demonstrate sustained national or international acclaim and that his or her achievements have been recognized in the alien's field of expertise in accordance with INA 203(b)(1)(A). Qualification under this classification is reserved for the small percentage of individuals at the very top of their fields of endeavor.8 CFR 204.5(h)(2).

The regulation at 8 CFR 204.5(h)(3), published in the Federal Register at 56 Fed. Reg. 60897 (Nov. 29, 1991), provides that a petition for an alien of extraordinary ability must be accompanied by initial evidence that the alien has achieved the requisite acclaim and recognition in the alien's field of expertise. Such evidence must be either a one-time achievement (that is, a major, internationally recognized award) or at least three out of the ten other types of evidence listed in the regulation (e.g., scholarly articles, high salary, commercial successes).

The statutory provision for the Outstanding Professor or Researcher immigrant classification at INA 203(b)(1)(B) requires that the alien be recognized internationally as outstanding in a specific academic field. Outstanding Professors or Researchers should stand apart in the academic community through eminence and distinction based on international recognition.[4] The regulation at 8 CFR 204.5(i)(3)(i) requires a petition for an outstanding professor or researcher to be accompanied by evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition. This evidence must consist of at least two out of the six types of evidence listed in the regulation (e.g., major prizes, membership in associations).

The statutory provision for the Alien of Exceptional Ability immigrant classification at INA 203(b)(2)(A) requires that the alien will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States because of his or her exceptional ability in the sciences, arts, or business. The alien must also have a job offer from a U.S.

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[2] AFM sections that have not been updated by this memo shall remain in effect.
[3] *See* House Report 101-723, 1990 U.S.C.C.A.N. 6710. (Sep. 19, 1990), 56 FR 60897 (Nov. 29, 1991).
[4] *See* 56 Fed. Reg. 30703 (July 5, 1991).

employer to provide services in the sciences, arts, professions, or business.[5] The regulation at 8 CFR 204.5(k)(2) defines exceptional ability in the sciences, arts, or business as having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. The regulation at 8 CFR 204.5(k)(3)(ii) requires that a petition for this immigrant classification must be accompanied by documentation consisting of at least three out of six types of evidence listed in the regulation (e.g., academic record, professional license, membership in professional associations).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the Administrative Appeals Office's (AAO) dismissal of a petitioner's appeal of a denial of a petition filed under 203(b)(1)(A) of the INA. *Kazarian* v. *USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although affirming the decision, the Ninth Circuit found that the AAO erred in its evaluation of the initial evidence submitted with the petition pursuant to 8 CFR 204.5(h)(3). Specifically, the Ninth Circuit concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted, those concerns should have been raised in a subsequent "final merits determination" of whether the petitioner has the requisite extraordinary ability. *Id.* at 1122. The Ninth Circuit further stated that the concerns were "not relevant to the antecedent procedural question of whether the petitioner has provided at least three types of evidence." *Id.* at 1121.

USCIS agrees with the *Kazarian* court's two-part adjudicative approach to evaluating evidence submitted in connection with petitions for aliens of extraordinary ability: (1) Determine whether the petitioner or self-petitioner has submitted the required evidence that meets the parameters for each type of evidence listed at 8 CFR 204.5(h)(3); and (2) Determine whether the evidence submitted is sufficient to demonstrate that the beneficiary or self-petitioner meets the required high level of expertise for the extraordinary ability immigrant classification during a final merits determination. By contrast, the approach taken by USCIS officers in *Kazarian* collapsed these two parts and evaluated the evidence at the beginning stage of the adjudicative process, with each type of evidence being evaluated individually to determine whether the self-petitioner was extraordinary.

The two-part adjudicative approach to evaluating evidence described in *Kazarian* simplifies the adjudicative process by eliminating piecemeal consideration of extraordinary ability and shifting the analysis of overall extraordinary ability to the end of the adjudicative process when a determination on the entire petition is made (the final merits determination). Therefore, under this approach, an objective evaluation of the initial evidence listed at 8 CFR 204.5(h)(3) will continue as before; what changes is when the determination of extraordinary ability occurs in the adjudicative process. USCIS believes that this approach will lead to decisions that more clearly explain how evidence was considered, the basis for the overall determination of eligibility (or lack thereof), and greater consistency in decisions on petitions for aliens with extraordinary ability.

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[5] No job offer is required for an alien of exceptional ability under INA 203(b)(2) if a waiver of the job offer in the national interest (NIW) is granted under INA 203(b)(2)(B).

This approach is equally applicable to the evaluation of evidence in the adjudication of petitions for outstanding professors or researchers and aliens of exceptional ability. Similar evidentiary requirements and qualitative analyses apply to these types of petitions. Therefore, a similar adjudication process also should apply.

Policy

In order to promote consistency in decision-making, USCIS officers should use a two-part approach for evaluating evidence submitted in support of all petitions filed for Aliens of Extraordinary Ability, Outstanding Professors or Researchers, and Aliens of Exceptional Ability. USCIS officers should first objectively evaluate each type of evidence submitted to determine if it meets the parameters applicable to that type of evidence described in the regulations (also referred to as "regulatory criteria"). USCIS officers then should consider all of the evidence in totality in making the final merits determination regarding the required high level of expertise for the immigrant classification.

Proof

USCIS officers are reminded that the standard of proof for most administrative immigration proceedings, including petitions filed for Aliens of Extraordinary Ability, for Outstanding Professors or Researchers, and for Aliens of Exceptional Ability is the "preponderance of the evidence" standard. *See Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). Thus, if the petitioner submits relevant, probative, and credible evidence that leads USCIS to believe that the claim is "more likely than not" or "probably true," the petitioner has satisfied the standard of proof. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989); *see also U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place).

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. USCIS officers should then evaluate the evidence together when considering the petition in its entirety to determine if the petitioner has established by a preponderance of the evidence that the self-petitioner or beneficiary has the required high level of expertise for the immigrant classification.

Implementation

Effective December 22, 2010, USCIS officers are to follow the amended procedures in this update of the *AFM*, AD11-14, in the adjudication of all Form I-140 petitions filed for Aliens of Extraordinary Ability, Outstanding Professors or Researchers, and for Alien of Exceptional Ability pending as of that date, as follows:

☞ 1. Paragraph (1)(A) of Chapter 22.2(i) of the *AFM* is revised to read as follows:

(A) Evaluating Evidence Submitted in Support of a Petition for an Alien of Extraordinary Ability. 8 CFR 204.5(h)(3) and (4) describe the various types of evidence that must be submitted in support of an I-140 petition for an alien of extraordinary ability. In general, the petition must be accompanied by initial evidence that: (a) the alien has sustained national or international acclaim; and (b) the alien's achievements have been recognized in the field of expertise. This initial evidence must include either evidence of a one-time achievement (*i.e.*, a major international recognized award, such as the Nobel Prize), or at least three of the types of evidence listed in 8 CFR 204.5(h)(3).

USCIS officers should use a two-part analysis to evaluate the evidence submitted with the petition to demonstrate eligibility under 203(b)(1)(A) of the INA. First, USCIS officers should evaluate the evidence submitted by the petitioner to determine, by a preponderance of the evidence, which evidence objectively meets the parameters of the regulatory description applicable to that type of evidence (referred to as "regulatory criteria"). Second, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination regarding the required high level of expertise for the immigrant classification.

Part One: Evaluate Whether the Evidence Provided Meets any of the Regulatory Criteria. The determination in Part One is limited to determining whether the evidence submitted with the petition is comprised of either a one-time achievement (that is, a major, internationally recognized award) or at least three of the ten regulatory criteria listed at 8 CFR 204.5(h)(3) (as discussed below), applying a preponderance of the evidence standard.

Note: While USCIS officers should consider the quality and caliber of the evidence when required by the regulations to determine whether a particular regulatory criterion has been met, USCIS officers should not make a determination regarding whether or not the alien is one of that small percentage who have risen to the very top of the field or if the alien has sustained national or international acclaim in Part One of the case analysis. See the table below for guidance on the limited determinations that should be made in Part One of the E11 analysis:

Part One Analysis of Evidence Submitted Under 8 CFR 204.5(h)(3) and (4) **Note:** In some cases, evidence relevant to one criterion may be relevant to other criteria set forth in 8 CFR 204.5(h)(3).	
Regulation	**Limited Determination**
8 CFR 204.5(h)(3)(i): *Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;*	**1. Determine if the alien was the recipient of prizes or awards.** The description of this type of evidence in the regulation provides that the focus should be on the alien's receipt of the awards or prizes, as opposed to his or her employer's receipt of the awards or prizes. **2. Determine whether the alien has received lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.** Relevant considerations regarding whether the basis for granting the prizes or awards was excellence in the field include, but are not limited to: • The criteria used to grant the awards or prizes; • The national or international significance of the awards or prizes in the field; and • The number of awardees or prize recipients as well as any limitations on competitors (an award limited to competitors from a single institution, for example, may have little national or international significance).
8 CFR 204.5(h)(3)(ii): *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their*	**1. Determine if the association for which the alien claims membership requires that members have outstanding achievements in the field as judged by recognized experts in that field.** The petitioner must show that membership in the associations is based on the alien being judged by recognized national or international experts as having attained outstanding achievements in the field for which classification is sought. For example, admission to membership in the National Academy of Sciences as a Foreign Associate requires individuals to be nominated by an academy member, and membership is ultimately granted based upon recognition of the individual's distinguished achievements in original research. *See*

members, as judged by recognized national or international experts in their disciplines or fields;	www.nasonline.org. Associations may have multiple levels of membership. The level of membership afforded to the alien must show that in order to obtain that level of membership, the alien was judged by recognized national or international experts as having attained outstanding achievements in the field for which classification is sought. Relevant factors that may lead to a conclusion that the alien's membership in the associations was not based on outstanding achievements in the field include, but are not limited to, instances where the alien's membership was based: • Solely on a level of education or years of experience in a particular field; • On the payment of a fee or by subscribing to an association's publications; or • On a requirement, compulsory or otherwise, for employment in certain occupations, such as union membership or guild affiliation for actors.
8 CFR 204.5(h)(3)(iii): *Published material about the alien in professional or major trade publications or other major media relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;*	**1. Determine whether the published material was related to the alien and the alien's specific work in the field for which classification is sought.** The published material should be about the alien relating to his or her work in the field, not just about his or her employer or another organization that he or she is associated with. Note that marketing materials created for the purpose of selling the alien's products or promoting his or her services are not generally considered to be published material about the beneficiary. **2. Determine whether the publication qualifies as a professional publication or major trade publication or a major media publication.** Evidence of published material in professional or major trade publications or in other major media publications about the alien should establish that the circulation (on-line or in print) is high compared to other circulation statistics and show who the intended audience of the publication is, as well as the title, date and author of the material.

8 CFR 204.5(h)(3)(iv): *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;*	**Determine whether the alien has acted as the judge of the work of others in the same or an allied field of specialization.** The petitioner must show that the alien has not only been invited to judge the work of others, but also that the alien actually participated in the judging of the work of others in the same or allied field of specialization. For example: • Peer reviewing for a scholarly journal, as evidenced by a request from the journal to the alien to do the review, accompanied by proof that the review was actually completed. • Serving as a member of a Ph.D. dissertation committee that makes the final judgment as to whether an individual candidate's body of work satisfies the requirements for a doctoral degree, as evidenced by departmental records.
8 CFR 204.5(h)(3)(v): *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;*	**1. Determine whether the alien has made original contributions in the field.** **2. Determine whether the alien's original contributions are of major significance to the field.** USCIS officers must evaluate whether the original work constitutes major, significant contributions to the field. Although funded and published work may be "original," this fact alone is not sufficient to establish that the work is of major significance. For example, peer-reviewed presentations at academic symposia or peer-reviewed articles in scholarly journals that have provoked widespread commentary or received notice from others working in the field, or entries (particularly a goodly number) in a citation index which cite the alien's work as authoritative in the field, may be probative of the significance of the alien's contributions to the field of endeavor. USCIS officers should take into account the probative analysis that experts in the field may provide in opinion letters regarding the significance of the alien's contributions in order to assist in giving an assessment of the alien's original contributions of major significance. That said, not all expert letters provide such analysis. Letters that specifically articulate how the alien's contributions are of major significance to the field and its impact

	on subsequent work add value. Letters that lack specifics and simply use hyperbolic language do not add value, and are not considered to be probative evidence that may form the basis for meeting this criterion.
8 CFR 204.5 (h)(3)(vi): *Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;*	**1. Determine whether the alien has authored scholarly articles in the field.** As defined in the academic arena, a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college, university, or research institution. In general, it should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article. For other fields, a scholarly article should be written for learned persons in that field. ("Learned" is defined as "having or demonstrating profound knowledge or scholarship"). Learned persons include all persons having profound knowledge of a field. **2. Determine whether the publication qualifies as a professional publication or major trade publication or a major media publication.** Evidence of published material in professional or major trade publications or in other major media publications should establish that the circulation (on-line or in print) is high compared to other circulation statistics and who the intended audience of the publication is.
8 CFR 204.5 (h)(3)(vii): *Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;*	**1. Determine whether the work that was displayed is the alien's work product.** The description of this type of evidence in the regulation provides that the work must be the alien's. **2. Determine whether the venues (virtual or otherwise) where the alien's work was displayed were *artistic* exhibitions or showcases.** Webster's online dictionary defines:

	Exhibition as a public showing. (*See*: http://www.merriam-webster.com/dictionary/exhibition) *Showcase* as a setting, occasion, or medium for exhibiting something or someone especially in an attractive or favorable aspect. (*See*: http://www.merriam-webster.com/dictionary/showcase)
8 CFR 204.5 (h)(3)(viii): *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;*	**1. Determine whether the alien has performed in leading or critical roles for organizations or establishments.** In evaluating such evidence, USCIS officers must examine whether the role is (or was) leading or critical. If a leading role, the evidence must establish that the alien is (or was) a leader. A title, with appropriate matching duties, can help to establish if a role is (or was), in fact, leading. If a critical role, the evidence must establish that the alien has contributed in a way that is of significant importance to the outcome of the organization or establishment's activities. A supporting role may be considered "critical" if the alien's performance in the role is (or was) important in that way. It is not the title of the alien's role, but rather the alien's performance in the role that determines whether the role is (or was) critical. This is one criterion where letters from individuals with personal knowledge of the significance of the alien's leading or critical role can be particularly helpful to USCIS officers in making this determination as long as the letters contain detailed and probative information that specifically addresses how the alien's role for the organization or establishment was leading or critical. Note: 8 CFR 204.5(g)(1) states that evidence of experience "shall" consist of letters from employers. **2. Determine whether the organization or establishment has a distinguished reputation.** USCIS officers should keep in mind that the relative size or longevity of an organization or establishment is not in and of itself a determining factor. Rather, the organization or establishment must be recognized as having a distinguished

	reputation. Webster's online dictionary defines *distinguished* as ***1:*** *marked by eminence, distinction, or excellence <distinguished leadership* and ***2:*** *befitting an eminent person <a distinguished setting.* (*See* http://www.merriam-webster.com/dictionary/distinguished)
8 CFR 204.5(h)(3)(ix): *Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field;*	**1. Determine whether the alien's salary or remuneration is high relative to the compensation paid to others working in the field.** Evidence regarding whether the alien's compensation is high relative to that of others working in the field may take many forms. If the petitioner is claiming to meet this criterion, then the burden is on the petitioner to provide appropriate evidence. Examples may include, but are not limited to, geographical or position-appropriate compensation surveys and organizational justifications to pay above the compensation data. Three Web sites that may be helpful in evaluating the evidence provided by the petitioner are: The Bureau of Labor Statistics (BLS): http://www.bls.gov/bls/blswage.htm The Department of Labor's Career One Stop website: http://www.careeronestop.org/SalariesBenefits/Sal_default.aspx The Department of Labor's Office of Foreign Labor Certification Online Wage Library: http://www.flcdatacenter.com Note: Aliens working in different countries should be evaluated based on the wage statistics or comparable evidence in that country, rather than by simply converting the salary to U.S. dollars and then viewing whether that salary would be considered high in the United States.
8 CFR 204.5(h)(3)(x): *Evidence of commercial successes in the performing arts, as shown*	**Determine whether the alien has enjoyed commercial successes in the performing arts.** This criterion focuses on volume of sales and box office receipts as a measure of the alien's commercial success in the performing arts. Therefore, the mere fact that an alien has recorded and released musical compilations or performed in

by box office receipts or record, cassette, compact disk, or video sales.	theatrical, motion picture or television productions would be insufficient, in and of itself, to meet this criterion. The evidence must show that the volume of sales and box office receipts reflect the alien's commercial success relative to others involved in similar pursuits in the performing arts.
8 CFR 204.5(h)(4): *If the standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.*	**Determine if the evidence submitted is comparable to the evidence required in 8 CFR 204.5(h)(3).** This regulatory provision provides petitioners the opportunity to submit comparable evidence to establish the alien beneficiary's eligibility, if it is determined that the standards described in 8 CFR 204.5(h)(3) do not readily apply to the alien's occupation. When evaluating such "comparable" evidence, consider whether the 8 CFR 204.5(h)(3) criteria are readily applicable to the alien's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation. General assertions that any of the ten objective criteria described in 8 CFR 204.5(h)(3) do not readily apply to the alien's occupation are not probative and should be discounted. Similarly, claims that USCIS should accept witness letters as comparable evidence are not persuasive. The petitioner should explain why it has not submitted evidence that would satisfy at least three of the criteria set forth in 8 CFR 204.5(h)(3) as well as why the evidence it has submitted is "comparable" to that required under 8 CFR 204.5(h)(3). On the other hand, the following are examples of where 8 CFR 204.5(h)(4) might apply. (1) An alien beneficiary who is an Olympic coach whose athlete wins an Olympic medal while under the alien's principal tutelage would likely constitute evidence comparable to that in 8 CFR 204.5(h)(3)(v). (2) Election to a national all-star or Olympic team might serve as comparable evidence for evidence of memberships in 8 CFR 204.5(h)(3)(ii). **Note:** There is no comparable evidence for the one-time achievement of a major, international recognized award.

Part One Note: Objectively meeting the regulatory criteria in part one alone does not establish that the alien in fact meets the requirements for classification as an Alien of Extraordinary Ability under section 203(b)(1)(A) of the INA.

For example:

Participating in the judging of the work of others in the same or an allied field of specialization alone, regardless of the circumstances, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's participation should be evaluated to determine whether it was indicative of the alien being one of that small percentage who have risen to the very top of the field of endeavor and enjoying sustained national or international acclaim.

Publishing scholarly articles in professional or major trade publications or other major media alone, regardless of the caliber, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's publications should be evaluated to determine whether they were indicative of the alien being one of that small percentage who have risen to the very top of the field of endeavor and enjoying sustained national or international acclaim.

The issue related to whether the alien is one of that small percentage who have risen to the very top of the field of endeavor and enjoys sustained national or international acclaim should be addressed and articulated in part two of the analysis, not in part one where the USCIS officer is only required to determine if the evidence objectively meets the regulatory criteria.

Part Two: Final Merits Determination. Meeting the minimum requirement of providing required initial evidence does not, in itself, establish that the alien in fact meets the requirements for classification as an alien of extraordinary ability under section 203(b)(1)(A) of the INA. As part of the final merits determination, the quality of the evidence also should be considered, such as whether the judging responsibilities were internal and whether the scholarly articles (if inherent to the occupation) are cited by others in the field.

In Part Two of the analysis in each case, USCIS officers should evaluate the evidence together when considering the petition in its entirety to make a final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise, indicating that the alien is one of that small percentage who has risen to the very top of the field of endeavor.

If the USCIS officer determines that the petitioner has failed to demonstrate these requirements, the USCIS officer should not merely make general assertions regarding this failure. Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the alien is an alien of extraordinary ability under section 203(b)(1)(A) of the INA.

☞ 2. The introductory language of paragraph (1)(E) of Chapter 22.2(i) of the *AFM* is revised to read as follows:

(E) Sustained National or International Acclaim. Under 8 CFR 204.5(h)(3), a petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that the alien's achievements have been recognized in the field of expertise. In determining whether the beneficiary has enjoyed "sustained" national or international acclaim, bear in mind that such acclaim must be maintained. (According to Black's Law Dictionary, 1585 (9th Ed, 2009), the definition of *sustain* is "(1) to support or maintain, especially over a long period of time; 6. To persist in making (an effort) over a long period of time.") However, the word "sustained" does not imply an age limit on the beneficiary. A beneficiary may be very young in his or her career and still be able to show sustained acclaim. There is also no definitive time frame on what constitutes "sustained." If an alien was recognized for a particular achievement, the USCIS officer should determine whether the alien continues to maintain a comparable level of acclaim in the field of expertise since the alien was originally afforded that recognition. An alien may have achieved national or international acclaim in the past but then failed to maintain a comparable level of acclaim thereafter.

Note: Section 22.2(i)(1)(A) of this chapter describes the limited determinations that should be made in Part One of the analysis to determine whether the alien has met any of the evidentiary criteria claimed by the petitioner at 8 CFR 204.5(h)(3). However, the evidence evaluated in Part One is also reviewed in Part Two to determine whether the alien is one of that small percentage who has risen to the very top of the field of endeavor, and that he or she has sustained national or international acclaim.

☞ 3. The existing text of paragraph (1)(F) of Chapter 22.2(i) of the *AFM* is removed and the paragraph is reserved.

☞ 4. Paragraph (2)(A) of Chapter 22.2(i) of the *AFM* is revised to read as follows:

(A) Evaluating Evidence Submitted in Support of a Petition for an Outstanding Professor or Researcher. 8 CFR 204.5(i)(3) describes the evidence that must be submitted in support of an I-140 petition for an outstanding professor or

researcher. The evidence that must be provided in support of E12, outstanding professor or researcher petitions must demonstrate that the alien is recognized *internationally* as outstanding in the academic field specified in the petition. 8 CFR 204.5(i)(2) defines academic field as "a body of specialized knowledge offered for study at an accredited United States university or institution of higher education." By regulatory definition, a body of specialized knowledge is larger than a very small area of specialization in which only a single course is taught or is the subject of a very specialized dissertation. As such, it would be acceptable to find the alien is an outstanding professor or researcher in the claimed field (e.g., particle physics vs. physics in general), as long as the petitioner has demonstrated that the claimed field is "a body of specialized knowledge offered for study at an accredited United States university or institution of higher education." In addition, the petition must be accompanied by an offer of permanent, tenured, or tenure-track employment (limited to "permanent positions" in the case of research positions) from a qualifying prospective employer and evidence that the alien has had at least three years of experience in teaching or research in the "academic field" in which the alien will be engaged. *See* 8 CFR 204.5(i)(3)(ii) and (iii). The definitions for "permanent" and "academic field" can be found in 8 CFR 204.5(i)(2).

USCIS officers should use a two-part analysis to evaluate the evidence submitted with the petition to demonstrate eligibility under 203(b)(1)(B) of the INA. First, USCIS officers should evaluate the evidence submitted by the petitioner to determine, by a preponderance of the evidence, which evidence objectively meets the parameters of the regulatory description applicable to that type of evidence (referred to as "regulatory criteria"). Second, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination regarding the required high level of expertise for the immigrant classification.

Part One: Evaluate Whether the Evidence Provided Meets any of the Regulatory Criteria. The determination in Part One is limited to determining whether the evidence submitted with the petition is comprised of at least two of the six regulatory criteria listed at 8 CFR 204.5(i)(3)(i) as discussed below, applying a preponderance of the evidence standard.

Note: While USCIS officers should objectively consider the quality and caliber of the evidence as required by the parameters of the regulations to determine whether a particular regulatory criterion has been met, USCIS officers should not make a determination relative to the alien's claimed international recognition in Part One of the case analysis. See the table below for guidance on the limited determinations that should be made in Part One of the E12 analysis:

Part One Analysis of Evidence Submitted Under 8 CFR 204.5(i)(3)(i) **Note:** In some cases, evidence relevant to one criterion may be relevant to other criteria set forth in 8 CFR 204.5(i)(3).	
Regulation	**Limited Determination**
8 CFR 204.5(i)(3)(i)(A): *Documentation of the alien's receipt of major prizes or awards for outstanding achievement in the academic field;*	**1. Determine if the alien was the recipient of prizes or awards.** The description of this type of evidence in the regulation provides that the focus must be on the alien's receipt of the major prizes or awards, as opposed to his or her employer's receipt of the prizes or awards. **2. Determine whether the alien has received major prizes or awards for outstanding achievement in the academic field.** Relevant considerations regarding whether the basis for granting the major prizes or awards for outstanding achievement in the academic field include, but are not limited to: • The criteria used to grant the major prizes or awards; and, • The number of prize recipients or awardees as well as any limitations on competitors (a prize or award limited to competitors from a single institution, for example, may not rise to the level of major).
8 CFR 204.5(i)(3)(i)(B): *Documentation of the alien's membership in associations in the academic field which require outstanding achievements of their members;*	**1. Determine if the association for which the alien claims membership requires outstanding achievements in the academic field.** The petitioner must show that membership in the associations is based on the alien's outstanding achievements in the academic field. Associations may have multiple levels of membership. The level of membership afforded to the alien must show that it requires outstanding achievements in the academic field for which classification is sought. Relevant factors that may lead to a conclusion that the

	alien's membership in the association was not based on outstanding achievements in the academic field include, but are not limited to, instances where the alien's membership was based: • Solely on a level of education or years of experience in a particular field; or • On the payment of a fee or by subscribing to an association's publications.
8 CFR 204.5(i)(3)(i)(C): *Published material in professional publications written by others about the alien's work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;*	**1. Determine whether the published material was about the alien's work.** The published material should be about the alien's work in the field, not just about his or her employer or another organization that he or she is associated with. Articles that cite the alien's work as one of multiple footnotes or endnotes are not generally "about" the alien's work. **2. Determine whether the publication qualifies as a professional publication.** Evidence of published material in professional publications about the alien should establish the circulation (online or in print) and that the intended audience of the publication, as well as the title, date, and author of the material.
8 CFR 204.5(i)(3)(i)(D): *Evidence of the alien's participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;*	**Determine whether the alien has participated either individually or on a panel, as the judge of the work of others in the same or an allied academic field.** The petitioner must show that the alien has not only been invited to judge the work of others, but also that the alien actually participated in the judging of the work of others in the same or allied academic field. For example: • Peer reviewing for a scholarly journal, as evidenced by a request from the journal to the alien to do the review, accompanied by proof that the review was actually completed. • Serving as a member of a Ph.D. dissertation committee that makes the final judgment as to whether an individual candidate's body of work satisfies the requirements for a doctoral degree, as evidenced by

	departmental records.
8 CFR 204.5(i)(3)(i)(E): *Evidence of the alien's original scientific or scholarly research contributions to the academic field;*	**Determine whether the alien has made original scientific or scholarly research contributions to the academic field.** As a reminder, this regulation does not require that the alien's contributions be of "major significance." That said, the description of this type of evidence in the regulation does not simply require original research, but an original scientific or scholarly research contribution. Moreover, the description of this type of evidence in the regulation requires that the contribution must be "to the academic field" rather than an individual laboratory or institution. The regulations include a separate criterion for scholarly articles at 8 CFR 204.5(i)(3)(i)(F). Therefore, contributions are a separate evidentiary requirement from scholarly articles. Possible items that could satisfy this criteria, include but are not limited to: • Citation history/patterns for the alien's work, as evidenced by number of citations, as well as an examination of the impact factor for the journals in which the alien publishes. While many scholars publish, not all are cited or publish in journals with significant impact factors. The petitioner may use web tools such as GoogleScholar, SciFinder, and the Web of Science to establish the number of citations and the impact factor for journals. • Since scholarly work tends to be specialized and to be expressed in arcane and specialized language, USCIS officers should take into account the probative analysis that experts in the field may provide in opinion letters regarding the alien's contributions in order to assist in giving an assessment of the alien's original contributions. That said, not all expert letters provide such analysis. Letters that specifically articulate how the alien has contributed to the field and its impact on subsequent work add value. Letters that lack specifics and simply use hyperbolic language do not add value, and are not considered to be probative evidence that

	may form the basis for meeting this criterion.
8 CFR 204.5(i)(3)(i)(F): *Evidence of the alien's authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field;*	**1. Determine whether the alien has authored scholarly articles in the field.** As defined in the academic arena, a scholarly article reports on original research, experimentation, or philosophical discourse. It is written by a researcher or expert in the field who is often affiliated with a college or university. It should have footnotes, endnotes, or a bibliography, and may include graphs, charts, videos, or pictures as illustrations of the concepts expressed in the article. **2. Determine whether the publication qualifies as a scholarly book or as a scholarly journal with international circulation in the academic field.** Evidence of published material in scholarly journals with international circulation should establish that the circulation (online or in print) is in fact, international, and who the intended audience of the publication is. Scholarly journals are typically written for a specialized audience often using technical jargon. Articles normally include an abstract, a description of methodology, footnotes, endnotes, and bibliography (*See* http://www.nova.edu/library/help/misc/glossary.html#s).

Part One Note: Objectively meeting the regulatory criteria in part one, alone does not establish that the alien in fact meets the requirements for classification as an outstanding professor or researcher under section 203(b)(1)(B) of the INA.

For example:

Participating in the judging of the work of others in the same or an allied academic field alone, regardless of the circumstances, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's participation should be evaluated to determine whether it was indicative of the alien being recognized internationally as outstanding in a specific academic area.

Authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field alone, regardless of the caliber, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the

alien's authorship of book or articles should be evaluated to determine whether they were indicative of the alien being recognized internationally as outstanding in a specific academic area.

The issue of whether the alien is recognized internationally as outstanding in a specific academic area should be addressed and articulated in part two of the analysis, not in part one where the USCIS officer is only required to determine if the evidence objectively meets the regulatory criteria.

Part Two: Final Merits Determination. Meeting the minimum requirement by providing at least two types of initial evidence does not, in itself, establish that the alien in fact meets the requirements for classification as an outstanding professor or researcher under section 203(b)(1)(B) of the INA. The quality of the evidence also must be considered. In Part Two of the analysis in each case, USCIS officers should evaluate the evidence together when considering the petition in its entirety to make a final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the alien is recognized internationally as outstanding in a specific academic area.

If the USCIS officer determines that the petitioner has failed to demonstrate these requirements, the USCIS officer should not merely make general assertions regarding this failure. Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the alien is an Outstanding Professor or Researcher under section 203(b)(1)(B) of the INA.

☞ 5. Paragraph (2)(A) of Chapter 22.2(j) of the *AFM* is revised to read as follows:

(A) Evaluation of Evidence Submitted in Support of a Petition for an Alien of Exceptional Ability. 8 CFR 204.5(k)(3)(ii) describes the various types of initial evidence that must be submitted in support of an I-140 petition for an alien of exceptional ability. The initial evidence must include evidence of at least three of the types of evidence listed in 8 CFR 204.5(k)(3)(ii).

USCIS officers should use a two-part analysis to evaluate the evidence submitted with the petition to demonstrate eligibility under 203(b)(2) of the INA. First, USCIS officers should objectively evaluate the evidence submitted by the petitioner to determine, by a preponderance of the evidence, which evidence meets the parameters of the regulatory description applicable to that type of evidence (referred to as "regulatory criteria"). Second, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination regarding the required high level of expertise for the visa category.

Part One: Evaluate Whether the Evidence Provided Meets any of the Regulatory Criteria. The determination in Part One is limited to determining whether the evidence submitted with the petition is comprised of at least three of the six regulatory criteria listed at 8 CFR 204.5(k)(3)(ii) (as discussed below), applying a preponderance of the evidence standard.

Note: While USCIS officers should consider the quality and caliber of the evidence when required by the regulations to determine whether a particular regulatory criterion has been met, USCIS officers should not make a determination regarding whether or not the alien is an alien of exceptional ability in Part One of the case analysis.

Following is a list of the types of evidence listed at 8 CFR 204.5(k)(3)(ii) applicable to this immigrant classification. Note that in some cases, evidence relevant to one criterion may be relevant to other criteria set forth in these provisions.

8 CFR 204.5(k)(3)(ii)

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;

Note: To satisfy this criterion, the evidence must show that the alien has commanded a salary or remuneration for services that is indicative of his or her claimed exceptional ability relative to others working in the field.

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

Additionally, 8 CFR 204.5(k)(3)(iii), states, "If the above standards do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility.

Note: This regulatory provision provides petitioners the opportunity to submit comparable evidence to establish the alien beneficiary's eligibility, if it is determined that the standards described in 8 CFR 204.5(k)(3)(ii) do not readily apply to the alien's occupation. When evaluating such "comparable" evidence, consider whether the 8 CFR 204.5(k)(3)(ii) criteria are readily applicable to the alien's occupation and, if not, whether the evidence provided is truly comparable to the criteria listed in that regulation.

General assertions that any of the six objective criteria described in 8 CFR 204.5(k)(3)(ii) do not readily apply to the alien's occupation are not probative and should be discounted. Similarly, claims that USCIS should accept witness letters as comparable evidence are not persuasive. The petitioner should explain why it has not submitted evidence that would satisfy at least three of the criteria set forth in 8 CFR 204.5(k)(3)(ii) as well as why the evidence it has submitted is "comparable" to that required under 8 CFR 204.5(k)(3)(ii).

Part One Note: Objectively meeting the regulatory criteria in part one alone does not establish that the alien in fact meets the requirements for classification as an Alien of Exceptional Ability under section 203(b)(2) of the INA.

For example:

Being a member of professional associations alone, regardless of the caliber, should satisfy the regulatory criteria in part one. However, for the analysis in part two, the alien's membership should be evaluated to determine whether it is indicative of the alien having a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

The issue of whether the alien has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business should be addressed and articulated in part two of the analysis, not in part one where USCIS officers are only required to determine if the evidence objectively meets the regulatory criteria.

Part Two: Final Merits Determination. Meeting the minimum requirement by providing at least three types of initial evidence does not, in itself, establish that the alien in fact meets the requirements for classification as an alien of exceptional ability under section 203(b)(2) of the INA. The quality of the evidence must be considered. In Part Two of the analysis, USCIS officers should evaluate the evidence together when considering the petition in its entirety for the

final merits determination of whether or not the petitioner, by a preponderance of the evidence, has demonstrated that the alien has a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

If the USCIS officer determines that the petitioner has failed to demonstrate this requirement, the USCIS officer should not merely make general assertions regarding this failure. Rather, the USCIS officer must articulate the specific reasons as to why the USCIS officer concludes that the petitioner, by a preponderance of the evidence, has not demonstrated that the alien is an alien of exceptional ability under 203(b)(2) of the INA.

Note: The petitioner must demonstrate that the alien is above others in the field; qualifications possessed by most members of a given field cannot demonstrate a degree of expertise "significantly above that ordinarily encountered." Note that section 203(b)(2)(C) of INA provides that mere possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Therefore, formal recognition in the form of certificates and other documentation that are contemporaneous with the alien's claimed contributions and achievements may have more weight than letters prepared for the petition "recognizing" the alien's achievements.

☞ 6. The existing text of paragraph (2)(B) of Chapter 22.2(j) of the *AFM* is removed and the paragraph is reserved.

☞ 7. Technical Correction: The thirteenth paragraph in Chapter 22.2(b)(5)(B) of the *AFM* is revised to read as follows:

For successor-in-interest purposes, the transfer of ownership may occur at any time after the filing or approval of the original labor certification with DOL.

☞ 8. Technical Correction: The DOL e-mail address to use to request duplicate approved labor certifications from DOL in paragraphs (9) and (10) of Chapter 22.2(b) of the *AFM* is revised (in both paragraphs) to read as follows:

The duplicate certification e-mail request to DOL should be sent to Duplicate.PERM@dol.gov. The e-mail must contain the petitioner's name in the subject line.

☞ 9. The *AFM* **Transmittal Memoranda** button is revised by adding, in numerical order, a new entry to read:

AD11-14 12/22/10	Chapter 22.2(b)(5)(B), Chapter 22.2(b)(9), Chapter 22.2(b)(10), Chapter 22.2(i)(1)(A), Chapter 22.2(i)(1)(E), Chapter 22.2(i)(1)(F), Chapter 22.2(i)(2)(A), Chapter 22.2(j)(2)(A), and Chapter 22.2(j)(2)(B)	Finalizes guidance provided in AFM Update AD10-41 on evaluation of evidentiary criteria in certain Form I-140 petitions, and makes technical revisions to other portions of Chapter 22.2. Although this update clarifies some of the language in the earlier update, it does so without revising the basic policy stated therein.

Use

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Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Business Employment Services Team within the Service Center Operations Directorate.