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Wait, Why Don't You Think I'm Extraordinary? Current RFE Trends and Hot Topics

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INTRODUCTION

The adjudications climate for extraordinary ability petitions is as challenging now as it has ever been.[1]

All extraordinary ability filings, O-1 or EB-1, ought to give a brief description of the beneficiary's field, quote the specific regulatory standards allegedly met therein, and refer to the specific evidence enclosed that supports each of the applicable criteria. Some of the evidence may support more than one evidentiary criterion at a time. Despite repeated U.S Citizenship and Immigration Services (USCIS) attempts to misconstrue its own rules and precedent case law, each criterion does NOT need to be supported by evidence showing independently that the beneficiary is

[1] See "Practice Pointer: Misapplication of *Kazarian* in O-1A RFEs," (June 26, 2020), AILA Doc. No. 20062606. *See also* F. Whittenburg, *et al*., "Fighting and Winning RFEs: Resources and Tips for Crafting a Winning Response," *2019 AILA ACES Conference Handbook* (AILA 2019).

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extraordinary. In other words, you may submit the same evidence in satisfaction of multiple criteria.

In this practice pointer, we offer some guidance to improve the structure and content of initial filings. We also advise on strategies for how to respond when the government requests additional evidence with challenges that may be legally or factually incorrect, or both.

GETTING STARTED: REVIEWING YOUR RFE AND DEVELOPING YOUR RESPONSE STRATEGY

To begin, we note two principles that should be repeated as often as necessary:

1. The applicable standard of proof is by a preponderance of the evidence, 51%, or, more likely than not.[2] A USCIS Request for Evidence (RFE) policy memorandum of June 3, 2013, reminds officers that petitioners only need to prove it is more likely than not that each required element has been met.

2. Templates for USCIS Requests for Evidence in both O-1 and EB-1A case types contain boilerplate language that contradict precedent case law in the 2010 *Kazarian* decision,[3] and the Service's own policy guidance memo[4]. *Kazarian* created a two-part analysis - the procedural step 1 analysis of whether evidence satisfies an individual evidentiary criterion and the step 2 substantive question of whether the beneficiary has sustained national or international acclaim, reached the very top of the field, and is indeed extraordinary. The template language conflates these two and alleges, "To satisfy this criterion, the record must contain sufficient evidence to establish not only the plain language of the criterion, but also show how the beneficiary is an alien of extraordinary ability, has sustained national or international acclaim..." Because it is in direct conflict with the Service's own policy guidance, this faulty analysis has been found to be arbitrary and capricious when challenged in federal court[5], and open to challenge, as it falls within the permissible scope of review under the Administrative Procedures Act.[6]

Accordingly, the first three questions to ask when reviewing a RFE are:

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[2] USCIS Online Policy Manual, Vol. 1, Pt. e, Ch. 4. *See also* USCIS Memorandum, M. Yates, "Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)," (Feb. 16, 2005), AILA Doc. No. 05021810.

[3] *Kazarian v. USCIS*, 596 F.3rd 1115, (9th Cir. 2010). See also "AILA Comments on USCIS Draft RFE Template for I-140 Extraordinary Ability Petitions" *(Sept. 23, 2010*), AILA Doc. No. 10092466.

[4] USCIS Memorandum, "Evaluation of Evidence Submitted with Certain I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14" (Dec. 22, 2010) AILA Doc. No. 11020231 (hereinafter "*Kazarian* Memo")

[5] *Eguchi v. Kelly*, 3:16-CV-1286 (N.D. Texas, July 7, 2017); *Kisor v. Wilkie*, ––– U.S. ––––, 139 S. Ct. 2400, 2417 (2019).

[6] §706 of the Administrative Procedures Act (APA), Pub. L. No. 79-404, 60 Stat. 237, 238; (codified at 5 USC §§ 551–59, 701–06, 1305, 3105, 3344, 5372, 7521). See also 5 USC §706 (2)(A), (E). Argue that the APA prohibits USCIS from ignoring evidence. Specifically, the APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "unsupported by substantial evidence."

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1) Is each item requested really required, or does the RFE misstate the applicable legal standard and demand something that is not required?
2) Did the examiner overlook, ignore, or inappropriately discount relevant and probative evidence already submitted, or attribute it to the wrong evidentiary criterion?
3) Does the examiner understand the industry standards, what kind of work the beneficiary does, and how work is normally secured, scheduled, and performed in that particular field?

Beyond these initial thoughts, we now address specific recurring issues in USCIS adjudications of extraordinary ability cases.

DEFINING THE FIELD OF ENDEAVOR

Not unexpectedly, the emergence of new media and non-traditional or "crossover" occupations has prompted a tide of confused RFEs, many of which betray the adjudicator's own confusion over which of the legal standard applies. Which standard applies is a function of the nature of the events and activities the beneficiary seeks to perform in the United States, as well as his/her demonstrated record of achievement in the field of endeavor.

Therefore, validating or defining the field of endeavor is a crucial first step that lends both clarity and credibility to your petition, and ultimately drives which legal standard—extraordinary ability or extraordinary achievement—will apply. When describing the field of endeavor, use published material from an impartial source whose content is not controlled nor created by either the petitioner or the beneficiary.

CONTRACTS

In the O-1 setting, agent-petitioners are required to submit contracts between the agent and beneficiary, and between the beneficiary and all nonpetitioning employers, as well as written consent from each of those employers for the agent-petitioner to act on their behalf.[7] The petitioner should also submit an itinerary detailing the proposed U.S. engagements. Neither the agent-beneficiary agreement nor the itinerary takes the place of a contract, job offer letter, or deal memo from each of the nonpetitioning employers.

Contracts do not need to be signed (except for film & TV projects –an *ultra vires* requirement imposed by AMPTP, the management organization). In the EB-1 setting, no specific employer or type of contract is required. Separate contracts between the agent-petitioner and each event employer are unnecessary, if the contracts between the beneficiary and each nonpetitioning employer include a provision that provides specific language such as: **"*We consent to [Agent-Petitioner] serving as our agent for the limited purpose of obtaining O-1 work authorization for [Beneficiary].*"**

[7] *See* "Executive Summary, 'O' Nonimmigrant Visas - Agents as Petitioners Stakeholder Teleconference," (Apr. 13, 2011), AILA Doc. No. 11030437.

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Periodically, USCIS demands employment contracts even in single direct employer O-1 petitions, where all material terms of employment were already clearly spelled out. These are not required, as regulations explicitly allow a summary of the terms of oral agreement. However, in all O-1 and EB-1 cases, the documentation submitted must be sufficient to give the examiner clear answers to basic questions about the material terms of employment agreed upon: What work will you be doing? Where will the work be performed, and when? Who will be paying you, how, and how much?

If the agent-petitioner is not in business as an agent, takes no active role in finding work for the beneficiary, and does not get any percentage of the beneficiary's earnings, then what is the agent's relationship to the beneficiary and/or the field of endeavor? Make it make sense: if a beneficiary is being sponsored by an uncompensated agent-petitioner with no connection to the field of endeavor, it raises a legitimate question as to whether that beneficiary is extraordinary. If the basis for the agent-petitioner relationship is not clear in the initial filing, expect an RFE.

ITINERARIES

A well-organized itinerary presents a single, easy-to-read document that the examiner can refer to when evaluating the agency agreements and contracts. It can even help tell a coherent story about the beneficiary's field and how engagements in the United States relate to past achievements. The itinerary must include, at least, the dates and locations of each engagement and the name and address of each employer or venue. In a P-3 petition filed by a theatre company on behalf of performing artists, the petition was denied because the itinerary "did not provide details." On appeal, the Administrative Appeals Office (AAO) disagreed with the director's finding:

> Here, within its original submission the Petitioner offered an itinerary that identified the Beneficiaries' "event" as a tour with seven scheduled performances during the requested period, and listed the dates and locations of the performances. We conclude that the Petitioner has delivered the required explanation of the nature of the Beneficiaries' events or activities.[8]

It is common for artists' and athletes' itineraries to include people or entities that are not "employers" in the traditional sense, such as performance venues or athletic arenas for competitions. Do not assume that the officer reviewing your case will be familiar with common practices within the beneficiary's field. If it is not immediately clear from the event contracts who is the responsible entity or how the beneficiary will be paid, the itinerary provides one opportunity to clarify these details. The petitioner's letter provides another.

COVID-19 has prompted USCIS not only to contact the employers listed in petitions, but also to Google the venues, to see whether scheduled performances and competitions listed on the itinerary are still slated to go forward. They may send RFEs whenever public information makes it clear that those events have been cancelled or postponed. It is prudent to discuss in advance what related types of work may be available to the beneficiary if public in-person events get cancelled due to the pandemic, and to document any such offers of such alternative work that has been lined up as

[8] *Matter of E–,* ID# 5099280 (AAO May 31, 2019).

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a safeguard, or to flesh out the itinerary. Both agent and beneficiary should be involved in such discussions. The itinerary presents an opportunity to state that the petitioner anticipates additional unconfirmed events, such as speaking engagements, recording sessions, performances, workshops, or clinics that may come up during the validity period – but keep in mind that permission to add such events without an amended petition is limited to O-1B artists.

Another concern related to the original itinerary and contracts, and any cancellations or later additions prompted by the pandemic or other changed conditions, is whether the newly substituted type of work may require a different peer advisory consultation. This is far less of a concern in fields that lack a labor union, league, or management organization, but in the performing arts, the kind of work the beneficiary is allowed to do may be circumscribed by what the union will cover and approve, and which unions were consulted. In sports, it is imperative to remember that P-1A petitions for athletes do not allow them to moonlight as coaches, and that O-1A petitions must be amended to permit new types of work not covered in the original petition.

In addition to reaching out to agents, employers, and venues to confirm whether the specific engagements in a petition itinerary will happen as scheduled, USCIS may also send RFEs challenging the petitioner's description of what field of endeavor the beneficiary is in, what type of work they do, whether testimonial writers are really experts in the field, and other challenges to the reliability of evidence submitted. The key in each of these areas is to detail the provenance of the information the petitioner is relying on, authenticate it where possible, and scrupulously comply with the procedural requirements in the regulations.

AWARDS

When detailing awards, be clear whether the regulatory standard being met is that of a one-time award or a lesser national or international award, and include background information both from the awarding entity itself, published articles about the award, eligibility criteria for the nomination or award, as well as information about previous winners and nominees, where known. Where possible, it is helpful to obtain a letter from the awarding entity confirming the beneficiary's receipt of the award as well as the rigorous criteria applied in awarding the prize. Use primary sources as much as possible. If using secondary publicly maintained resources such as Wikipedia, use only as a bibliography or index of material to supplement or corroborate primary sources.

WEIGHT GIVEN TO REFERENCE LETTERS

Where an RFE ignores or dismisses testimonial letters, or broadly claims that the petition includes "no evidence" of the beneficiary's original contributions or their significance in the field of endeavor, the *Skirball*[9] decision is useful for this purpose, far beyond the P-3 context. The AAO opined:

> USCIS may reject an expert opinion letter, or give it less weight, if it is not in accord with other information in the record or if it is in any way questionable.... In the present matter, the director did not question the credentials of the experts, take issue with their knowledge of the group's musical skills, or otherwise find reason to

[9] *Matter of Skirball Cultural Center*, 25 I&N Dec. 799 (May 15, 2012)

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> doubt the veracity of their testimony. The AAO finds the uncontroverted testimony to be reliable, relevant, and probative as to the specific facts in issue. Accordingly, the expert testimony satisfies the evidentiary requirement.[10]

One recent response the Service has evolved in this sphere, when presented with *Skirball* arguments in support of the validity of testimonials, is to claim (often erroneously) that none of the applicable evidentiary criteria in the O-1 setting can be established by testimonial evidence. Where you believe the Service is wrong, examine the regulations actually met, point out the Service's application of ultra vires requirements and artificially heightened standard of review, and quote the regulations in support of your evidence.

There are several other resources you can point to, in support of your use of expert testimony[11]:

- *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994) holding that expert statements about the petitioner's contributions must be fully considered, even if the expert opinions came from people who knew or had worked with the beneficiary.
- *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995) finding that dismissal of expert letters without full consideration was "clear evidence that [the INS] did not adequately evaluate the facts before it."
- USCIS's *Kazarian* Policy Memo[12]

According to the *Kazarian* Policy Memo, USCIS provides the following guidance to its officers for adjudication of expert letters:

> ***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.***
>
> ***…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.*

Show that testimony is from recognized experts in the field of endeavor. Letters must be accompanied by the writer's CV or resume (where it has not been provided, pull up the writer's LinkedIn profile), attest to the authenticity of the beneficiary's skills, explain the basis for the writer's knowledge, and speak to the beneficiary's ability or significant contributions in field of endeavor.

HIGH REMUNERATION

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[10] *Id.,* at 805–06.
[11] "Practice Pointer: Expert Opinion Testimony: Yes, It's Evidence USCIS Should Consider!" (March 22, 2019), AILA Doc. No. 19032230.
[12] USCIS Memorandum, "Evaluation of Evidence Submitted with Certain I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14" (Dec. 22, 2010) AILA Doc. No. 11020231.

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When submitting either initial evidence of high remuneration in relation to others in the field, or replying to an RFE on this point, find as many different wage surveys and industry wage reports as possible. Many private sector wage and salary reports are readily available online. Do not rely on one or two sources, and do not place primary reliance on a wage survey from the US Department of Labor. If private sector wage surveys or industry wage reports are not readily available, get an independent report with detailed analysis of relevant pay data for similarly employed individuals from either an economist or a headhunter with extensive experience in the beneficiary's field. Make sure to provide comparative wage data for the country in which the beneficiary earned a high remuneration, and provide conversions to U.S. dollar to make it clear for the officer.

LEADING OR CRITICAL ROLE/EMPLOYMENT

USCIS may discount being a member of a prominent team, group, department, or organization, on the assumption that not all members can be extraordinary, so the applicant cannot take credit for "lead" or "critical" with the employer "as a whole." Make clear your argument what the specific role and contributions are, obtain employment verifications or other letters of support, to demonstrate the interpretation of "critical role" that includes critical roles within a specific group or department of a company as opposed to the company as a whole. There are some useful ice hockey precedents to call on, including a lawsuit filed last year on behalf of a strength trainer for the Buffalo Sabres, where USCIS backed down after litigation.[13]

CONCLUSION

Overall, we recommend being proactive in initial filings to anticipate USCIS challenges, providing as much documentation as possible and corroborating single sources of evidence, as needed. But most important, do not accept statements in an RFE without reading them carefully and thinking about them analytically. Sometimes the Service may have missed evidence provided in the initial file, or perhaps misunderstood some of the material provided. And at other times, the officer may impose the wrong legal standard or include boilerplate language from an RFE template menu. Push back not only on the facts, but on the law. And consider litigation if needed to counter a faulty denial.[14] These tools and tips may need to be supplemented with new ones. USCIS never tires of finding new ways to misread old regulations.

[13] *Dr. Edward Anthony Gannon*, *Hockey Western New York, LLC., v. U.S. Citizenship and Immigration Services*, Case 1:20-cv-00594-GWC (WDNY 05/19/20). See also *Chursov v. Miller*, No. 18-cv-2886 PKC (S.D.N.Y. May 13, 2019).
[14] www.americanimmigrationcouncil.org/practice_advisory/mandamus-and-apa-delay-cases-avoiding-dismissal-and-proving-case.

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