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**15. Employment First Preference**

The first employment-based preference category is available to individuals of extraordinary ability in the sciences, arts, education, business, or athletics. This memo will address achievement in the sciences. Different, but sometimes overlapping rules, apply to the other disciplines.

In order to qualify for Employment First Preference, aliens of extraordinary ability in the sciences must establish that they are one of a small percentage of people who have risen to the top of their field. The alien must establish sustained national or international acclaim and recognition for achievements in their field of expertise and must be seeking to enter the United States to continue work in the area of extraordinary ability.

Establishment of sustained national or international acclaim and recognition for achievement in the field of expertise can be established by providing evidence of receipt of a major internationally recognized award such as the Nobel Prize or at least three of the following:

1. Documentation of receipt of lesser nationally or internationally recognized awards for excellence in the field of endeavor.
2. Documentation of membership in associations in the field of endeavor which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.
3. Published material in professional or major trade publications or major media about the alien, relating to the alien’s work in the field for which classification is sought, which shall include the title, date and author of such published material, and any necessary translation.
4. Evidence of participation on a panel or individually as a judge of the works of others in the same or an allied specialization.
5. Evidence of original scientific contributions of major significance in the field of endeavor.
6. Evidence of authorship of scholarly articles in the field in professional journals or other major media.
7. Evidence of having commanded a high salary or other significantly high remuneration for services in relation to others.
8. Employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation.
9. Comparable evidence if the above criteria do not readily apply to the alien’s case.
10. Evidence of the display of the alien’s work in the field at showcases in more than one country.

USCIS carefully scrutinizes these petitions. They maintain a very high threshold, which must be met in order to obtain an approved petition.

1. Documentation of receipt of nationally or internationally recognized awards for excellence in the field. USCIS may accept documentation that works were selected for presentation at medical conferences and meetings as fulfilling this requirement. However, if these accomplishments are also being used to satisfy another standard for qualifying in this category, it may not be acceptable for this purpose.
2. Documentation of membership in associations in the field of endeavor. The mere membership in various medical associations is not sufficient to meet this requirement. The individual must be a member of a society or association that is extremely selective and would not accept members merely by their filing of an application and payment of dues. Documentation of their selectivity and the selection process should be given, as well as information about the society.
3. Published material and professional or trade publications. Documentation submitted to USCIS must discuss the merits of the alien’s work, the alien’s standing in the field, and any significant impact that work has had in the field. In addition to submitting published material about the alien and their work, USCIS requires evidence to establish the significance of the published materials submitted about the individual’s work, and how it has set the individual apart from others in the field as one of the small percentage who have risen to the top of their field. The publication’s name, its logo, national or international circulation, how often it is printed, and the number of copies printed should also be provided.
4. Judging the work of others. Numerous physicians and researchers are involved in reviewing articles by others which are submitted for publications in various trade journals. However, USCIS may not deem this to be sufficient. USCIS requires evidence to establish the criteria used to choose the alien as a judge. It must be demonstrated that the individual’s sustained national or international acclaim resulted in their being selected to serve as a judge of the work of others in the field. The judging must be on a national or international level, and involve other accomplished professionals in the field. Evidence demonstrating the review of an unusually large number of articles, or the receipt of independent requests from a substantial number of journals or serving in an editorial position for distinguished journals should be submitted.
5. Original scientific contribution.­ USCIS requires proof establishing that the individual’s work is considered original and how it has made a contribution of major significance in the field, compared to all others in the field. According to USCIS, research by itself cannot be considered major in the absence of proven major accomplishments resulting from the studies. USCIS requires other evidence to satisfactorily establish the impact in the field. If the individual has written scholarly articles, heavy independent citation of those articles would be acceptable evidence and objective evidence, according to USCIS, that other researchers have relied on the individual’s work. A listing containing the name of each article and the author should be provided.

If an individual holds one or more patents, evidence of the significant implementation of the patent(s) and innovation(s) should be provided.

The mere fact that the individual has made presentations of their research or publication at a conference is not sufficient. USCIS requires evidence that sets these presentations apart from others in their field. Such evidence would include, but not be limited to, documentation that the individual was a keynote speaker, or that the presentation drew an unusually large audience. Accordingly, poster presentation should not satisfy this requirement.

1. Scholarly articles. USCIS requires evidence establishing the significance and importance of the alien’s scholarly articles in the field. The evidence must indicate that the published articles have garnered national or international attention, for example, being widely cited by individual researchers.

USCIS does not consider the mere publication of an article in a scientific publication, in and of itself, as meeting any of the criteria. USCIS has concluded that every scientist whose scholarly research is accepted for publication does not necessarily mean that they have made a major contribution in the field.

1. Documentation of receipt of lesser nationally and internationally recognized awards for excellence in the field. USCIS does not consider the selection of an individual’s work by a medical conference or journals as being equivalent to an award of a prize.
2. Performance in a leading or critical role for organizations that are established as having a distinguished reputation. The fact that the individual has done research at a major research facility or major hospital could meet the standard. Very strong letters of recommendation establishing the contributions made, and the individual’s extraordinary ability, as well as information about the facility should be made. Significant detail should be included in these letters.

On March 4, 2010, the Ninth Circuit of the United States Court of Appeals issued a decision on a case appealed to it regarding an alien of extraordinary ability whereby after establishing three of the criteria for Extraordinary Ability, the applicant must show in the final merits analysis that the requisite level of achievement has been attained. The following is a link to the decision.

<http://www.ca9.uscourts.gov/datastore/opinions/2010/03/04/07-56774.pdf>.

In the case, 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, the Court held the following:

1. The regulations do not require an individual to demonstrate the research community’s reaction to their published articles before the articles can be considered as evidence.
2. Neither USCIS nor the Administrative Appeals Office (AAO) may unilaterally impose novel substantive or evidentiary requirements beyond those set forth in 8 C.F.R. §204.5.
3. While the authors’ citations (or lack thereof) might be relevant to the final merits determination of whether a petitioner is at the very top of their field, they are not relevant to the antecedent procedural question of whether they have provided at least three types of evidence.
4. The criteria applied by the USCIS and AAO in determining whether the individual was judging the works of others by judging graduate level diploma works at a university, and the AAO’s conclusion that this was not persuasive evidence of acclaim beyond that of the university, and the determination by USCIS and the AAO that absent ‘evidence that the petitioner served as an external dissertation reviewer for a university…” was not correct. The Court determined that 8 C.F.R. §204.5(h)(3)(iv) does not allow USCIS to inquire as to whether judging university dissertations counts as evidence, depends on which university the judge is affiliated with. The Court felt that although this might be relevant to the final merits of the determination, the AAO and USCIS could not unilaterally impose this requirement, and felt that this was a “novel evidentiary requirement.”

Although the decision by the Court did not reverse the decision of USCIS and the AAO, it did acknowledge that USCIS and the AAO erred by stating that none of the criteria were met. The Court determined that two of the ten criteria, of which three are required, were met.

It is unknown what impact this decision will have on future cases. However, there is no doubt that it is extremely difficult to meet the present standards set by USCIS. Hopefully, the decision will result in a fairer application of the standards.

As of the date of this memo, despite the Kazarian decision, USCIS is taking a very tough position on these cases. After filing the petitions, they are issuing letters requesting additional information, claiming that the submission is deficient and stating and requesting the following:

“The criterion has not been met because the evidence submitted does not show that the beneficiary has made original scientific or scholarly research contributions to the Academic field. To assist in determining whether the beneficiary’s contributions are original, you may submit:

* Objective documentary evidence of the beneficiary’s contribution to their academic field.
* Documentary evidence that people throughout the field currently consider the beneficiary’s work original.
* Testimony and/or support letters from experts which discuss the beneficiary’s original scientific or scholarly research contributions to their academic field. (see note below).
* Evidence that the beneficiary’s original contribution has provoked **widespread** public commentary in the field or has been widely cited.
* Evidence of the beneficiary’s work being implemented by others. **Possible evidence may include but is not limited to:**
  + **Contracts with companies using the beneficiary’s products;**
  + **Licensed technology being used by others;**
  + **Patents currently being utilized and shown to be significant to the field.**
* Any other relevant evidence

Note: Letters and testimonies, if submitted, must provide as much detail as possible about the beneficiary’s contribution and must explain, in detail, how the contribution was “original” (not merely replicating the work of others). General statements regarding the importance of the endeavors are insufficient.

Letters of support alone are not sufficient to meet this criterion. Letters, though not without weight, cannot form the cornerstone of a successful outstanding ability claim. USCIS may, in its discretion use such letters as advisory opinions submitted by expert witnesses. However, USCIS is ultimately responsible for making the final determination of the alien’s eligibility [*Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr.1988)]. The content of these letters, and how the letter writers became aware of the beneficiary’s reputation, is important. **Letters solicited by him in support of an immigration petition are of less weight than the preexisting, independent evidence one would expect to find where an individual has made original contributions.** Without extensive documentation showing that the beneficiary’s work has made original contributions to the field, we cannot conclude he meets this criterion.”

Accordingly, the process established by the US government to bring the best and brightest to the United States, has been overly and subjectively complicated, making approvals of these cases for physicians extremely difficult.

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