Fighting and Winning RFEs: Resources and Tips for Crafting a Winning Response

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INTRODUCTION

Despite having prepared the strongest possible O-1 or EB-11 petition for your artist or entertainer client, you find yourself in receipt of a lengthy request for evidence. This practice pointer provides some tips for preserving your sanity and creating a reasoned response to the most tortuous and often incorrect (Requests for Evidence) RFEs from U.S. Citizenship and Immigration Services (USCIS).

With the latest USCIS RFE and Notice of Intent to Deny (NOID) Memorandum, effective September 11, 2018, USCIS can now deny a petition if "initial evidence" is lacking with the petition submission.[1] Therefore, with the initial filing, it is imperative to look at the regulations and the form instructions, which have the force of regulations, as well as any checklists provided by USCIS, in order to determine what constitutes "initial evidence" in each of these cases. You should structure your cover letter or exhibit index to make it easier for the USCIS adjudicator to see that the appropriate initial evidence is included.[2]

In the context of the RFE, your best resources are the O-1 and EB-11 regulations. In crafting a response, you should respond to the specific issues raised in the RFE or NOID. Although, if you receive a "kitchen sink" RFE, it gives you the opportunity to emphasize certain arguments or pieces

[1] USCIS Memorandum, "Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b)," AILA Doc. No. 18071377.
[2] So far, USCIS has issued an I-129 checklist for initial evidence at *www.uscis.gov/i-129Checklist*.

of evidence already in the record. If USCIS is asking for something you have provided already, it is better to submit it again with the RFE response and respectfully point out to the adjudicator that the evidence is being resubmitted to ensure the record is complete and that it does not get overlooked.

In the following sections we will review some common requests in RFE's and NOIDS and offer guidance as to how to prepare a winning response. While this is not an exhaustive list of resources, the authors hope it provides a good base for your response.

If you receive a broad RFE covering a host of categories it is helpful to remind the reviewing officer of a few general points:

Standard of Review is Preponderance of the Evidence

We also explain that preponderance of the evidence means that the matter asserted is more likely than not to be true and that filings are not required to demonstrate eligibility beyond a reasonable doubt.[3] It is useful to bring to the Service's attention the Interoffice Memorandum ("the Memo") by the USCIS Associate Director of Operations, Mr. William Yates, outlining the standard of proof to be met by the petitioner and discussing drafting strategies for RFE. This Memo confirms that the correct burden of proof by petitioners seeking immigration benefits is "preponderance of the evidence" and not the criminal law standard of "beyond a reasonable doubt":

> … adjudicators too often issue a RFE for additional types of evidence that could tend to eliminate all doubt and all possibility for fraud ….
>
> The standard to be met by the petitioner… is "preponderance of the evidence," which means that the matter asserted is more likely than not to be true. Filings are not required to demonstrate eligibility beyond a reasonable doubt… A RFE is most appropriate when a particular piece or pieces of necessary evidence are missing…
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> Generally, it is unacceptable to issue a RFE for a broad range of evidence when, after review of the record so far, only a small number of types of evidence is still required… While it is sensible to use well-articulated templates that set out an array of common components of RFEs for a particular case type, it is not normally appropriate to "dump" the entire template in a RFE; instead, the record must be examined for what is missing, and a limited, specific RFE should be sent, using the relevant portion from the template. The RFE should set forth what is required in a comprehensive manner so that filer is sufficiently informed of what is required.[4] (*copy attached*)

This means that, even if an officer has a reasonable doubt (*i.e.*, has a doubt and it is even reasonable) as to whether a particular beneficiary meets the regulatory criteria, the officer must

[3] *See Matter of Chawathe*, 25 I&N Dec. 369 (Comm'r AAO Oct. 20, 2010), *see also* Adjudicator's Field Manual, ch. 11.1(c).
[4] USCIS Memorandum, "Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)" (Feb. 16, 2005), AILA Doc. No. 05021810.

approve the case, provided the beneficiary is more likely than not eligible for the particular immigration benefit. Thus, if the petitioner submits relevant, probative, and credible evidence that leads USCIS to believe that the claim is true "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*,[5] (definition "more likely than not" as a greater than 50 percent probability of something occurring).

As a practice pointer, it can sometimes be useful to remind the officer of this throughout your analysis of each eligibility criterion, for example, if the petitioner has proven that the beneficiary has performed in a lead and critical role for distinguished organizations in the past, it is more likely than not that they will continue to perform in similar roles for distinguished organizations in the future.

Consider the Submission as a Whole

Recent S.D. New York case *Chursov v. Miller*[6]

> Rather than considering Chursov's submission as a whole, the agency's review excessively focused on the significance of individual components of the submission. The failure to adequately consider the totality of the submission was arbitrary and capricious. For example, the letters from professionals in the field were considered principally in isolation and without adequate consideration of the light they shed on the significance of scholarly publications and presentations or the pending patent application.

It can be helpful to point out to the officer that each specific criterion does not require a beneficiary to establish that they have "a high level of achievement evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that the beneficiary is described as prominent, renowned, leading, or well-known." Rather, this is the definition provided in the Title 8 Code of Federal Regulations (CFR) of "extraordinary ability in the field of arts," or "distinction." The regulations continue to explain that a beneficiary sufficiently meets this definition if they demonstrate at least three of the six criteria which follow. To be clear, this means that a beneficiary is not and should not be required to demonstrate extraordinary ability for each separate criterion, but instead that USCIS finds meeting at least three of the prescribed criteria sufficient to demonstrate extraordinary ability. Therefore, it can be argued that the Service erroneously represents the standard of sufficiency for each criterion by suggesting that the beneficiary must demonstrate extraordinary ability through each criterion in and of itself, which would be an abuse of discretion by imposing substantive or evidentiary requirements beyond those set forth in the regulations.

RFE Cites Incorrect Regulations or Cases for the Wrong Proposition

Finally, USCIS is known to sometimes issue RFEs or NOIDs incorrectly citing the regulations or the pertinent cases. USCIS is also known to issue RFEs in which their understanding of the field is inconsistent with the facts or entirely wrong. In a recent RFE, USCIS had confused the job title

[5] *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987).
[6] *Chursov v. Miller,* 1:18-CV-02886-PKC (S.D. NY 2019).

for the field. In your response, it is important to bring such errors to the adjudicator's attention, and to provide the correct, applicable legal standards, as well as the correct facts. When USCIS overreaches in its requests for evidence or misstates the law, it is important to remind the adjudicator that USCIS cannot impose novel substantive requirements.[7]

We now turn so some common areas of inquiry in O-1 and EB-11 cases.

CATEGORIES

O-1 Nature of the Event

In recent months, USCIS has increasingly issued Requests for Evidence (RFE) addressing the availability of future work and questioning the distinction of the future event. RFE's typically state,

> The beneficiary has performed in the past as a lead or starring participant in productions or events with distinguished reputations. However, the record fails to establish the beneficiary will perform in the future as a lead or starring participant in productions or events with distinguished reputations.

Also

> "The beneficiary has performed in the past in a lead, starring, or critical role for organizations that have distinguished reputations. However, although the beneficiary's future position with Company LLC appears to be a lead, starring, or critical role, the record contains no evidence to establish that Company LLC, a company established in 2014, is an organization with a distinguished reputation."

The contributions of the beneficiary and the event itself must be shown to be leading or critical. You should carefully document the distinguished reputation of the sponsor as well as the beneficiary's previous employers. Do not assume officers will recognize even household names. Carefully spell out how the beneficiary's role is a leading or starring role.

Speculative Employment

Recent RFEs have focused on "speculative employment," but certain industries, such as fashion and advertising, may only book artists at the last minute. The applicable statute authorizes the admission for the period of the "event" in question, which is broadly defined. The USCIS regulations at 8 CFR §214.2(o)(3)(ii) define an event as:

> … an activity such as, but not limited to, a scientific project, conference, convention, lecture series, tour, exhibit, business project, academic year, or engagement. Such activity 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**…

[7] *See Kazarian v. USCIS, supra* note 21 at 1121.

Also 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.

The July 20 Policy Memo Clarifying Guidance on "O" Petition Validity Period Revisions to the Adjudicator's Field Manual (AFM) Chapter 33.4(e)(2) AFM Update AD10-36[8] contains some useful language:

> 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, travels between engagements, etc. 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."

O-1 and EB-11 Expert Opinions, Reference Letters, and Testimonials

One of the most common issues and current USCIS trends is the way USCIS treats reference letters, expert testimonials, and opinions submitted in support of O-1 and EB-11 petitions. In unconventional fields, these letters may form the foundation of the case. Therefore, it is important to avoid pitfalls and navigate roadblocks raised by USCIS in recent years.

While these letters have long been considered reliable evidence of an applicant's abilities, in recent years, USCIS has begun to require corroboration of the statements in the letters and has, at times, discounted them outright. When evaluating letters, USCIS frequently cites to *Matter of Caron Int'l Inc*., 19 I&N Dec. 791, 795 (Comm'r 1988), holding that USCIS is not required to accept, or may give less weight to, expert testimony evidence if it is not in accord with other information, or if is

[8] USCIS Memorandum, "Clarifying Guidance on "O" Petition Validity Period Revisions to the Adjudicator's Field Manual (AFM) Chapter 33.4(e)(2)" (July 20, 2010), AILA Doc. No. 10072061.

in any way questionable.[9] *Matter of Caron* is distinguishable because the opinion arose with legacy INS in a particular fact pattern involving advisory opinions related to a bachelor's degree, and not in the extraordinary ability context.

USCIS has a long history of accepting expert letters as evidence. In the 1992 letter from legacy INS Acting Assistant Commissioner for Examinations, Lawrence Weinig, to the Northern Service Center Director, expert letters were listed among the acceptable types of evidence to determine whether an individual could establish extraordinary or outstanding ability. A number of non-precedent AAO decisions reinforce this view. For example, one AAO decision noted that "[t]he significance of the Beneficiary's research work is evidenced by the numerous letters from doctors and researchers in Canada, China and the United States, attesting to the merits of the beneficiary's contributions to his field and to his international reputation."[10]

In addition, the court in *Buletini v. INS* held that expert statements respecting the petitioner's contributions must be fully considered, even if the expert opinions came from people who knew, or had worked with the beneficiary.[11] Similarly, the court in *Muni v. INS* found that dismissal of expert opinion letters without full consideration was "clear evidence that [the INS] did not adequately evaluate the facts before it."[12] The infamous *Kazarian v. USCIS*, did not change this analysis, and instead noted that expert opinion letters cannot be vague and should specifically identify contributions and give examples of how the beneficiary influenced the field.[13] USCIS must consider letters that satisfy these requirements, as they are important testimonial evidence.

Failure to consider expert testimony and/or affidavits is a violation of due process. *Tun v. Gonzales.*[14] Unchallenged expert testimony cannot be rejected outright. *Banks v. Gonzales.*[15]

In determining the credibility of documentary evidence you can point to the same standard used in determining the credibility of testimony: any rejection of testimonial letters can only be based on "specific, cogent reasons that bear legitimate nexus to the finding." *Zahedi v. INS.*[16]

For more information see also the "AILA Practice Pointer: Expert Opinion Testimony—Yes, It's Evidence USCIS Should Consider!"[17]

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[9] *See Matter of Skirball Cultural Center*, 25 I&N Dec. 799, at 805–06 (BIA 2012) citing to *Matter of Caron Int'l, Inc.,* stating, "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 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] *See, e.g., Matter of [name not provided]*, 1997 WL 33171069 (Comm'r AAO 1997); *Matter of [name not provided]*, 1997 WL 33171273 (Comm'r AAO 1997).

[11] *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994) at 1232–33.

[12] *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995) at 445.

[13] *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) at 1122.

[14] *Tun v Gonzalez* 485 F. 3d 1014 (8th Cir. 2007).

[15] *Banks v. Gonzales*, 453 F. 3d 449 453–54 (7th Cir. 2006).

[16] *Zahedi v. INS*, 222 F. 3d 1157, 1165 (9th Cir. 2000).

[17] "Practice Pointer: Expert Opinion Testimony - Yes, It's Evidence USCIS Should Consider!" (Mar. 22, 2019), AILA Doc. No. 19032230.

O-1 and EB-11 Published Material about the Beneficiary

Foreign nationals can use published material about them or their work in professional or major trade publications or other major media to establish distinction for O-1B or extraordinary ability for O-1A or EB-11.[18] USCIS typically applies this criterion restrictively, especially if the beneficiary's name is not in the publication. In addition, according to the USCIS EB-11 RFE Template, "[t]he published material should be about the beneficiary's work in the field, not just about the beneficiary's employer or other organizations the beneficiary is associated with."[19]

Additionally, USCIS applies this criterion restrictively if a publication appears to focus on the beneficiary's work but does not sufficiently discuss the beneficiary themselves. In a recent non-precedent AAO decision, a journalist presented articles which focused on a film that he directed, wrote, and edited; yet, since the article focused on "the film and the individual who inspired it," the AAO decision noted that this article was not "about" the beneficiary. Another publication focused on the beneficiary's novel, but it did not satisfy the criterion because it only mentioned him once by name.[20]

If you choose to include published material in which the beneficiary is not explicitly mentioned in the article, you should also connect the beneficiary to the work that is being highlighted. For example, to use an article highlighting a product that the beneficiary assisted in designing, you could provide a letter from the company or other entity commercializing the product that explains the beneficiary's contribution. Or, perhaps the beneficiary received an award or other type of internal recognition for his role in the product development, or the beneficiary may be the author of white papers or other internal guidance that connects them to the product. The goal is to leverage published material even where the beneficiary is not explicitly mentioned and connect the dots through other objective materials between product described in the article and the beneficiary's role in creating the product.

It is also important to include evidence of the reputation and significance of the publication, such as evidence showing the publication has a wide circulation, industry awards, or use metrics from a reputable web-monitoring source about the amount of traffic on the publications website. Providing documentation of the publication is mentioned in the draft USCIS O-1A RFE Template.[21]

Further, the EB-1 RFE Template explains:

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[18] *See* 8 CFR §214.2(o)(3)(iii)(B); 8 CFR §214.2(o)(3)(iv)(B); 8 CFR §204.5(h)(3)(iii).
[19] USCIS Draft RFE Template, "Request for Evidence, I-140 E11 Alien of Extraordinary Ability," (May 4, 2011) AILA Doc. No. 11050431.
[20] *Matter of W-S-,* ID# 2756032 (AAO June 5, 2019).
[21] USCIS Draft RFE Template, "Request for Evidence I-129 O-1A SEBA" (Jan. 22, 2013), AILA Doc. No. 13012250.

- Marketing materials created for the purpose of selling the beneficiary's products or promoting the beneficiary's services are not generally considered to be published material about the beneficiary.
- Unevaluated listings in a subject matter index or footnote, or reference to the beneficiary's work without evaluation, are insufficient.[22]

Finally, note that the O-1B is distinguishable from the O-1A and EB-11 in this prong, in that for the O-1B, the published material can also be written by the beneficiary. The O-1B regulations state: "[e]vidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials ***by*** or about the individual in major newspapers, trade journals, magazines, or other publications."[23] Having been selected to write in a particular publication may serve as evidence of the beneficiary's national or international recognition, since the selection itself is due to the beneficiary's achievements.

USCIS has recently begun to question published material if it does not mention the beneficiary by name or if the article is not solely about the beneficiary. You should make a strong argument that USCIS must accept press about the beneficiary and his or her work, whether or not the articles highlight the beneficiary as extraordinary. In *Muni v. INS*, the court held that "published material about [Muni] in professional or major trade publications or other major media, relating to [his] work in the field for which classification is sought" was sufficient to satisfy this criterion.[24] The court noted that the "articles do not establish that *Muni* is one of the stars … but that is not the applicable standard." Instead, the court found that "the articles Muni submitted, which appeared in various newspapers and hockey magazines, clearly fit this requirement."[25] The court in *Ravine v. INS* similarly found that "[The] INS was not following its own regulations when it held that there are no articles which state that Racine is 'one of the best in the field.'"[26] Like *Muni*, the court in *Racine* held that "articles [that] … demonstrate his work within the field" were sufficient to meet this criterion.

In *Russell v. INS*[27] the district court opined on what constitutes "major media." The court rejected INS' position that articles from Chicago newspapers did not demonstrate that Russell had "major media" attention because the newspapers were not **national** media. The court noted, "Nowhere in the relevant language of the INS is regulation there a requirement that the submitted media publications be from news outlets throughout the country."[28]

Questioning Online Publications

"Any documentation from Wikipedia, web links, web portals or social media sites carry no evidentiary weight within the present proceedings."

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[22] USCIS Draft RFE Template, "Request for Evidence, I-140 E11 Alien of Extraordinary Ability," (May 4, 2011), AILA Doc. No. 11050431.
[23] 8 CFR §214.2(o)(3)(iv)(B)(2) (emphasis added).
[24] *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995) at 445.
[25] *Id.*
[26] *Racine v. INS*, 1995 WL 153319 (N.D. Ill. 1995) at 6.
[27] *Russell v. INS* (Russell v. INS, 2001 U.S. Dist. LEXIS 52 (E.D. Ill. Jan. 4, 2001).
[28] *Id*., at 15 n.5.

Can use a study to establish importance of Internet publications: www.pewinternet.org/2011/09/26/part-5-the-role-of-the-internet/

Also *Matter of B-A-S-T LLC*, ID #660539 (AAO June 7, 2017). Quote from footnote 2:

"Keeping in mind Wikipedia's limitations, our consideration of material from this source will vary depending on whether an entry's relevant information is corroborated, as well as the purpose for which it is presented. As with any submission, we must evaluate the probative value and credibility of the documents provided. See Chawathe, 25 I&N Dec. at 376. In this instance, we find no reason to question the information in this entry, which is supported by 40 footnotes."

Recent non-precedent AAO decisions have restrictively challenged the metrics by which websites can qualify as "major media," particularly in the absence of traditional distribution and readership figures. For example, a recent AAO decision stated that the inclusion of "likes" and "follows" on a website's Facebook page does not demonstrate major circulation, nor do site "visits."[29] Another recent AAO decision stated that a website which received an estimated 100,800 visits within the past 30 days also does not qualify as a form of major media.[30]

Going back to the Oxford English Dictionary, "media" is the "main means of mass communication (broadcasting, publishing, and the Internet) regarded collectively." As such, any website with a high volume of visitors, pageviews, and a broad geographical readership should necessarily be considered major media. There is no doubt that online publication, in this day and age, much more important than print publications.

On occasion, USCIS tries to add a requirement to the publications criterion, stating that "publications must be independent, have a national audience, and a board of editors." The regulations for this criterion plainly allow, "…published material in professional or major trade publications or other **major media**." "Major media" includes broad-spectrum business periodicals in print or online editions, broadsheet daily newspapers, weekly news magazine, industry-specific blogs, and online news aggregator sites. To that end, a "board of editors" should not be required.

O-1/EB-1 Plurality Within Criteria

Often the USCIS will issue requests for evidence stating that, "according to the plain language of the regulation at 8 CFR §204.5(h)(3)(i), the evidence must establish that the alien is the recipient of the prizes or the awards (in the plural)." In these cases, it is necessary to remind the USCIS that they have explicitly rejected this reasoning as erroneous and plainly stated that this argument should not be used as a reason for an RFE. According to the Adjudicator's Field Manual at ch. 22.2(i)(1)(C) "Additional Adjudication Guidelines":

The evidence provided in support of the petition need not specifically use the words "extraordinary." Rather the material should be such that it is readily apparent that the alien's contributions to the field are qualifying. **Also, although some items in the regulatory lists**

[29] *Matter of T-Inc.,* ID# 1841739 (AAO Nov. 20, 2018).
[30] *Matter of S-34D-, Inc.,* ID# 1389007 (AAO Oct. 12, 2018).

occasionally use plurals, as indicated above, it is entirely possible that the presentation of a single piece of evidence in that category may be sufficient. On the other hand, the submission of voluminous documentation may not contain sufficient persuasive evidence to establish the alien beneficiary's eligibility.

It is clear that despite the plurality of many of the criteria, one lesser nationally or internationally recognized award or prize of excellence, for example, may sufficiently fulfill this criterion.

Requiring That O-1 Beneficiaries Demonstrate That They Have "Sustained National or International Acclaim."

A disturbing recent trend has been requests for evidence issued by the USCIS that state "the O-1 classification requires you to demonstrate sustained national or international acclaim in the field. Therefore, USCIS will only consider the evidence provided since the beneficiary's last approval."

While the Service has not defined "sustained," in disqualifying all evidence of acclaim attained prior to the beneficiary garnering their current O-1, it appears to be implying that "sustained" means no longer than three years of a lack of acclaim.

The vagueness and subsequent misinterpretation of the word "sustained" gives root to several questions: Does "sustained" mean since last O-1?; Every three years?; Can it refer to a sustained past?; Does/should it disqualify a foreign national's past achievements? With this requirement for sustained acclaim presented as a window for viewing the following regulatory criteria, the definition of "sustained" has a significant impact on how the USCIS regulations for an O-1B nonimmigrant visa are interpreted.

Again, going back to definitions can be helpful in fighting this, arguing that "sustained" as it is used in the USCIS regulations, is "to support by adequate proof, confirm" (sense #5 in *Black's Law Dictionary*, #8 in *Merriam Webster's Dictionary*, and #4 in the *Oxford Dictionary*). The regulations for an O-1B nonimmigrant visa state that a one-time achievement (nomination or receipt of significant national or international awards or prizes in the particular field) demonstrates sustained national or international acclaim. If this logic is followed, the regulatory requirements do not require a continuation of acclaim throughout a beneficiary's career, but instead adequate proof/confirmation that a beneficiary is nationally or internationally distinguished. In absence of a one-time achievement, the beneficiary must demonstrate extraordinary ability by fulfilling three of the six regulatory criteria in order to confirm their national or international acclaim.

If this sense of "sustain" is used, then "sustained national or international acclaim" is not demonstrated separately from the given six criteria, nor does it act as a lens through which to judge each of the six criteria, but is demonstrated by the six criteria (or, at least three of the six). This is corroborated by 8 CFR 214.5, which does not specify the need for "sustained acclaim" in order to fulfill each individual criterion, but rather uses "sustained acclaim" to define extraordinary ability in the arts, a title only fulfilled by satisfying three of six criteria (or a one-time achievement).

EB-11 Critical or Leading Role in Organization as a Whole

EB-11 beneficiary plays a critical role in the organization. The language that keeps appearing is "a leading role should be apparent by its position in the overall hierarchy of an organization or establishment and that role's corresponding duties."

Several recent non-precedent AAO decisions note the lack of an "organizational chart" or other such evidence needed to demonstrate the hierarchy of an organization.[31] [32] As a practice pointer, visual evidence such as a chart may assist a case when the structure of an organization or establishment is not otherwise clearly defined.

Moreover, there is a distinction between a "leading" and a "critical" role. While a leading role is directly linked to hierarchical structure, a supporting role can still be considered critical if the beneficiary's performance is significant to the outcomes of the organization's activities, according to a recent AAO decision.[33] This is not necessarily easy to demonstrate. Another recent AAO decision regarding an industrial engineer noted that although the beneficiary was the only industrial engineer in his establishment, and the establishment had implemented his work, this was not sufficient to show that he was "responsible for its success or standing."[34] Therefore, his role was not deemed critical. It's important to discuss how the beneficiary's work has been implemented in the relevant organization or establishment, but also how their work has impacted its broader activities.

Comparable Evidence

To the extent that you believe USCIS has exceeded the regulatory requirements in it restrictive interpretation of the comparable evidence provision, we suggest that you cite to *Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010) (citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008)), which states that "neither USCIS nor [the] AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth [in the regulations].

For comparable evidence to be considered, the petitioner must explain why the evidentiary criterion is not readily applicable to the beneficiary's occupation as well as why the submitted evidence is "comparable" to the criteria listed in the regulation. A general unsupported assertion that the listed criterion does not readily apply to the alien's occupation is not probative and will be discounted. However, a statement alone can be sufficient if it is detailed, specific and credible.

The word "readily" is specifically used to temper these criteria and create a standard for its correct application. As per the source www.merriam-webster.com, "readily" is defined as 1) by choice or preference; or 2) without difficulty, suggesting that comparable evidence may be submitted if other standards are less referable or present difficulty in application. The recent USCIS policy

[31] *Matter of AF-W-C-Inc.,* ID# 2249175 (AAO Mar. 8, 2019).
[32] *Matter of P-C-. LLC,* ID# 1963952 (AAO Dec. 19, 2018).
[33] *Matter of A-L-O-,* ID# 1846296 (AAO Jan. 2, 2019).
[34] *Matter of S-S-L-,* ID# 3522701 (AAO June 18, 2019).

memorandum published in January 2016 regarding the identically worded comparable evidence provision for O Nonimmigrant Visa Classifications confirms that:

In order to demonstrate this, you first need to point out specific criteria that do not "readily" apply to the specific "occupation." In fact, sometimes the Service will help with this side of things by stating in the RFE itself that certain criteria do not apply to the beneficiary's field. A good example of this is the "display of the alien's work in the field at artistic exhibitions or showcases" and "commercial successes in the performing arts." Clearly these are both very specific to artists and performing artists respectfully and the fact that both criteria include specific language that restricts their application to those in the arts/performing arts clearly demonstrates that these criteria do not apply to, for example, the field of business.

Continuing this example, it can be successfully argued that "commercial success in the **field**" can be considered in lieu of "commercial success in the performing arts" because it is clearly of equivalent persuasive value that establishes the petitioner meets the antecedent procedural requirements for the petition, based on both the similarity in language and purpose of the criterion. This criterion is understandably used by the Service to establish whether the petitioner has achieved commercial success in their particular field. As the Service acknowledges, the fact that the criterion is limited to those in the "performing arts" unnecessarily excludes those in other fields such as the field of business and accordingly, this can be used as a "comparable criterion."

DENIALS

In assessing denials, you must determine whether the case is strong enough to justify litigating the case in federal court, assuming your client would agree to do so. While you always have the option of filing an appeal with the AAO, appeals can take six months or longer to process and often lead to a rubber-stamping of an erroneous decision by the very same agency that denied the petition. It is only with federal court litigation that you will be able to obtain a review of the petition by another branch of the government. Frequently, the government does not extensively litigate such appeals, and instead sends the case back to USCIS for reopening and potential approval (or, on occasion, another RFE). Although such reopening does not qualify as success on the merits sufficient to award Equal Access to Justice Act attorneys' fees, it frequently happens early in the case, within two months of filing and before the need for significant litigation, beyond the filing of the complaint.

> ***Practice Pointer*:** American Immigration Council's Business Litigation Section is an excellent resource for federal court litigation and offers several practice advisories that can simplify the process of filing a federal court complaint. In addition, many AILA mentors are available to assist with such litigation.
>
> ***Practice Pointer*:** Federal court litigation and AAO appeals are not the only available options. Consider whether the case may be more successful simply by re-filing, and if necessary, paying any premium processing fee again. In situations where you could provide additional evidence that was unavailable at the time of filing that strengthens the overall case, or even when you cannot, sometimes refiling is sufficient to obtain a quick approval after review by another officer.

USCIS APPROVAL IS NOT THE END OF THE PROCESS

Consular Interviews for O-1 Cases

After the excitement of an O-1 petition approval, many foreign nationals expect smooth sailing ahead and assume the O-1 will be rubber stamped at the consulate. But, as every wise practitioner knows, there still may be challenges to overcome.

What used to be a one-page application and a fairly routine mail-in process now involves an eight-page online form and a fairly rigorous interview. Where consular officers used to engage with lawyers about their clients' visa applications, consular officers are now shielded by layer upon layer of administration. Where consular officers used to review papers presented at the interview as part of the adjudication process, they now rely more and more on individual applicants articulating the merits of their hundreds of pages of submission in a matter of minutes. Therefore, it is imperative that the foreign national be familiar with his or her application, including a thorough understanding of how the case was presented to USCIS. A foreign national must convey the content of the O-1 petition in a way that helps the officer understands how the foreign national is among the best in the field and explain how he or she will apply those unique abilities once inside the U.S.

Several recent changes in the FAM permit consular officers to re-examine O-1 petitions and apply their interpretations of the facts, as well as consider new information that was not included in the petition. Although the FAM states that by "mandating a preliminary petition, Congress placed responsibility and authority with DHS to determine whether the requirements for O status which are examined in the petition process have been met," consular officers continue to re-adjudicate O-1 petitions at the consular interview. [35]

The FAM used to emphasize the following to consular officers:

> Once you have verified approval through PIMS or PCQS, consider this as prima facie evidence that the requirements for O classification, which are examined in the petition process, have been met. Other than instances involving obvious errors, consular officers do not have the authority to question the approval of O petitions without specific evidence, unavailable to DHS at the time of petition approval, that the beneficiary may not be entitled to status. The large majority of approved O petitions are valid, and involve bona fide establishments, relationships, and individual qualifications that conform to the DHS regulations in effect at the time the O petition was filed.

Formerly 9 FAM 402.13-5(B)(a).

[35] 9 FAM 402.13-5(A)(a).

The FAM used to go further and specifically state that disagreement "with DHS interpretation of the law or the facts, however, is not sufficient reason to ask DHS to reconsider its approval of the petition."[36]

Recent FAM changes now allow and even encourage consular officers to look beyond the approval of the petition to reexamine facts, providing as follows:

> An approved petition is considered prima facie evidence that the requirements for visa classification, which are examined by a USCIS adjudicator during the petition process, have been met. However, the approval of a petition by USCIS does not relieve the alien of the burden of establishing visa eligibility. While the majority of petitions are valid, you should confirm that the facts in the petition are true during the visa interview. Remember that DOL and USCIS interact solely with the petitioner; the interview is the first point during the petition-based visa process where a USG representative has the opportunity to interact with the beneficiary of the petition. Additionally, consular officers overseas benefit from cultural and local knowledge that adjudicators at USCIS do not possess, making it easier to spot exaggerations or misrepresentation in qualifications.

Current 9 FAM 402.13-9(A)(a).

Given this additional level of scrutiny foreign nationals must be prepared to defend their cases in a manner consistent with the submitted documents.

> ***Practice Pointer:*** Young applicants and those with particularly unique fields are more likely to encounter difficulties at the consulate, since their applications typically do not encompass traditional O-1 fields. They should be well-versed in all aspects of their petition. They should also be ready to explain how they qualify for the O-1, despite their youth or the unique nature of their field. They must be able to articulate the specific criteria used in support of their case. It can also be helpful to submit articles or other examples of young people excelling in the same field. Moreover, know your posts. Certain consulates and embassies are known to be tougher in their adjudication of different visa applications. Sometimes this cannot be avoided but in some situations, another consulate within the same country can be applied at and this can avoid the mess of potential revocation proceedings following a confrontation with a tough consular officer.

GENERAL RESOURCES

- USCIS Memo on Clarifying Guidance on "O" Petition Validity Period, Revisions to AFM[37]
- Practice Pointer: O-1 Fashion Model RFEs, NOIDS, and Denials[38]

[36] *Id.*
[37] AILA Doc. No. 10072061.
[38] AILA Doc. No. 1904100.

- Practice Pointer: Expert Opinion Testimony - Yes, It's Evidence USCIS Should Consider![39]
- USCIS O visa Q&A - some helpful language for O basics.[40]

CONCLUSION

Practitioners should take the RFE or NOID as an opportunity to educate the officer about the areas of confusion or misunderstanding. It is an opportunity to try to present your case again, especially in the context of unconventional jobs and fields.

[39] AILA Doc. No. 19032230.
[40] www.uscis.gov/working-united-states/temporary-workers/o-1-individuals-extraordinary-ability-or-achievement/o-nonimmigrant-classifications-question-and-answers