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Extraordinary and Outstanding: O-1As and EB-1s for Science And Business

by Ellen Krengel, Neena Wiora, Becki Young and Lucy Cheung

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One might think it a foregone conclusion that the goal of an employment-based immigration scheme would be to attract the best and brightest. But U.S. immigration laws have never been simple or straightforward, and despite some attempts by policymakers over the years to facilitate entry for these individuals, the immigration system continues to put up a variety of hurdles.

This article examines ways to demonstrate extraordinary or outstanding ability for O-1A petitions in the sciences or business given the changing standards in these categories. It covers documenting scientific research and business metrics in an easy-to-understand manner, making the leap from O-1A to EB-1, and when Outstanding Researcher classification or National Interest Waivers (NIWs) are a viable option for difficult O-1/EB-1 cases.

LEGISLATIVE HISTORY

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Let's start with a little legislative history. The Immigration & Nationality Act of 1952 (McCarran-Walter Act),[1] the backbone of our current immigration laws, did not create separate categories for either O-1 or EB-1. What later became O-1 visas are contained in the section for H visas (and initially, many nonimmigrants of extraordinary ability were classified as H-1B's):

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform temporary services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as an industrial trainee;

Employment based immigrants (including those with extraordinary ability) were lumped into the first quota category:

ALLOCATION OF IMMIGRANT VISAS WITHIN QUOTAS

SEC. 203. (a) Immigrant visas to quota immigrants shall be allotted in each fiscal year as follows:

(1) The first 50 per centum of the quota of each quota area for such year, plus any portion of such quota not required for the issuance of immigrant visas to the classes specified in paragraphs (2) and (3), shall be made available for the issuance of immigrant visas (A) to qualified quota immigrants whose services are determined by the Attorney General to be needed urgently in the United States because of the high education, technical training, specialized experience, or exceptional ability of such immigrants and to be substantially beneficial prospectively to the national economy, cultural interests, or welfare of the United States, and (B) to qualified quota immigrants who are the spouse or children of any immigrant described in clause (A) if accompanying him.

It was not until the Immigration Act of 1990[2] that the O-1 and EB-1 categories were created. Thus, the history of these two categories is only about 30 years long.

HOW OUTSTANDING DOES A BENEFICIARY NEED TO BE? THE CHANGING STANDARDS OF OUTSTANDING ABILITY

Adjudicative standards for outstanding aliens are higher now than ever before, even though there have been no significant changes to the statute or regulations. In many instances, U.S. Citizenship and Immigration Services (USCIS) has raised the bar via updates to its Policy Manual[3] and misapplications of the law during adjudications. This disparate treatment is especially apparent in O-1A, EB-1A and Schedule A Group II petitions and to a lesser extent for EB-1B and NIW filings.

[1] Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*).
[2] Immigration Act of 1990 (IMMACT90), Pub. L. No. 101-649, 104 Stat. 4978.
[3] See USCIS' Policy Alert, "O Nonimmigrant Visa Classification" (Sept. 17, 2020), AILA Doc. No. 20091703.

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EB-1A After O-1A

The current environment reflects significant variations between adjudicators and service centers. As a result, even the strongest cases often receive an RFE or denial. In addition, the pathway from nonimmigrant to immigrant is less certain than ever. For example, even though both the O-1A and EB-1A are for individuals of "extraordinary ability" considered to be among the very top of their field of endeavor, in practice, an EB-1A candidate must meet a much higher standard than an O-1A.

As of this writing, I-140 petitions are adjudicated by USCIS's Texas and Nebraska Service Centers. Practitioners report that adjudications from the Nebraska Service Centers have become unpredictable.

While the approval of an O-1A visa petition has never guaranteed approval of an EB-1A petition, the higher standard that the Nebraska Service Center is recently applying in its adjudication of I-140 petitions has enabled the service centers to deny I-140 petitions with increasing frequency.

Making the Leap from O-1A to EB-1: Dealing with Standards of Review

Both O-1A and EB-1A beneficiaries must demonstrate "extraordinary ability in the sciences, education, business, or athletics," "sustained national or international acclaim," "achievements recognized by others in the field of expertise," and "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." Prior approval of an O-1A nonimmigrant petition does not guarantee favorable adjudication of the EB-1A immigrant petition. Each petition is separate and independent and must be adjudicated on its own merits, under the corresponding statutory and regulatory provisions.

The 2010 *Kazarian v. USCIS* case,[4] and the resulting USCIS memorandum,[5] established the current standard of review for EB-1A cases. The *Kazarian* court proposed a two-step process:

- ***First Step***: focus on counting the number of lines of evidence for which evidence was presented as required by the regulations. If the number of lines of evidence that passed through the first step is less than three, the petition could be rejected directly, without detailed examination.
- ***Second Step***: a "final merits determination" subjects the evidence to critical scrutiny. If it holds up to critical scrutiny, the petition will be accepted. At this stage, additional evidence could be sought from the petitioner.

[4] *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010).
[5] USCIS Memorandum, "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," (Dec. 22, 2010), AILA Doc. No. 11020231.

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