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*Updates and Best Practices for Filing Outstanding Researcher and
Extraordinary Ability Cases*

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Updates and Best Practices

- ❖ Perspective of University Attorney and Outside Counsel when working with Scholars, Researchers and Professors
- ❖ CIS Employment-Based Petition policies affecting “Aliens with Extraordinary Ability” and Outstanding Researchers and Professors
- ❖ Recent changes after the *Kazarian* case and new CIS policy for adjudicating these petitions
- ❖ Ideas for filing the strongest cases possible

Employment –Based Preferences

- ❖ In seeking U.S. lawful permanent residency through employment, one looks to file an immigrant petition on form I-140
- ❖ Given how immigrant numbers are allotted based on country of birth, preferences are assigned
- ❖ In this session we will focus on two Employment-based filing strategies that are first preference, which is often called “EB-1”

Case Study: Dr. Smarty

- ❖ Hypo: Dr. Smarty is a national of China. He is a Materials Sciences Researcher at the University of Anytown. He has been working in H-1B status for 4 years and wants to apply for permanent residence. He is a well-respected, up-and-coming scientist in his field and the university is eager to keep his research team, as they were recently awarded a big grant and are close to publishing some ground-breaking new findings. He goes to an attorney in Anytown first to find out what options he may have for permanent residence.

EB-1 category for permanent residence

Focus:

- EB-1A – Employment-based petition eligible to Aliens of Extraordinary Ability
 - Must demonstrate that they are at the very top of their fields – very high evidentiary standards
 - Allows for self-sponsorship
- EB-1B – Employment-based petition eligible to outstanding, recognized researchers and professors
 - Requires permanent/tenure track position
 - Requires that sponsoring employer have a recognized research department/facility
 - Applicant must demonstrate outstanding accomplishments in the field of study that have been internationally recognized

EB-1A requirements

- ❖ In general, the petition must be accompanied by evidence that:
 - The individual has sustained national or international acclaim;
 - The individual's achievements have been recognized in the field of expertise;
 - The individual is one of that small percentage who has risen to the very top of the field of endeavor;
 - The individual seeks to enter the United States to continue work in the area of extraordinary ability; and
 - The individual's entry into the United States will substantially benefit prospectively the United States.

Must Meet 3 out of 10 Listed Criteria

EB-1A Aliens of Extraordinary Ability should show evidence of:

1. Receipt of lesser nationally or internationally recognized prizes or awards.
2. Membership in an association in the field for which classification is sought which requires outstanding achievement of their members.
3. Published material about the person in professional or major trade publications or other major media.
4. Participation as a judge of the work of others.
5. Evidence of original scientific, scholastic, artistic, athletic or business-related contributions of major significance.
6. Authorship of scholarly articles in the field.
7. Artistic exhibitions or showcases.
8. Performances in a leading or cultural role for organizations or establishments that have a distinguished reputation.
9. High salary or remuneration in relation to other in the field.
10. Commercial success in the performing arts.

EB-1B requirements

❖ In general, the petition must be accompanied by evidence that:

1. The beneficiary is recognized internationally as outstanding in a specific academic area;
2. The beneficiary has at least 3 years of experience in teaching or research in the academic area; and
3. The beneficiary seeks to enter the United States for a
 - Tenured Position (or tenure track position) within a university or institution of higher education to teach in the academic area;
 - Comparable position with a university or institution of higher education to conduct research in the area; or
 - Comparable position to conduct research in the area with a department, division, or institute of a private employer, if the department, division, or institute employs at least 3 persons full-time in research activities and has achieved documented accomplishments in an academic field.

Must Meet 2 out of 6 Listed Criteria

EB-1B Outstanding Professor/Researchers should show evidence of:

1. Receipt of major prizes or awards for outstanding achievements.
2. Membership in an association which requires outstanding achievement.
3. Published material in professional publications written by others about the applicant's work.
4. Evidence of the person's participation as a judge of the work of others.
5. Evidence of original scientific research.
6. Authorship of scholarly books or articles in the field.

(Other comparable evidence can sometimes be used too)

Strategic Decisions

- ❖ When do you advise Extraordinary Ability (EB-1A) over Outstanding Researcher/Professor (EB-1B)?
 - Level of “eminence” and the nature of the work done
 - University policy and future planning
 - The scholar’s own career plans
 - The research portfolio – analyze achievements to date
 - How many years of experience, especially post-PhD?
 - Other case-specific factors – ask good questions!
- ❖ Remember too the Standard of Proof - Preponderance of the Evidence ("more likely than not")

Sponsorship: University Planning

- ❖ What does an in-house attorney consider when determining how to potentially proceed and what to advise the university community?
 - What is university policy for supporting the scholar, and who must pay the fees associated with the petition?
 - What can be done in house vs. using an outside attorney?
 - Will the university assist with the final stage of the filing strategy (and who pays for that)?

University Policy and Procedures

- ❖ Clear communication and setting expectations is critical (both timing and strategy decisions)
- ❖ What filing strategy will be used (and who makes that decision)?
- ❖ What qualifications are relevant?
- ❖ How much H-1B time is left to the individual – is there time to further bolster the portfolio”
- ❖ What precedents exist?
- ❖ How can we ensure quality filings?

How Does the Applicant Stand Out?

- ❖ How do you establish "eminence" in the absence of a major international award?
 - Reference letters from other experts in the field, discussing the applicant's work and research and how it has impacted the industry
 - Don't use form letters
 - Very time consuming – start early to gather these letters
 - Reference letters from institutions in the industry who use/know of the applicant's work/research
 - Can be very powerful
 - The Immigration Service puts much stock in “objective” letters

Submitting Evidence to Support the Petition

- ❖ Selecting the Best Evidence
- ❖ Building your Case without Breaking your Back
 - Employee involvement – a partnership
 - Start with a detailed CV
 - Get itemized lists from the employee to organize published materials, patents, presentations, etc.
 - Printed materials vs. CD/DVD
 - Translations into English

Kazarian Case

- ❖ The *Kazarian* case and how it has changed the standard of proof

Kazarian v. USCIS, 596 F.3d 1115 (9th Cir. 2010)

- ❖ 2-part evaluation recommended for these cases:
 - First, review the evidence to make sure it meets the regulatory requirements
 - Second, evaluate whether the applicant meets the highest level of expertise

Kazarian and Its Effect on Policy

- ❖ USCIS Policy, issued December 22, 2010, provided the government's interpretation of *Kazarian* and changed instructions to officers for adjudicating these cases
 - used to be sufficient to prove up the case through evidence – if you established that the applicant had evidence to satisfy the regulatory criteria, the case was approved unless the Service could establish why it should not be approved or why the evidence was insufficient
 - now, additional "argument" is required to establish that the applicant is extraordinary or outstanding (eminence), and then the evidence is considered

Recommendations

- ❖ Start with the CV - the more detailed the better, and get the applicant involved in the process
- ❖ Make sure the applicant has evidence to "prove up" each item on his/her CV
- ❖ Document, document, document!
- ❖ An organized packet makes all the difference
- ❖ Premium Processing - worth the extra money?

Some Lessons Learned

- ❖ Post PhD experience carries more weight
- ❖ Be sure to present the meaning of the scholar's work in terms that an adjudicator will understand – what does it mean?
- ❖ A well-written index and organized materials can make a good case a great one
- ❖ Specific recommendation letters that link assertions to facts are critical

Q & A

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