EB-1-2 Outstanding Researcher Cases: Issues and Trends

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One way to obtain an immigrant visa in the United States is to be an outstanding professor or researcher. This classification is known as the EB-1-2 category. [1] Between 2,000 and 3,000 people obtain green cards each year through the EB-1-2 category. [2]

Many practitioners believe that a successful EB-1-2 case is either: (1) an unattainable dream for all but the very best scholars or researchers; or (2) simply a matter of providing any evidence that fulfills any two of the six criteria set forth in the relevant regulations of U.S. Citizenship and Immigration Services (USCIS). The answer lies somewhere in between. A relatively wide variety of U.S. employers may be able to use this immigrant visa category, which avoids labor certification. Also, because it falls within the employment-based first preference (EB-1) category, beneficiaries have the opportunity to file concurrently for adjustment of status.

The Outstanding Researcher category is often used by researchers and scientists, whether employed by universities, nonprofit research organizations, or for-profit pharmaceutical or biotechnology companies. Clinical physicians and their employers often mistakenly overlook this category given that they have other options available, such as a National Interest Waiver (NIW), labor certification under the Program Electronic Review Management (PERM) program, or a family-based petition. However, the Outstanding Researcher category, if it is appropriate, offers clear advantages: (1) it avoids the Department of Labor (DOL)-driven PERM process entirely, and, it places the foreign national in the EB-1 category. Moreover, the Outstanding Researcher category is broad enough to encompass academic fields in the hard sciences, social sciences, and humanities.

USCIS Administrative Appeals Office (AAO) opinions involving appeals of denied EB-1-2 petitions show certain consistent patterns that will assist in deciding whether to use the EB-1-2 category, and in crafting a strong petition. [3] One clear key to success, especially in light of *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), [4] is that each piece of evidence submitted must indicate "international recognition" in the particular sub-field, not just ordinary academic activity, such as writing papers, being cited, advising graduate students, joining professional societies, and presenting at meetings.

The vast majority of appeals are dismissed, and remands, while few, are generally on procedural grounds. This indicates that the law is relatively well-settled. Even with the AAO's consistent application of the two-prong analysis set forth by *Kazarian,* the long-held underlying standard of international recognition has not been challenged. EB-1-2 **[[page 216]]** can be a relatively safe and effective option to consider after appropriate analysis.

After a review of the statute, we present key issues and trends in EB-1-2 case law.

The EB-1-2 Standard

Section 203(b)(1)(B) of the Immigration and Nationality Act (INA) [5] states that a person qualifies for immigrant visa classification as an Outstanding Professor or Researcher if he or she:

(i) is recognized internationally as outstanding in a specific academic area,

(ii) has at least three years of experience in teaching or research in the academic area, and

(iii) seeks to enter the United States—

(I) for a tenured position (or tenure-track position) within a university or institution of higher education to teach in the academic area,

(II) for a comparable position with a university or institution of higher education to conduct research in the area, or

(III) for a 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 three persons full-time in research activities and has achieved documented accomplishments in an academic field.

USCIS regulations at 8 CFR §204.5(i)(3) state that a petition for an Outstanding Researcher or Professor must be accompanied by:

(i) Evidence that the professor or researcher is recognized internationally as outstanding in the academic field specified in the petition. Such evidence shall consist of at least two of the following:

(A) "Documentation of the [individual]'s receipt of major prizes or awards for outstanding achievement in the academic field;

(B) Documentation of the [person]'s membership in associations in the academic field that require outstanding achievements of their members;

(C) Published material in professional publications written by others about the [person]'s work in the academic field. Such material shall include the title, date, and author of the material, and any necessary translation;

(D) Evidence of the [individual]'s participation, either individually or on a panel, as the judge of the work of others in the same or an allied academic field;

(E) Evidence of the [person]'s original scientific or scholarly research contributions to the academic field; or

(F) Evidence of the [individual]'s authorship of scholarly books or articles (in scholarly journals with international circulation) in the academic field;

(ii) Evidence that the [person] has at least three years of experience in teaching and/or research in the academic field. Experience in teaching or research while working on an advanced degree will only be acceptable if the individual has acquired the degree, and if the teaching duties were such that he or she had full responsibility for the class taught or if the research conducted toward the degree has been recognized in the academic field as outstanding. Evidence of teaching and/or research experience shall be in the form of letter(s) from former or current employer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the [person]."

ISSUES REGARDING THE PETITIONING INSTITUTION

A "Permanent Offer of Employment"

EB-1-2 cases require that the sponsoring institution file a petition on behalf of the beneficiary; he or she cannot self-petition. Moreover, the petitioner must have offered the beneficiary a permanent, full-time position. The regulation states that "[p]ermanent, in reference to a research position, means

either tenured, tenure-track, or for a term of indefinite or unlimited duration, and in which the employee will ordinarily have *an expectation of continued employment* unless there is good cause for termination." [6] **[[page 217]]**

In June 2006, USCIS issued a memorandum that provided much needed guidance on the requirements of a "permanent offer of employment" under this immigrant category. [7] The memorandum ("Permanent Offer" memo) acknowledged the realities of modern business practice in that not all employment agreements contain "good cause for termination" clauses. It reiterated that the "permanent" requirement refers to research positions only, and not to a non-research professor position, which must be shown to be tenured or tenure-track. Thus, an Outstanding Researcher petition may be approvable even without an employment agreement containing a "good cause for termination" clause if the sponsoring employer can show that the offer is intended to be "of an indefinite or unlimited duration and that the nature of the position is such that the employee will ordinarily have an expectation of continued employment."

Practice Pointer: In addition to submission of evidence of a history of prior grant renewals, the petitioner should submit clear evidence that it intends to seek continued funding for the position, either in its letter in support of the petition or ideally, in the offer letter itself. Even in a case where a written employment agreement is valid for one year, evidence of the renewal or extension of earlier employment agreements with this same employee, or others in the research team, and other documentation of the expected long-term nature of the research of the department or division would serve to demonstrate this key requirement.

If a temporary position is renewable in this manner, the job offer may not qualify as "permanent" if the individual is restricted to a limited number of re-appointments. USCIS may look to the petitioner's human resource manual to determine the nature of the position offered. For example, a post-doctoral researcher who could reasonably expect renewal of his one year contract was not found to have a permanent position, as the petitioner's human resource practices limited such reappointments to a maximum of three years. [8]

Another, related issue in past cases involved the AAO's finding that the job offer be evidenced in the form of a letter from the petitioner *addressed to the beneficiary* and not to the immigration authorities. [9] In one opinion, the AAO stated that an offer letter from a department head should not be given any weight without evidence (typically from the personnel department) that the individual signing the letter had been granted the authority to hire permanent employees. [10] Finally, several of the decisions noted the requirement that the formal job offer letter must pre-date the petition's filing date. [11]

The prudent approach in such cases is to seek and include an offer letter written by someone at the institution who has actual hiring authority and directed to the foreign national.

At Least Three Persons Full-Time in Research Activities

Petitioners for EB-1-2 cases must demonstrate employment of "at least three persons full-time in research activities." This may prove difficult, especially if some tweaking is necessary to fit the beneficiary into a research position in the first place. The additional persons need not be of the same outstanding caliber as the beneficiary, as long as they are engaged in full-time research in the beneficiary's field. Potential issues could be raised if the beneficiary has a different field of study than

the other researchers employed by the petitioner. To avoid this, the entire research team should be presented as working toward a common goal.

Additionally, the research program as a whole must have "achieved documented accomplishments in an academic field." Publications are by far the **[[page 218]]** easiest way to evidence this, but when they are not available, evidence of being awarded large sums of grant money, patents or invitations to present work at national or international conferences may suffice.

Practice Pointer: A petitioner's annual report or similar publication often includes information on the types and numbers of employed staff, including job titles, such as "researcher." Similarly, the organization's mission statement and description of past and current achievements or milestones in such a publication can constitute valuable evidence that it meets this requirement. It is also important to include independent websites that report glowingly of the petitioner's accomplishments, and to mention them in at least one of the independent expert support letters.

It is important to note that the AAO has been known to enter DOL's Occupational Outlook Handbook [12] into the record of proceedings when delving into the nature of an employment position. [13] If it is difficult to fit the beneficiary into a research position, or to prove that the petitioner employs at least three other full-time researchers, it may benefit practitioners to consult the Occupational Outlook Handbook to weigh the possible deleterious effects of job titles.

Employer's Ability to Pay

Practice Pointer: Most attorneys who file EB-1-2 cases have been successful in excluding "Ability to Pay" documentation and just including evidence of an established research program. Note that the regulations require "Ability to Pay" documentation for every employment-based immigrant visa petition that is based on a job offer. "Ability to Pay" documentation is considered "initial evidence" and based on telephone communication with Service Center adjudicators, [14] a Form I-140, Immigrant Petition for Alien Worker, can be denied without a Request for Evidence (RFE) for lack of initial evidence. [15] Avoid potential problems by submitting appropriate "Ability to Pay" documentation at the time of initial filing.

EVIDENTIARY ISSUES

Three Years of Research Experience

According to 8 CFR §204.5(i)(3), evidence of research experience "shall be in the form of letter(s) from former or current employers and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien." Evidence of having presented research findings at international conferences and/or publication of related articles in peer-reviewed journals also will serve to corroborate fulfillment of this criterion.

Cases where the beneficiary has had a long career are naturally easier to prove. There may be more scrutiny for the cases where the three years of research experience is just met. For example, in *Matter of [name & file number not provided]* (AAO Feb. 6, 2003), the AAO remanded for further action as a result of the director's "summary conclusion" that "[t]he beneficiary has only been out of school for four years—not really enough time to distinguish himself internationally." In its decision, the AAO noted the requirement of three years of experience and stated, "[w]hile it would likely be rare for a researcher to earn international recognition as outstanding after only four years, to deny the petition on that basis is arbitrary and not grounded in any statute, regulation or case law." Nevertheless, this

case demonstrates the scrutiny given to cases involving researchers early in their careers.

The Outstanding Researcher regulations specifically note that experience gained while completing an advanced degree may be counted toward the requisite "three years" if the foreign national acquired the degree, and if the research he or she conducted toward the degree in the academic field has been "recognized as outstanding." Of past AAO decisions, only a few hinged on the regulatory option that pre-doctoral research counts toward the three-year requirement. However, as a practical matter, it is hard to prove that a beneficiary with less than three years of post-doctoral research has an international reputation in his or her field.

In such a case, the petition must clearly document the outstanding nature of any pre-doctoral research, and consider a NIW or a PERM labor certification if that research is not outstanding. Paid research assistant work, for example, is treated with suspicion, and must be carefully distinguished from **[[page 219]]** the basic research involved in the doctoral degree. Again, it is best to be aware that the AAO may look to DOL's Occupational Outlook Handbook to determine whether a position was research-based or merely research-oriented, and to consider the job experience accordingly.

Peer Letters of Recommendation

AAO decisions have routinely held that "letters containing mere assertions of widespread recognition and vague claims of contributions are less persuasive than letters that specifically identify contributions and provide specific examples of how those contributions have influenced the field." [16]

Be sure to include letters from peers who have not collaborated directly with the beneficiary. However, it undermines the claim to an international reputation when the peer reference did not previously know the beneficiary, but is writing the letter simply after reviewing his or her résumé and publications. [17] Therefore, a combination of letters from collaborators and mentors who describe the beneficiary's reputation in the field, along with a few other letters from independent references who know the beneficiary's work via their conference presentations or publications, is the best recipe for success. Moreover, it is possible that many letters may sound repetitive. A total of five to seven letters seems reasonable given the amount of time the adjudicator has to review each petition.

Receipt of Major Prizes or Awards for Outstanding Achievements

We offer a short list of awards submitted that held little or no weight in the appeals process because they did not establish international recognition:

- § Student prizes, including graduate fellowships; [18]
- § Beneficiary having made the Dean's List or received merit awards: "Student awards for which only students compete are not major prizes or awards such that they are indicative of international recognition"; [19]
- § Awards granted by the petitioner, including internal research funding awards and bonuses; [20]
- § Travel awards; [21]
- § Teaching assistant awards; [22]
- § Elected student officer positions; [23]
- § Receipt of a high score on an admissions examination; [24]
- § Acceptance for publication; [25]

§ Research fellowships, unless granted on the basis of prior significant achievement; [26] and

§ Grants for new work. [27] **[[page 220]]**

Note that grants do not fall cleanly into any of the six regulatory criteria for EB-1-2 classification. You can document that the reason for funding by the granting agency was based on recognized past accomplishments (*e.g.*, documented either by the peer reviews for the grant or in the peer reference letters for the EB-1-2 petition). The same is true for research or medical fellowships. The grant must be related to the beneficiary's field of endeavor.

By "major," the USCIS standard generally means "international." [28] It is important to include not just proof of the award, but proof of how and why the award is important in the field. This may include the judging criteria or evidence of media coverage.

Furthermore, a shared prize or award resulting from collaborative work should not be considered any less prestigious for that reason alone. Even the Nobel Prize is frequently shared amongst collaborators, just as an Olympic medal is often shared by a team. In fact, if the beneficiary led a collaborative effort between multinational researchers resulting in the award, it can speak to his or her reputation and influence in the international research community. [29] Peer letters can address this issue as well, particularly from a peer with direct knowledge of the awarding criteria and/or the beneficiary's prime role in a recognized endeavor.

Membership in Associations

Specialized researchers frequently belong to associations in their fields. However, most professionals with the appropriate degree, certification, or credentials are eligible for such associations upon payment of a membership fee. For a membership to have weight in this category there must be a higher selective standard for admission to the association. An often-used analogy to illustrate this point for a client might be the American Bar Association, or the American Immigration Lawyers Association, both large and well-respected organizations, but ones that would not meet this more rigorous membership standard. It is not assumed "that every association that enjoys a premier or preeminent reputation as an association has exclusive membership requirements." [30] The practitioner should submit evidence of selective membership criteria along with evidence of membership in the association. The association must be related to the beneficiary's field of endeavor.

Practice Pointer: Although mere membership in an association in one's field without evidence of membership criteria beyond payment of dues does not fulfill this criterion, the petition may include evidence of the beneficiary's unique or selected role within such an association, such as being invited to serve on a steering committee, as a reviewer of the association's publications, or as an elected member of the association's governing body. Such additional achievements within an organization point to an individual's reputation and advanced standing among his or her peers.

The AAO decisions state clearly that this criterion is intended for the "most prestigious associations, such as the National Academy of Sciences, which are extremely restrictive in their membership requirements. The National Academy of Sciences admits a few dozen members each year and these new memberships are decided at the national level rather than by local members." [31]

Practice Pointer: If the professional associations to which the beneficiary belongs do not rise to the level of fulfilling this criterion, then leave them out altogether. Do not assume "it can't hurt to include it" because it can. Including unpersuasive evidence **[[page 221]]** only gives fodder to the

adjudicator on which to base a denial.

Published Material About the Person

To satisfy this criterion, the published material should be at the national or international level. Articles in local newspapers, university publications, or the petitioner's internal reports do not qualify. Moreover, standard academic citations do not count as published material "about" the beneficiary. [32]

Publications that may meet this criterion are trade or academic journals that feature the beneficiary and/or his or her work; internationally circulated newspapers that report on the beneficiary and/or the beneficiary's employer, if the article discusses the research work for which the beneficiary is known.

Participation as a Judge of the Work of Others

Reviewing grants or articles can satisfy this criterion if the review request is directed particularly to the beneficiary. All invitations to review should be accompanied with confirmation that the reviewing actually took place; invitations alone are not sufficient. [33] In addition, generic "Dear colleague" letters or requests passed down from a mentor do not indicate an international reputation in the field. [34]

To fulfill this criterion, a position as a member of a journal editorial board is ideal. In such a position, the beneficiary "provides policy guidance in addition to reviewing manuscripts," and is "not simply one of the journal's numerous peer-reviewers." [35] Serving as a member of conference-organizing or other steering committees may also be persuasive. It is important to remember that the job of reviewing cannot be an "inherent duty of the occupation," such as a professor evaluating the work of his or her students. [36] However, any kind of higher level reviewing that is based on merit, such as being appointed to evaluate other professors for international awards or grant money, may qualify. Finally, reviewing articles in journals located within the region where the beneficiary studied may not be found to "demonstrate an international base of recognition." [37] In several cases, the AAO has stated that peer review, like publication, may be routine in a particular field, and, therefore, not every peer reviewer enjoys an international reputation. [38] Therefore, the burden is to set the beneficiary's peer-review record apart from others in the field. The letters from fellow experts can serve to provide the details necessary to place the beneficiary's peer-review work in the necessary context.

Practice Pointer: If possible, include evidence that the beneficiary was in fact "judging" the grant proposal or article by including a copy of the beneficiary's comments and, even better, include evidence that the beneficiary's comments were accepted by the applicant submitting the grant proposal or article.

Original Scientific or Scholarly Research Contributions to the Academic Field

Evidence submitted in this category must address the "final merits determination," the second prong in the *Kazarian* test. Simply publishing or presenting one's work, or receiving grant funding, is common in research, and does not indicate international recognition of an individual's work. Overall, the AAO has concluded: "it does not follow that every published article represents an original contribution demonstrative of outstanding research or an international recognition. If we were to hold otherwise, then every alien who has published a scholarly article in an internationally circulated journal would **[[page 222]]** automatically qualify as outstanding, which would clearly go against the intent of the regulations." [39]

Patents or patent applications also carry little weight unless they demonstrate an international reputation in the field. Practitioners should document the widespread use or application of the patent, for example, through direct evidence of its use (such as a licensing agreement to use the patent) and/or through the peer review letters in support of the petition.

Citation of the beneficiary's work without mention of its value is useless, given that the citing paper mostly likely credits at least a dozen other researchers. More acceptable evidence would be citation index entries that acknowledge the beneficiary's work as authoritative in the field. This helps to establish the significant impact of the beneficiary's work. [40] It is also best practice to eliminate self-citations from the aggregate citation count, to avoid giving the impression of inflating the evidence.

Peer letters of recommendation can play an important role in demonstrating original contributions. Experts in the field can attest to the beneficiary's mastery and/or advocacy of a novel technique that has shaped the field, and indeed the expert's own work, which is not easily documented otherwise. [41] However, "general attestations of a contribution to the field, without more detail, are insufficient." References should be sure to specifically address the beneficiary's contributions and their overall influence on the field, and not just on the petitioning institution or research group. [42]

Authorship of Scholarly Books or Articles

The publications must be in peer-reviewed academic journals, preferably those with international circulation. When submitting evidence under this category, the practitioner must demonstrate that the publication record rises above that of the average researcher. [43] One method of doing so is to show that the beneficiary's papers have been widely cited by independent researchers in the field. Evidence of the international citation of the beneficiary's articles is "generally a reliable indicator of a given article's impact." [44] "Self-citations" by the beneficiary, or citations by collaborators, do not satisfy this criterion. [45] The citation to the beneficiary's work by well-known organizations in the field, such as the World Health Organization for a medical researcher, or the World Bank for a researcher in economics, in their own reports and publications also may document the prestige associated with a particular publication.

It also helps to have the peer recommendation letters include references to specific papers, their impact, the beneficiary's contribution, and that they appeared in prestigious journals of international circulation. This can be particularly important when the beneficiary is listed as "co-author" on all or most articles. [46]

Evidence of the articles' "significant international distribution from independent sources[,] such as media guides or the publishers themselves" can also be helpful to demonstrate international circulation. [47] Note that the Institute for Scientific Information (ISI) ranks journals in terms of citation impact and in terms of total number of citations for journals in all scientific fields. [48] However, ranking alone will carry little weight except in conjunction with a finding that the author's work has been widely cited or followed. [49] **[[page 223]]** Reading lists from university-level courses in the United States and abroad "listing the beneficiary's work as required or recommended reading" may also help to provide evidence of international recognition. [50]

Practice Pointer: Noting the impact of an article in subjective terms, where appropriate, can be

helpful. For example, when mentioning a particular article, the reference could write: "From my travel to international meetings and my professional interactions in our field, I also note that Dr. X's article is widely discussed, and has been the basis of numerous research proposals." Any specific details, such as the article sparking discussion at a particular meeting, should also be included. The practitioner should encourage the expert letter writers to take a bit of extra time to generate details like this if possible or ask pointed questions that will strengthen an expert's letter of support.

The practitioner must consider the standards within the particular field, and the indicators of achievement that may be specific to it. For example, for academic physicians, authorship of medical textbook chapters may be more common than scholarly article publications. The authorship of medical textbook chapters, particularly if the invitation to do so is extended as a result of international acclaim in the field, and if the textbook is widely used in medical schools, seems a strong alternative to scholarly article publications if they are few or nonexistent. In a different field, such as economics, the beneficiary's authorship of a case study that is later used in the academic setting as required reading for graduate students may serve to fulfill this criterion, as might an op-ed piece in a widely-circulated newspaper.

Other points raised by the AAO include:

§ Published abstracts do not carry the same weight as full-length articles.

§ Articles published in only one country with only domestic circulation, such as many Chinese medical journals, do not satisfy the international-reputation standard.

§ "An unpublished manuscript is not published material." [51]

Interestingly, the AAO has acknowledged that the beneficiary does not have to be the first author on an article to claim credit for it. This is because of "the inherently collaborative nature of modern scientific inquiry, in which researchers rarely labor in isolation." [52] In our experience, USCIS service centers do send RFEs asking for proof that the beneficiary is a key independent researcher in a group project. Therefore, as noted above, practitioners should clearly document the role of the beneficiary in a research team, especially if the beneficiary is not first author on any articles that result from the work.

Comparable Evidence

Unlike the regulations governing the EB-1-1 Extraordinary Ability category that specifically allow for comparable evidence, [53] there is no provision for comparable evidence in the Outstanding Researcher regulations.

Non-traditional Researchers

Although most Outstanding Researcher petitions are filed on behalf of those in the sciences, this category also affords a route to lawful permanent residence for those employed in other, perhaps "less traditional" fields. Petitioners—academic, nonprofit and private—have successfully utilized the EB-1-2 category for those specialized in such fields as economics, law, and human rights. However, with the exception of universities, state agencies are ineligible to petition in the EB1-2 category. [54]

The USCIS regulations at 8 CFR §204.5(i)(2) define "academic field" as a "body of specialized knowledge offered for study at an accredited United States university or institution of higher education." Thus, an Outstanding Researcher petition for a beneficiary in a less-than-traditional field might include evidence that U.S. universities do offer degree or certificate programs in the particular

field as a means of demonstrating that the field itself is "academic." Although professor positions clearly contemplate the beneficiary's employment within an institution of higher education, there is no requirement **[[page 224]]** that the "researcher" *be employed by* an academic employer, but rather he or she must show that the research work falls within an established, accepted academic field.

For example, a nonprofit research organization may file an Outstanding Researcher petition on behalf of one of its "researchers" or "fellows," which are common job titles within such institutions, provided that the petition shows that the beneficiary's work is in an academic "field," such as human rights or national security. The accompanying evidence might include printouts of degree programs in human rights or national security from institutions of higher education, such as University of Notre Dame Law School's Center for Civil and Human Rights or the University of Nevada's Institute for Security Studies.

In preparing such a "non-traditional" petition, it may be necessary to point out that "research," while traditionally thought of as basic research, also includes "applied" research. USCIS's regulations for Outstanding Researcher petitions are silent on this point. The regulations for H-1B petitions, however, include a helpful definition of research in the context of which employers are exempt from payment of the additional "scholarship and training fee" due to their status as "nonprofit research organizations."

That regulation at 8 CFR §214.2(h)(19)(iii)(C) defines "applied research," specifically stating that it includes "research and investigation in the sciences, social sciences, or humanities." The regulation further describes applied research as "research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met … [It] includes investigations oriented to discovering new scientific knowledge that has commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, and humanities." Based on this broad USCIS definition of "research," one might convincingly argue that "field research," such as that undertaken by human rights investigators and those in similar fields, is eligible for consideration under the Outstanding Researcher category.

Practice Pointer: Practitioners should consider all possible avenues for a beneficiary in a non-traditional research field, including self-sponsorship under the EB-1-1 category or a NIW petition. With careful case preparation, a practitioner may be able to demonstrate a beneficiary's eligibility under more than one category.

The evidence in a "non-traditional" filing also may vary somewhat from the standard publications, articles, and citations found in nearly every scientific researcher petition. In "non-traditional" cases, the beneficiary may have op-ed pieces in international newspapers in which he or she offers an expert viewpoint based on years of study in the field. A human rights researcher's invited appearance before the United Nations to offer testimony about country conditions or the implications of a particular regional conflict clearly attest to his or her original contributions, and might serve as evidence of his or her overall international recognition. Unlike the published material in a scientific journal about a beneficiary's work, an individual in a "non-traditional" field might have television or radio appearances in which he or she was interviewed as an expert for a more general and wider audience. The practitioner must find a way to include such evidence within the often-traditionally viewed and somewhat narrow criteria categories of the Outstanding Researcher regulations.

Burden of Proof

The burden of proof on the petitioner is the "preponderance of the evidence," meaning the

evidence must show that the claim is probably true. It is not necessary to prove any claim beyond a reasonable doubt. Reasonably supported claims evidencing that the beneficiary meets at least two of the six criteria should result in granting of the classification sought, regardless of any doubts held by the adjudicating officer. [55]

PRACTICE TIPS

First and foremost, screen your cases carefully. Discuss the standard with the beneficiary and, if possible, with his or her supervisor or mentor, to evaluate whether the Outstanding Researcher classification applies and whether the necessary evidence can be gathered. Detailed initial intakes will help manage expectations, avoid delays due to RFEs, and reduce the chance of a denial. Careful screening not only weeds out weak cases, but also may help identify a case for the self-effacing researcher. In some cases, talking to a supervisor may lead to filing such **[[page 225]]** a petition where the beneficiary's initial modesty about his or her accomplishments might not.

Tailor your petition to the correct audience. Not all USCIS examiners are college-educated, and none are likely to be experts in your client's specialized field. Additionally, USCIS examiners have a very limited amount of time to read all the materials in each petition (less than 30 minutes in most cases). Present the beneficiary's accomplishments and qualifications in layperson's terms. This is especially important in the peer recommendation letters and the cover letter. A clear and easy-to-read cover letter, table of contents, and tabs should make the petition more easily navigable for someone who is not familiar with the field or the evidentiary material. The practitioner should highlight key quotes from the peer recommendation letters in the cover letter as they pertain to each evidentiary criterion.

As a practical matter, include only the first page of each journal publication and the first few pages of each peer letter writer's curriculum vitae (CV). Otherwise, each publication and each CV could be 10 pages long (or more!), which can make the package quite unwieldy. We have been told that USCIS examiners are not impressed by the volume of material submitted; in fact, the examiner might be more likely to set aside a particularly large submission in favor of a shorter one. Be selective and include only the strongest evidence. Do not "pad" the petition with documentation that does not clearly make your point. Meeting two of the six categories with strong evidence is probably better than submitting marginal evidence when stretching for additional categories. [56]

Remember that since *Kazarian*, adjudication of EB1-2 cases means 1) verifying that the beneficiary has submitted evidence of meeting sufficient criteria, and 2) evaluating the evidence in a final merits determination for the necessary level of international recognition. Thus, the key point to remember in crafting an EB-1-2 petition is to establish an international reputation. Each piece of evidence should speak to that standard.

The AAO concluded in one decision that "[a]n individual that is recognized internationally as outstanding should be able to produce ample unsolicited materials reflecting such a reputation. If the beneficiary's scholarly achievements are not widely praised outside of individuals with whom he has previously studied, collaborated, or worked, then it cannot be concluded that he enjoys an international reputation." [57] Therefore, remember to seek independent references, and to document that the beneficiary has been not only published and cited, but noticed in his or her field. Elaborate as much as possible about how others in the field, beyond the beneficiary's collaborators, are benefiting from his or her contributions.

CONCLUSION

Even with the introduction of *Kazarian* standards, AAO decisions remain fairly consistent and adhere to the statute and regulations. It does appear that the Outstanding Researcher category may be moving toward a higher standard of review, paralleling similar patterns in NIW and EB-1-1 adjudications, particularly for non-traditional researchers. [58]

Furthermore, as the AAO decisions are generally firmly grounded in the statute and regulations, it remains important for the practitioner to carefully screen potential beneficiaries for eligibility, and present a strong petition for the service center to approve.

Some practitioners have reported that they follow a "play for the kickback" strategy of submitting a basic petition, holding back some evidence, and waiting for an RFE. We recommend against that strategy because of a 2004 USCIS memo advising adjudicators to deny petitions without an RFE, [59] and also because submitting documentation dated after the initial filing is likely to prove problematic. [60] *See Matter of [name & file number not provided]*, (AAO Oct. 23, 2003) (abstract published after petition submitted cannot be added as additional evidence to satisfy RFE). *See also Matter of Katigbak*, 14 I&N Dec. 45, 49 (INS Reg'l Comm'r 1971) (education or experience acquired after the filing date of an immigrant visa petition may not be considered, since to do so would result in according the beneficiary a priority date for visa issuance at a time when not qualified for the preference status sought). **[[page 226]]**

If an EB-1-2 petition fails, the AAO decisions argue against filing an appeal. Appeals to the AAO can take one year or longer to be decided. They are very unlikely to lead to reversal. We suggest the following alternatives:

§ File the Form I-140 again, with whatever additional publications or other materials are available, addressing the reasons for the initial denial.

§ Consider filing an EB-1-1 or NIW petition if the beneficiary is one of the top few in his or her field, or if he or she has made a significant accomplishment in a field of national interest.

§ Consider PERM labor certification, which allows restrictive requirements based on business necessity, and can help focus on the beneficiary's particular skills required by the petitioner.

§ Finally, do not forget to ask about other paths to lawful permanent residence, including family-based sponsorship, spouse's employment-based options, the diversity visa lottery program, or asylum. **[[page 227]]**
