

A Review of Recent AAO EB-1A Extraordinary Ability Decisions
by Hun Lee and Stephen Yale-Loehr^{1}*

“As a married, self-employed serial entrepreneur from the Dominican Republic, the well-trodden paths of gaining a green card to work in the U.S., like marrying an American, investing more than \$500K to \$1M, or finding a corporate sponsor and waiting years to be accepted for the H-1B were not for me. However, what I was lacking in funds, patience, a sponsor and marriage availability, I made up in industry expertise.”²

INTRODUCTION

The employment-based first-preference immigrant visa category (EB-1A), colloquially known as the “genius green card” or “Einstein visa,” provides a path to a green card for foreign nationals with extraordinary ability in the sciences, arts, education, business, or athletics. For immigrants who do not qualify for other immigrant visas or who face long backlogs in other categories, EB-1A may be the only viable option to obtain a green card.³

Proving extraordinary ability has always been hard. Recently it has become even harder. Approval rates for EB-1A declined from 82 percent in 2016 to 56 percent in 2019.⁴ Immigration attorneys contend that USCIS adjudicators are interpreting the EB-1A regulations more narrowly than before.⁵

The chances of winning an administrative appeal are even slimmer. We reviewed 39 recent EB-1A decisions decided by the USCIS Administrative Appeals Office (AAO). Of the 30 AAO EB-1A decisions decided between November 2019 and November 2020, 28 were denied.⁶ Of the nine EB-1A decisions decided since January 2021, seven were denied.

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² Hamlet Batista, *Here’s How to Get the American EB-1 Genius Visa, According to Someone Who Got It*, TNW (June 2, 2017), <https://thenextweb.com/news/heres-get-american-eb-1-genius-visa-according-someone-got>.

³ See generally Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Wada, *Immigration Law and Procedure* §39.03; Chris Gafner & Stephen Yale-Loehr, *Attracting the Best and the Brightest: A Critique of the Current U.S. Immigration System*, 38 Fordham Urb. L.J. 183 (2010); David Wilks, Brooke Ireland & Stephen Yale-Loehr, *Extraordinary Entrepreneurs Require Extraordinary Evidence: A Review of Recent Non-Precedent EB-1A AAO Decisions Under the Trump Administration*, 23-10 Bender’s Immigr. Bull. 02 (May 15, 2018), also available at <https://millermayer.com/2018/extraordinary-entrepreneurs-require-extraordinary-evidence-eb-1a-ao-decisions-under-t-he-trump-administration/>.

⁴ Sinduja Rangarajan, *Melania Trump Got an “Einstein Visa.” Why Was It So Hard for This Nobel Prize Winner?*, Mother Jones (Feb. 27, 2020), www.motherjones.com/politics/2020/02/genius-green-card-visa-nobel-prize-trump/.

⁵ See *id.* (discussing a Nobel laureate’s EB-1A denial in April 2017 for failing to present adequate evidence of receiving a Nobel prize).

⁶ See also Chris Gafner, Carolyn S. Lee, & Stephen Yale-Loehr, *The AAO Makes Extraordinary Ability Extraordinarily Hard to Prove*, 7 Bender’s Immigr. Bull. 1218 (Oct. 15, 2002).

This article examines each of the EB-1A regulatory criteria in terms of how those AAO decisions analyzed them and suggests practice tips for attorneys preparing EB-1A green card applications. The AAO decisions we reviewed focus mostly on scientists and researchers,⁷ as athletes and artists tend to have a relatively higher chance of winning at the AAO.⁸

BACKGROUND

Because the EB-1A immigrant visa category allows foreign nationals to self-petition, they do not have to have a prospective employer or a specific job offer. EB-1A can also save applicants a lot of time because it allows them to forego the normal labor certification process. As of August 2021, visa availability in the EB-1A category is also current for all countries, whereas other employment-based green card categories have long backlogs for citizens of certain countries, especially individuals from China and India.⁹

To qualify for EB-1A, foreign nationals must provide evidence of “extraordinary ability” in the sciences, arts, education, business, or athletics.¹⁰ Although the O-1 nonimmigrant visa category also requires “extraordinary ability,” an O-1 approval does not guarantee later EB-1A approval.¹¹

⁷ The 39 decisions included three entrepreneurs and one journalist. All the other applicants were researchers or scientists.

⁸ Searching the terms “I-140 extraordinary ‘sustain the appeal’” on the USCIS website for AAO decisions showed 10 sustained appeals between November 2019 and November 2020. Out of the 10, there were two designers, one fashion model, one athlete, one musician, and one actress. *In re 11271284* (AAO Oct. 14, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/OCT142020_02B2203.pdf (track & field athlete); *In re 10994398* (AAO Oct. 6, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/OCT062020_01B2203.pdf (footwear designer); *In re 9369644* (AAO Aug. 26, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG262020_01B2203.pdf (fashion model); *In re 9732760* (AAO Aug. 10, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG102020_02B2203.pdf (musician); *In re 8264039* (AAO May 27, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/MAY272020_01B2203.pdf (fashion designer); *In re 6195673* (AAO Mar. 5, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/MAR052020_04B2203.pdf (actress).

The other four sustained appeals were for a human rights lawyer and legal researcher, *In re 9450423* (AAO July 28, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JUL282020_01B2203.pdf; an entrepreneur and marketing specialist, *In re 7163508* (AAO May 27, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/MAY272020_08B2203.pdf; a photographer, *In re 6986109* (AAO May 27, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/MAY272020_02B2203.pdf; and an international relations scholar and consultant, *In re 4689485* (AAO Jan. 7, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JAN072020_02B2203.pdf.

⁹ DOS, Bureau of Consular Affairs, Visa Bulletin for August 2021,

<https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2021/visa-bulletin-for-august-2021.html>.

¹⁰ INA §203(b)(1)(A).

¹¹ *See, e.g., Hristov v. Roark*, No. 09-CV-2731, 2011 U.S. Dist. LEXIS 114885 (E.D.N.Y. Sep. 30, 2011) (plaintiff granted O-1 visa and extended it four times before being denied EB-1A classification); *In re 12796266* (AAO Jan. 29, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021

A foreign national can show extraordinary ability if they received a one-time major international prize such as a Nobel prize or an Academy Award.¹² But as these awards are not very common, most applicants demonstrate extraordinary ability by submitting qualifying documentary evidence of at least three out of the following ten criteria:

1. Receipt of a lesser nationally or internationally recognized prizes or awards
2. Membership in associations in the foreign national's field of expertise that require outstanding achievements of their members
3. Published material about the foreign national in professional or major trade publications or other major media
4. Participation, either individually or on a panel, as a judge of the work of others in the foreign national's field
5. Original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the foreign national's field
6. Authorship of scholarly articles in the foreign national's field, in professional or major trade publications or other major media
7. Display of the foreign national's work at artistic exhibitions or showcases
8. A leading or critical role for organizations or establishments that have a distinguished reputation
9. Command of a high salary or other significantly high remuneration for services, in relation to others in the field
10. Commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales

If these criteria do not apply to the foreign national's field, the foreign national may submit comparable evidence.¹³

An applicant must first file a petition on Form I-140 with evidence that would convince an adjudicator that the applicant satisfies at least three of the above criteria. Even if the applicant meets three or more of the ten criteria, however, the I-140 can be denied under the two-step test

1/JAN292021_14B2203.pdf; *In re 12685089* (AAO Feb. 3, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB032021_04B2203.pdf.

¹² 8 CFR §204.5(h)(3); *see generally* USCIS, Employment-Based Immigration: First Preference EB-1 (updated Nov. 23, 2020), www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1.

¹³ 8 CFR §204.5(h)(4).

used by USCIS following *Kazarian v. USCIS*.¹⁴ Under that test, USCIS must: (1) determine whether the petitioner has submitted evidence that meets the standards stated above; and (2) determine whether the evidence submitted is sufficient to demonstrate that the applicant meets the required high level of expertise for the extraordinary-ability preference category during a final merits determination.¹⁵ In other words, meeting at least three criteria does not show extraordinary ability, but rather allows the application to move forward to the final merits stage, where an USCIS adjudicator considers the totality of the evidence to assess whether the applicant demonstrates that the applicant is “one of that small percentage [at] the very top of their field of endeavor.”¹⁶ The applicant must demonstrate this by a preponderance of the evidence, and it is possible that the applicant fails at the final merits stage despite satisfying more than three evidentiary criteria.¹⁷

AAO DECISIONS

After a I-140 denial, the applicant may appeal to the AAO. The AAO reviews the record *de novo*, meaning the AAO might hold that the applicant fails to satisfy even the criteria that the USCIS adjudicator initially found were satisfied.¹⁸ The following list the 10 criteria and provide the AAO’s suggestions for submitting evidence for each criterion.¹⁹

1. Receipt of Lesser Nationally or Internationally Recognized Prizes or Awards

Evidence for this criterion includes documentation (e.g., copy of award certificate or photo of award, letter from awarding organization) showing the applicant’s name as well as the criteria for receiving the award.²⁰ The applicant should make sure there are no typos or errors on the

¹⁴ 596 F.3d 1115 (9th Cir. 2010).

¹⁵ *Id.* at 1121 (discussing the “antecedent procedural question of whether the petitioner has provided at least three types of evidence,” after which comes the final merits determination of whether the petitioner is at the very top of their field of endeavor).

¹⁶ *Id.* at 1119 (citing 8 CFR §204.5(h)(2), (3)).

¹⁷ *See, e.g., In re 7144255* (AAO Apr. 23, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR232020_04B2203.pdf (application denied even though the applicant met four evidentiary criteria); *In re [name not provided]* (USCIS Nov. 2, 2020) (Irving, Tex.) (application denied even though the applicant met five evidentiary criteria).

¹⁸ *See, e.g., In re 9895142* (AAO Sept. 24, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/SEP242020_05B2203.pdf (reversing previous finding that applicant meets awards and leading role criteria); *In re 6559665* (AAO Apr. 29, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR292020_07B2203.pdf (reversing previous finding that applicant meets published-material and high-salary criteria).

¹⁹ For more suggestions on evidence, see Dan Berger, Emma Binder, Philp Katz, David Wilks & Stephen Yale-Loehr, *Recent Trends in EB-1 Extraordinary Ability and Outstanding Professor/Researcher Green Card Petitions*, 37-17 *Bender’s Immigr. Bull.* 01 (Sept. 1, 2018), also available at <https://miller-mayer.com/2018/recent-trends-in-eb-1-extraordinary-ability-and-outstanding-professor-researcher-green-card-petitions/>.

²⁰ *In re 13072199* (AAO Jan. 29, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_10B2203.pdf (applicant failed to submit documentary evidence from the awarding entity and selection criteria to show how rigorous they are).

documentation that would call into question the validity of the award.²¹ Student awards or fellowships generally do not satisfy this criterion.²² An award given to the applicant's company also fail to satisfy the criterion, because the award should be given to the applicant.²³ The award should also be given for the field of the applicant's endeavor and should be nationally recognized beyond a single award ceremony.²⁴ If the award is nationally recognized in another country, the applicant should explain the award in terms of its U.S. equivalent.²⁵ For entrepreneurs, receiving venture capital funding may serve as evidence under this criterion, but still requires the applicant to show that such funding amounts to a nationally or internationally recognized award.²⁶

Even if there is evidence of a qualifying award, the applicant must show at the final merits stage that the award is extraordinary compared to other awards in the upper echelon of the field.²⁷ It would thus help to include the number of other candidates for the award and their credentials, information about the awarding committee, and media coverage of the award showing its reputation.²⁸

Practice Pointer: USCIS has approved some EB 1-A cases in the engineering field where the award was granted to the project, not to the engineer. USCIS has accepted evidence of the award, a detailed description of the project's impact on the industry, and a letter confirming that the

²¹ *In re 6221341* (AAO Aug. 26, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG262020_02B2203.pdf (photocopied certificate misspelled a word).

²² *Id.* (award is an academic award given to students at the university).

²³ *In re 6559665* (AAO Apr. 29, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR292020_07B2203.pdf; *but see In re 11971158* (AAO Feb. 1, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB012021_02B2203.pdf (even though the award lists recipients by institution name, awards listing names of individual research members could be acceptable because they show that those individuals were recognized by the awarding organization).

²⁴ *In re 9895141* (AAO Sept. 24, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/SEP242020_01B2203.pdf (overruling service center's finding that the awards criterion was met because there was no evidence indicating that the award was recognized beyond the organizers of the competition; suggesting applicant should have submitted evidence of widespread reporting and coverage from publications in the field).

²⁵ See Rusten C. Hurd, *The Three Most Important EB-1 (Extraordinary Ability) Visa Trends in the Trump Era*, Colombo Hurd (Feb. 1, 2018), www.colombohurd.com/three-important-eb-1-extraordinary-ability-visa-trends-trump-era/ (noting that receipt of national award from applicant's country or second-place award frequently failed under the Trump administration).

²⁶ *In re 12685089* (AAO Feb. 3, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB032021_04B2203.pdf (information about the companies and capital venture funding in general failed to demonstrate national or international recognition of that venture capital funding); *In re 8638300* (AAO July 21, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JUL212020_02B2203.pdf (founder should be the recipient of venture capital funding, not the company; applicant needs to submit criteria for obtaining the funding to establish it is a nationally or internationally recognized award).

²⁷ *In re 8656970* (AAO July 23, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JUL232020_03B2203.pdf.

²⁸ *In re 10730197* (AAO Sept. 24, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/SEP242020_05B2203.pdf.

self-petitioner was the lead engineer of the project and that the petitioner's contributions and expertise resulted in the project's award.

2. Membership in Associations in the Foreign National's Field of Expertise that Require Outstanding Achievements of Their Members

Evidence for this criterion includes documentation showing membership (e.g., a printout from an online database listing applicant's membership, copy of membership card, confirmation letter from association) along with the membership criteria.²⁹ For example, the AAO might deny this criterion if membership credentials are not stated in the organization's bylaws.³⁰ Such evidence should not raise questions about the document's origin and authenticity.³¹ Membership should not be part of the applicant's employment, although athletes on national sports teams would meet this criterion.³² The AAO might also deny this criterion if the organization is not deemed distinguished enough.³³ Hence, adding a list of other members who are esteemed in the field helps, as well as publications covering the selectivity of the organization's membership. In addition to evidence of qualifying membership, the applicant must provide evidence articulating how satisfying the criterion constitutes "outstanding achievement."³⁴

²⁹ *In re 11971158* (AAO Feb. 1, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB012021_02B2203.pdf (no evidence of criteria employed by the members in casting their votes); *In re 6221341* (AAO Aug. 26, 2020)

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG262020_02B2203.pdf (evidence lacks governing documents establishing membership requirements); *In re 5779473* (Dec. 30, 2019),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2019/DEC302019_01B2203.pdf (no evidence that members were selected by national or international experts in their fields).

³⁰ *In re 2551623* (AAO Nov. 13, 2019),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2019/NOV132019_01B2203.pdf (bylaws are too vague and do not detail membership qualifications and the review process).

³¹ *In re 6221341* (AAO Aug. 26, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG262020_02B2203.pdf (letter from organization contains information inconsistent with applicant's statements, merely reiterates language of statutory requirement).

³² See Berger et al., *supra* note 18.

³³ *In re 12685089* (AAO Feb. 3, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB032021_04B2203.pdf (no evidence indicating whether nationally or internationally recognized experts judged the outstanding achievements for membership); *In re 6559665* (AAO Apr. 29, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR292020_07B2203.pdf (no evidence showing that recognized experts judge for membership; merely saying members showed "outstanding achievements" is not enough).

³⁴ *In re 10875587* (AAO Oct. 5, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/OCT052020_09B2203.pdf (letter stating that members must "demonstrate a continuous interest in any discipline important to hematology, as evidenced by work in the field" fails to show outstanding achievement).

Practice Pointer: In addition to presenting evidence of membership, such as a membership certificate and a detailed letter providing information about the panel of experts who admit and evaluate new members, evidence should include the admission criteria and reiterate that the applicant’s membership was approved due to their achievements. Providing USCIS with evidence of the association’s bylaws may result in USCIS misinterpreting the bylaws’ plain language.

3. Published Material about the Foreign National in Professional or Major Trade Publications or Other Major Media

Evidence for this criterion includes press materials (e.g., interviews, articles, TV/radio appearances) about the applicant and applicant’s accomplishments, along with evidence showing the reputation of the press source. Articles need to be primarily about the applicant and focus on their accomplishments.³⁵ Interview transcripts must be mainly about the applicant and the evidence must contain the author of interview transcripts.³⁶

The press material should be a professional or major trade publication.³⁷ If the material is on a website, the applicant must provide independent evidence of the website’s standing as a major media.³⁸ If the press material is from another country, the applicant must submit evidence establishing it as a major trade publication with information such as circulation statistics showing how the publication compares to other publications in that country.³⁹ Evidence establishing a professional or major trade publication cannot only have self-serving assertions

³⁵ *In re 12685089* (AAO Feb. 3, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB032021_04B2203.pdf (applicant’s name is only briefly mentioned); *In re 10730197* (AAO Sept. 24, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/SEP242020_05B2203.pdf (materials only briefly mention applicant and are not mainly about the applicant and his work); *In re 10320524* (AAO Sept. 8, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/SEP082020_01B2203.pdf (evidence does not mention the applicant and only discusses an art exhibition curated by the applicant).

³⁶ *In re 11971158* (AAO Feb. 1, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB012021_02B2203.pdf (transcript of video showing the petitioner was not submitted); *In re 8638300* (AAO July 21, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JUL212020_02B2203.pdf (merely quoting the applicant is not enough).

³⁷ *In re 9369644* (AAO Aug. 26, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG262020_02B2203.pdf (general-interest newspaper with limited, local circulation does not satisfy criterion).

³⁸ *In re 8638300* (AAO July 21, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JUL212020_02B2203.pdf (suggesting evidence like website traffic figures from third parties, not “About Us” page self-assertions from website itself).

³⁹ *In re 10320524* (AAO Sept. 8, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/SEP082020_01B2203.pdf (requiring circulation statistics specifically for print version, not just the digital version).

about reputation and circulation. The applicant must provide independent, objective evidence to support such claims.⁴⁰ Promotional materials promoting the applicant's products or services are not considered published material about the individual.⁴¹

Even if there is evidence of a qualifying published material, the applicant must show at the final merits stage that the published materials recognized them for a career of sustained national or international acclaim.⁴²

4. Participation, Either Individually or on a Panel, as a Judge of the Work of Others in the Foreign National's Field

Evidence for this criterion includes invitations to serve as a judge, along with subsequent confirmation that the applicant rendered service as a judge or was a member of the judging panel.⁴³ This criterion may apply to judging activities that constitute a routine part of the applicant's occupation.⁴⁴ Researchers may submit evidence of peer reviewing manuscripts, whereas artists, athletes, and entrepreneurs may submit evidence of judging contests and showcases. Entrepreneurs submitting company-issued certificates about their judging activities

⁴⁰ *In re 5856469* (AAO Dec. 27, 2019), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2019/DEC272019_01B2203.pdf (16,471-copy circulation figure did not provide sufficient comparative information to establish that the magazine is a major media in Singapore; need to establish magazine's relative standing among other Singaporean print media).

⁴¹ *In re 13189151* (AAO Feb. 25, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB252021_02B2203.pdf (marketing materials for business or directory listing the business are not published material about the applicant).

⁴² *In re 11198670* (AAO Feb. 26, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB262021_05B2203.pdf (overall media coverage does not indicate level of success of being among the small percentage who has risen to the very top of the field of endeavor); *In re 7144255* (AAO Apr. 23, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR232020_04B2203.pdf (applicant's article received media attention from *BBC News*, *The Times*, *The Telegraph*, and the *Los Angeles Times*, but still failed to show that the media outlets recognized applicant as a researcher who is one of the small percentage at the top of his field).

⁴³ *In re 12685089* (AAO Feb. 3, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB032021_04B2203.pdf (participation as a mentor does not involve judging work of others); *In re 12796266* (AAO Jan. 29, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_14B2203.pdf (testimonial evidence lacks specificity and fails to confirm that the petitioner's supervisory role involved judging the work of others); *In re 13454774* (AAO Jan. 29, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_09B2203.pdf (applicant merely accepted an invitation to act as a peer reviewer and was thanked in advance for participation, which does not establish that the application actually participated as a peer reviewer).

⁴⁴ *In re 12796266* (AAO Jan. 29, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_14B2203.pdf (criterion may apply where management consultant must judge the work of others as an inherent job function).

should make sure they are not inconsistent with other documentary evidence.⁴⁵ The applicant should include criteria for the judge's qualifications as well as evidence showing the high reputation of the organization or journal for which the applicant served as a judge.⁴⁶ The evidence should specifically identify what work or whose work the applicant judged.⁴⁷ The applicant should also include evidence that the petitioner was recognized for the reviewing activity.⁴⁸

Even if there is evidence of a qualifying judging activity, the applicant must show at the final merits stage how that activity shows sustained national or international acclaim. For example, the applicant may submit evidence showing a consistent history of completing a substantial number of review requests relative to others or serving in editorial positions for distinguished journals or publications.⁴⁹

Practice Pointer: For this criterion, USCIS expects the evidence to show that the petitioner contributed to judging the final outcome of a particular competition or event. The AAO initially denied an EB-1A petition because the evidence did not establish this, but approved the case after the petitioner filed a motion to reconsider that included evidence showing that the petitioner's role as the technical judge qualified for this criterion.

5. Original Scientific, Scholarly, Artistic, Athletic, or Business-Related Contributions of Major Significance in the Foreign National's Field

⁴⁵ *In re 6370813* (AAO Apr. 6, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR062020_02B2203.pdf (AAO found discrepancies between company's certificate and other independent documentary evidence, such as articles on social media).

⁴⁶ *In re 7144255* (AAO Apr. 23, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR232020_04B2203.pdf (criterion of selecting reviewer based on subject matter expertise is not enough).

⁴⁷ *In re 12796266* (AAO Jan. 29, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_14B2203.pdf.

⁴⁸ *In re 10066114* (AAO Aug. 25, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG252020_02B2203.pdf (evidence of judging others was not enough at final merits stage because it did not sufficiently remark on the quality of the review or explain the criteria used in selecting the applicant for the reviewing activity).

⁴⁹ *In re 7144255* (AAO Apr. 23, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR232020_04B2203.pdf; *see also In re 11198670* (AAO Feb. 26, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB262021_05B2203.pdf (no evidence showing that two occasions of judging, seven years apart, demonstrate a career of acclaimed work; no evidence that participating as judge garnered wide attention from the field of endeavor); *In re 9183884* (AAO July 1, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JUL012020_02B2203.pdf (requiring evidence that the reviewing activity was reserved for small percentage at very top of the field).

Evidence for this criterion includes publications, citations to the applicant’s published work, and letters from experts in the field. Among the 39 AAO decisions reviewed, 24 decisions determined that this criterion was unmet, showing how difficult it is for applicants to satisfy this criterion. A USCIS policy memorandum suggests submitting peer-reviewed articles in scholarly journals that garnered widespread commentary, or entries in a citation index citing the applicant’s work as authoritative in the field.⁵⁰ It is not enough that one article cites the applicant’s work as one of “key references,” because the evidence needs to show widespread commentary throughout the field.⁵¹ Evidence of receiving research grants is irrelevant, unless the grant was for an original contribution of major significance.⁵² The work must also be related to a field in which the applicant currently conducts research.⁵³ The applicant’s work cannot be one of several works that had an impact in the field.⁵⁴ Screenshots of social media pages are not strong evidence of original contributions.⁵⁵

The applicant’s evidence must first show that the contribution was “original.”⁵⁶ The evidence must then explain *why* the original contribution was of major significance. That requires showing that the applicant’s work sparked some demonstrable change that has been widely implemented throughout the field or that remarkably influenced the field.⁵⁷ In other words, evidence must

⁵⁰ USCIS Policy Memorandum, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions* 8–9, (Dec. 22, 2010), AILA Doc. No. 11020231.

⁵¹ *In re 4581819* (Aug. 3, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG042020_01B2203.pdf.

⁵² *In re 5082984* (AAO Jan. 14, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JAN142020_02B2203.pdf.

⁵³ *In re 7977790* (AAO May 27, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/MAY272020_12B2203.pdf (applicant’s most highly cited works are in a field in which applicant no longer conducts research).

⁵⁴ *In re 10875587* (AAO Oct. 5, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/OCT052020_09B2203.pdf.

⁵⁵ *In re 13189151* (AAO Feb. 25, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB252021_02B2203.pdf (screenshots of clinic’s social media pages do not demonstrate a contribution that is of major significance in dermatology and skin care).

⁵⁶ *In re 9387310* (AAO Aug. 11, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG112020_01B2203.pdf (patent is evidence of “original contribution”).

⁵⁷ *In re 12685089* (AAO Feb. 3, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB032021_04B2203.pdf; *In re 13454774* (AAO Jan. 29, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_09B2203.pdf; *In re 9945545* (AAO Oct. 19, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/OCT192020_02B2203.pdf; *In re 4925539* (AAO Jan. 6, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JAN062020_02B2203.pdf.

include specific examples of how the applicant's work was highly regarded by the *entire* field,⁵⁸ for a *continuous* period of time.⁵⁹

For citations, the applicant thus needs to show evidence comparing citations to other similarly highly cited articles in the field to distinguish the applicant's work as majorly significant.⁶⁰ This requirement has made it harder for applicants to submit reference letters as evidence,⁶¹ because the AAO has been requiring specific, objective evidence showing how the applicant's work widely impacted the overall field and dismissing letters that are conclusory and use hyperbolic language.⁶² Submitting multiple letters with identical wording could even lead to USCIS inferring that the letters were written by the petitioner.⁶³ Reference letters discussing the potential significant impact of the applicant's work will also fail.⁶⁴ Where objective measures like citation

⁵⁸ *In re 9387310* (AAO Aug. 11, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG112020_01B2203.pdf (impact needs to be beyond the applicant's employer); *In re 6370813* (AAO Apr. 6, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR062020_02B2203.pdf (impacting a local area not enough; has to impact entire business field in China); *In re 5082984* (AAO Jan. 14, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JAN142020_02B2203.pdf (citations do not show impact beyond authors who cited the applicant).

⁵⁹ *In re 9581705* (AAO Aug. 4, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG042020_01B2203.pdf (applicant's most notable accomplishments are too recent); *In re 7743609* (AAO Mar. 5, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/MAR052020_02B2203.pdf (most cited articles appeared 12 years before petition).

⁶⁰ *In re 5784760* (AAO Jan. 7, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JAN072020_01B2203.pdf (having publication among 10% most cited is not enough without comparative evidence).

⁶¹ See Hurd, *supra* note 24 (noting how reference letters have been mostly rejected after the Trump administration heightened the standard); *but see Chursov v. Miller*, No. 18-cv-2886 (PKC) at 7, 2019 U.S. Dist. LEXIS 80426, at *9–10 (S.D.N.Y. May 13, 2019) (pointing out that USCIS failed to consider the totality of the evidence by considering letters from professionals "principally in isolation and without adequate consideration of the light they shed on the significance of scholarly publications and presentations").

⁶² *In re 12685089* (AAO Feb. 3, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB032021_04B2203.pdf; *In re 12796266* (AAO Jan. 29, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_14B2203.pdf; *In re 9945545* (AAO Oct. 19, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/OCT192020_02B2203.pdf (letters broadly attested to significance of the applicant's work without specific examples of how researchers used the applicant's work or what kind of treatments were derived from the applicant's work); *In re 5784760* (AAO Jan. 7, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JAN072020_01B2203.pdf.

⁶³ *In re 13189151* (AAO Feb. 25, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB252021_02B2203.pdf; *see also In re 11971158* (AAO Feb. 1, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB012021_02B2203.pdf (certificates from hospitals stating they used devices based on the applicant's patents, but the certificates all included nearly identical language).

⁶⁴ *In re 13072199* (AAO Jan. 29, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_10B2203.pdf; *Matter of P-K-* (AAO Nov. 14, 2019),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_201

count are unavailable to show major significance, reference letters may explain why such measures are not good measures of the applicant's impact and give a more descriptive example of the applicant's impact on the entire field.⁶⁵

Even if the applicant manages to submit satisfactory evidence of original contribution of major significance, the applicant must also articulate at the final merits stage how such contribution demonstrates that they are at the very top of their field. The AAO itself has declared this to be a very high bar, noting that the final merits stage focuses not on "influence" but rather on "sustained acclaim."⁶⁶ To overcome this high bar, the applicant should provide evidence that compares the applicant's work to those considered to be at the very top of the field.

6. Authorship of Scholarly Articles in the Foreign National's Field, in Professional or Major Trade Publications or Other Major Media

Evidence for this criterion includes any publications that include the applicant's name and accomplishments. Evidence of circulation rate or ranking can help. The evidence should establish that the intended audience of the publication shows that it was a "scholarly article."⁶⁷ The evidence should be published before filing the I-140 petition and should not contain

9/NOV142019_04B2203.pdf; *Matter of N-K-S-* (AAO Nov. 7, 2019),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2019/NOV072019_03B2203.pdf

⁶⁵ *In re 9183884* (AAO July 1, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JUL012020_02B2203.pdf (AAO accepted letter explaining how the applicant's work influenced standardization of new protocols in the field, noting that the statements may seem anecdotal because the applicant's impact cannot be measured by objective measures like citation counts because he works in the private sector).

⁶⁶ *In re 13951115* (AAO Feb. 26, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB262021_03B2203.pdf (reference letters focus on the beneficiary's immediate work without demonstrating a career of acclaimed work in the field); *In re 11991701* (AAO Jan. 29, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_11B2203.pdf (applicant's contributions have been beneficial to employers and the industry, but the recognition of the contributions did not rise to the level of sustained national or international acclaim); *In re 10066114* (AAO Aug. 25, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG252020_02B2203.pdf (reference letters satisfied evidentiary criterion because they detailed how the applicant's research led to broader implementation of software throughout the field, but letters were seemingly prepared for purposes of the petition and failed to show that the applicant's work enjoyed *sustained* acclaim); *In re 8185333* (AAO June 24, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JUN242020_04B2203.pdf (applicant's discovery significantly advanced the field's method for treatment and prevention of disease and applicant was invited to prestigious conferences, but evidence failed to include contextual data allowing USCIS to compare publications and citations to others in the field to establish applicant as one of the "small percentage at the very top of the field").

⁶⁷ *In re 13189151* (AAO Feb. 25, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB252021_02B2203.pdf (materials written for general audience seeking medical advice or considering cosmetic procedures are promotional stories, not scholarly articles).

inconsistencies or typos that might question its validity.⁶⁸ The criterion might be deemed unmet if publications were sporadic and their significance within the field is unexplained.

Even if the applicant provides sufficient evidence of scholarly articles, the applicant must still show at the final merits stage how the publications impacted their field to the extent they were placed among those at the top of the field.⁶⁹ For example, providing numerous independent citations for an article authored by the applicant may provide evidence that the work has been recognized and that other researchers have been influenced by it.⁷⁰

7. Display of the Foreign National's Work at Artistic Exhibitions or Showcases

Evidence for this criterion would include brochures, posters, advertisements, or photos of exhibits including the name of the applicant. It also helps to provide the number of people who attended, as well as evidence of the exhibition's prestige and the media's reaction to it to explain how the criterion places the applicant among those at the very top of the field. The exhibition or showcase must be "artistic,"⁷¹ and the purpose of the exhibition or showcase must be to display the petitioner's own work.⁷²

8. A Leading or Critical Role for Organizations or Establishments That Have a Distinguished Reputation

This can be a helpful criterion for entrepreneurs who typically hold a leading role in their companies. Evidence for this criterion includes documentation (e.g., confirmation letter, organization chart, internal awards, etc.) showing employment as an executive or other leading

⁶⁸ *In re 6221341* (AAO Aug. 26, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG262020_02B2203.pdf (book dated after filing date, contains inconsistencies, typos, and incomplete information that raise questions about extent of thoroughness of editorial review).

⁶⁹ *In re 13951115* (AAO Feb. 26, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB262021_03B2203.pdf (publication record of five articles over 15 years ago does not demonstrate career of sustained national or international acclaim); *In re 11991701* (AAO Jan. 29, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_11B2203.pdf (no evidence differentiating the applicant's publication rate to those of others in the field to establish that the applicant is among the small percentage at the very top of his field of endeavor); *In re 6178689* (AAO Feb. 20, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/FEB202020_01B2203.pdf (noting that not every journal has an impact in the field and requiring evidence of the field's overall reception of the applicant's work).

⁷⁰ *In re 7144255* (AAO Apr. 23, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR232020_04B2203.pdf (comparing applicant's citation figures to those of others in the field, concluding applicant's independent publications did not reach the threshold).

⁷¹ *In re 13189151* (AAO Feb. 25, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB252021_02B2203.pdf (denying petitioner's argument that "showcase" is applicable to any occasion, including corporate conventions).

⁷² *Id.* (petitioner's participation in promoting suppliers' products is not the same as displaying the petitioner's work).

role and evidence that the applicant actually performed that role, contributing in some way to the organization.⁷³ The reputation of the organization should also be documented,⁷⁴ and the applicant's role must have an impact beyond just the organization. Merely contributing to important projects is not enough, as the applicant must explain the impact of their work on the company's overall operations, finances, or research.⁷⁵ Media appearances or having a large number of followers on social media likely do not provide sufficient evidence to meet this criterion.⁷⁶

Even if the applicant satisfies the evidentiary criterion of a leading role, the applicant must explain at the final merits stage how the applicant drew significant attention or gained significant recognition as a result of their leading role.⁷⁷ Even if the applicant had played a crucial role in various projects of the organization, the AAO may still deny the petition if there is no evidence

⁷³ *In re 11971158* (AAO Feb. 1, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB012021_02B2203.pdf (evidence must show how the applicant's position fits into the overall hierarchy at the hospital); *In re 5808571* (AAO Nov. 21, 2019), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2019/NOV212019_04B2203.pdf (noting that what matters is whether the role was important to the organization's standing in the industry, not the applicant's title).

⁷⁴ *In re 11971158* (AAO Feb. 1, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB012021_02B2203.pdf (evidence does not show that the hospital has a distinguished reputation among similar hospitals in the region or in the field overall); *In re 13072199* (AAO Jan. 29, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_10B2203.pdf (evidence fails to show that the hospital has a distinguished reputation; materials generated by the hospital itself or letters making conclusory assertions are not enough); *cf. Chursov v. Miller*, No. 18-cv-2886 (PKC) at 13–14, 2019 U.S. Dist. LEXIS 80426, at *19 (S.D.N.Y. May 13, 2019) (citing the *USCIS Policy Manual* stating that “USCIS officers should keep in mind that the relative size or longevity of an organization ... is not in and of itself a determining factor”).

⁷⁵ *In re 5808571* (AAO Nov. 21, 2019), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2019/NOV212019_04B2203.pdf (letters from former colleagues do not contain a full description of applicant's job duties or include evidence of applicant's placement in the company's hierarchy); *cf. In re 12796266* (AAO Jan. 29, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2019/NOV212019_04B2203.pdf (letters from high-level employees familiar with the applicant's work provided detailed position description for applicant's position and its placement within the company's hierarchy). *See also* Hurd, *supra* note 24 (noting how the Trump administration added a new restriction by requiring that the applicant must have had a leading role for the organization as a whole, not just a division or specific part).

⁷⁶ *In re 13189151* (AAO Feb. 25, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB252021_02B2203.pdf (applicant's media appearances recommending aesthetic treatments do not demonstrate a critical role for mass media; applicant's clinic having a large number of social media followers is not sufficient evidence without comparative evidence showing why the clinic holds a critical role compared to those of rival businesses in the same field).

⁷⁷ *In re 11991701* (AAO Jan. 29, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_11B2203.pdf; *In re 7144255* (AAO Apr. 23, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR232020_04B2203.pdf.

explaining how such a leading role translated into an equally prominent role within the field.⁷⁸ When an applicant has worked for multiple companies, the AAO may look at the applicant's role with all the companies to see if the employment resulted in recognition from the field reflecting a career of sustained national or international acclaim.⁷⁹

Practice Pointer: USCIS has issued requests for additional evidence partially accepting this criterion, meaning accepting the past component of this criteria and asking for evidence that the applicant will continue having a leading role in a distinguished organization in the future.

9. Command of a High Salary or Other Significantly High Remuneration for Services, in Relation to Others in the Field

Evidence for this criterion includes tax returns, paystubs, and contracts showing that the applicant actually received the stated salary.⁸⁰ The applicant's salary must be high compared to others who are performing similar work and have similar levels of experience.⁸¹ Hence, it is important to also include evidence showing comparable salary data of others in the same field.⁸² Ideal evidence would be a W-2 accompanied by a letter from the employer confirming the salary and geographical-position-appropriate compensation data showing the salary of others holding the same position in the same geographical area.⁸³

⁷⁸ *In re 6178689* (AAO Feb. 20, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/FEB202020_01B2203.pdf.

⁷⁹ *In re 11198670* (AAO Feb. 26, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB262021_05B2203.pdf (petitioner served in various executive capacities for several companies, but the evidence only relates to his roles for three businesses).

⁸⁰ *In re 5856469* (AAO Dec. 27, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2019/DEC272019_01B2203.pdf (noting that tax documents are better evidence because invoices and bank statements do not demonstrate the applicant actually commanded a high salary in the past).

⁸¹ *In re 11971158* (AAO Feb. 1, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB012021_02B2203.pdf (average salary information for those performing work in a related but distinct occupation with different responsibilities is not a proper basis for comparison).

⁸² *In re 11991701* (AAO Jan 29, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_11B2203.pdf (accepting data from a Department of Labor source establishing that the applicant's salary exceeds the published "high salary" threshold for similarly employed workers in the same state); *In re 6559665* (AAO Apr. 29, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR292020_07B2203.pdf (noting that the applicant selected a misleading labor category when presenting comparable salary data).

⁸³ *In re 8185333* (AAO June 24, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JUN242020_04B2203.pdf.

Even if the applicant provides evidence of a high salary, the applicant must still show at the final merits stage that the earnings are at a level reflecting that they are one of a small percentage who has risen to the top of the field.⁸⁴

Practice Pointer: For this criterion, applicants should provide support of the applicant’s salary and a reference of the Foreign Labor Certification Data Center or online wage library that reflect a level 4 salary. Applicants should also submit a letter from the applicant’s employer confirming that the compensation offered to the applicant is high compared to the compensation of other professionals with similar education and experience, and that such high compensation is based on the applicant’s expertise.

10. Commercial Successes in the Performing Arts, as Shown by Box Office Receipts or Record, Cassette, Compact Disk, or Video Sales

Performing artists mostly use this criterion. The “commercial successes” do not refer to an individual’s personal income, as that is covered by the “high salary” criterion.⁸⁵ Evidence for this criterion includes evidence of relevant box office, record sales, TV ratings, and audience viewing statistics. Press materials discussing commercial success or proof of payment for royalties and revenues also help. The applicant should also explain how the commercial success places the applicant among those at the very top of the field.

PRACTICE POINTERS

Win at the Service Center Level So You Don’t Have to Appeal to the AAO

While the AAO decisions we reviewed suggest a high denial rate, many EB-1A I-140 petitions get approved at the service center level and are not published. For example, some immigration law firms share success stories about their EB-1A clients, which suggest that a robust initial application can be approved.⁸⁶

The AAO may dismiss evidentiary criteria that the service center found to be satisfactory, because the AAO revisits all evidentiary criteria in the original submission, not just those found

⁸⁴ *In re 11198670* (AAO Feb. 26, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB262021_05B2203.pdf; *In re 13951115* (AAO Feb. 26, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB262021_03B2203.pdf; *In re 11991701* (AAO Jan. 29, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/JAN292021_11B2203.pdf; *In re 9183884* (AAO July 1, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JUL012020_02B2203.pdf.

⁸⁵ *In re 13189151* (AAO Feb. 25, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB252021_02B2203.pdf.

⁸⁶ See, e.g., <https://miller-mayer.com/?s=eb-1a> (success stories of Miller Mayer, LLP).

probative by the service center.⁸⁷ The AAO may even find new reasons to support a denial.⁸⁸ Hence, it could be better to have the service center rule on the sufficiency of the evidentiary criteria. But because the service center may still deny the petition at the final merits stage even if the applicant meets more than three evidentiary criteria,⁸⁹ it is crucial that the applicant ensure each evidentiary criterion is accompanied by an explanation as to how that places the applicant at the very top of their field. As with evidentiary criteria, it could be easier to persuade the service center at the final merits stage than the AAO.

Appeal to the AAO with Stronger Evidence

If the applicant appeals to the AAO, ensure that all evidentiary criteria are met and accompanied by explanations as to how they demonstrate sustained national or international acclaim. The applicant may provide evidence of additional criteria even if one only needs to meet three,⁹⁰ because the AAO will consider all the evidence when evaluating at the final merits stage.⁹¹ The applicant should also not assume that the AAO will approve the criteria that the service center approved. The applicant should have this in mind when supplementing the petition on appeal.⁹²

⁸⁷ See, e.g., *In re 9945545* (AAO Oct. 19, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/OCT192020_02B2203.pdf; *In re 6221341* (Aug. 26, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG262020_02B2203.pdf; *In re 8638300* (AAO July 21, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JUL212020_02B2203.pdf.

⁸⁸ Diane M. Butler, Leslie K. Dellon, David Isaacson, & Stephen Yale-Loehr, *Post-Denial Strategies: How to Get from “No” to “Yes,”* 24 *Bender’s Immigr. Bull.* 1327, 1328 (Nov. 1, 2019) (noting that the AAO sometimes finds new reasons to reinforce a denial in case it goes to federal court).

⁸⁹ See, e.g., *In re 11198670* (AAO Feb. 26, 2021), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB262021_05B2203.pdf (application denied even though the applicant met four evidentiary criteria); *In re 13951115* (AAO Feb. 26, 2021),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2021/FEB262021_03B2203.pdf (same); *In re 7144255* (AAO Apr. 23, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR232020_04B2203.pdf (same); *In re [name not provided]* (USCIS Nov. 2, 2020) (Irving, Tex.) (application denied even though the applicant met five evidentiary criteria).

⁹⁰ *In re 7144255* (AAO Apr. 23, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/APR232020_04B2203.pdf (service center ruled the applicant satisfied two criteria, but the AAO ruled applicant satisfied four).

⁹¹ *In re 9183884* (AAO July 1, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JUL012020_02B2203.pdf (applicant submitted evidence of fourth criterion to AAO; AAO said it will not analyze it because applicant already satisfied three but will take the evidence into consideration at the final merits stage).

⁹² *In re 10066114* (AAO Aug. 25, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/AUG252020_02B2203.pdf (applicant met third criterion by raising it as additional criterion on appeal; however, the AAO will not accept evidence offered for first time on appeal where the applicant was put on notice of a deficiency in the evidence and was given an opportunity to respond to that deficiency).

It is not useful for an applicant to cite federal district court decisions when appealing to the AAO because the AAO considers only federal circuit court decisions to bind the agency.⁹³

Because the decision is ultimately up to the adjudicator's interpretation, the applicant should focus on advocating for *each* piece of evidence to demonstrate how that piece places the applicant in the very top of their field. It is better to omit evidence that is relatively weaker rather than submitting everything, because the AAO may point to the weaker evidence to uphold the denial. Where an applicant believes that the service center did not consider all of the applicant's evidence or omitted an accomplishment at the final merits stage, appeal to the AAO.⁹⁴

Bypass the AAO and Sue Directly in Federal Court

If the service center denies the petition, the applicant may choose to sue directly in federal court instead of appealing to the AAO, arguing that USCIS's decision was arbitrary or capricious as a matter of law.⁹⁵ If the applicant wins in federal court, the court will likely remand to the service center for further proceedings.⁹⁶ It will be especially more beneficial to sue in federal court if the service center disregarded or misconstrued important facts and evidence,⁹⁷ failed to adequately explain its basis for denial,⁹⁸ or heightened the evidentiary standard by requiring more stringent evidence than is normally required.⁹⁹ The applicant should sue if the service center simply held that the evidence does not establish extraordinary ability, effectively foregoing the first step under *Kazarian*.¹⁰⁰

⁹³ *Id.* at *5 (rejecting the applicant's reliance on *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994), and stating that "in contrast to the broad precedential authority of the case law of a United States circuit court, USCIS is generally not bound by the published decisions of United States district courts").

⁹⁴ *In re 9369644* (AAO Aug. 26, 2020), www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/JUN302020_05B2203.pdf (remanding because the service center did not consider totality of the evidence at the final merits stage).

⁹⁵ For advantages to suing in federal court over appealing to the AAO, see Butler et al., *supra* note 87, at 1333.

⁹⁶ *See, e.g., MRC Energy Co. v. USCIS*, No. 3:19-CV-2003-K, at 32, 2021 U.S. Dist. LEXIS 61982, at *37 (N.D. Tex. Mar. 31, 2021) (refusing to grant petitioner's request that the court remand with instructions that USCIS approve the petition within 10 days, because the "proper course" when an agency acts arbitrarily and capriciously is to remand for additional investigation and explanation); *Berardo v. USCIS*, No. 3:19-cv-01796-SB, at 26–27, 2020 U.S. Dist. LEXIS 195449, at *26–27 (D. Or. Oct. 20, 2020) (explaining it is better for the court to remand and provide USCIS an opportunity to reevaluate in light of the court's findings, although the court could grant the applicant's petition).

⁹⁷ *Berardo*, No. 3:19-cv-01796-SB, at 17–21, 2020 U.S. Dist. LEXIS, at *17–21 (service center erroneously dismissed the leading role criterion based on the applicant's title listed in film credits, without evaluating important evidence explaining the significance of that title in the industry).

⁹⁸ *MRC Energy Co.*, No. 3:19-CV-2003-K, at 27, 2021 U.S. Dist. LEXIS 61982, at *28 (USCIS failed to explain why petitioner's evidence does not constitute "any evidence" of outstanding achievement despite USCIS acknowledging that the evidence demonstrated the difficult process in obtaining membership in association); *Chursov v. Miller*, No. 18-cv-2886 (PKC), 2019 U.S. Dist. LEXIS 80426 (S.D.N.Y. May 13, 2019) (USCIS failed to adequately consider the totality of submitted evidence and adequately explain why the details are not enough to constitute substantial evidence).

⁹⁹ *MRC Energy Co.*, No. 3:19-CV-2003-K, at 30, 2021 U.S. Dist. LEXIS 61982, at *35 (explaining that USCIS "may not unilaterally impose a novel evidentiary requirement"); *Berardo*, No. 3:19-cv-01796-SB, at 22–26, 2020 U.S. Dist. LEXIS 195449, at *23–25 (USCIS service center was arbitrary in evaluating evidence at the final merits stage because it did not explain basis and only referred to parts of the evidence or erroneously applied evidence).

¹⁰⁰ *Eguchi v. Kelly*, No. 3:16-CV-1286-D, at 7–13, 2017 U.S. Dist. LEXIS 104974, at *6–13 (N.D. Tex. July 7, 2017) (remanding because service center conflated the final merits stage with the procedural question regarding evidentiary criteria, such

Sometimes, the USCIS might voluntarily reopen the applicant’s denied petition and reconsider its decision once the applicant files a lawsuit,¹⁰¹ meaning bringing a lawsuit itself may help the applicant. Suing in federal court after losing an AAO appeal is often not advisable, because it incurs higher costs and the court might be less likely to overturn the AAO’s reasoned decision than a service center’s shorter decision.¹⁰²

CONCLUSION

In denying I-140 petitions for extraordinary ability, many AAO decisions note that “[t]he Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top.”¹⁰³ Successfully showing extraordinary ability is difficult for all applicants, especially because of the two-step analysis under *Kazarian*. It became even harder under the stricter standards applied during the Trump administration. It remains to be seen whether this may change under the Biden administration.

This does not mean, however, that applicants should not attempt to obtain an EB-1A green card. By focusing on what service centers and the AAO really look for and submitting robust evidence, those who have extraordinary ability should be able to win approval. Like the “golden snitch” in the Harry Potter series, the “genius green card” may be elusive, but with proper preparation it can be obtained.

as by requiring evidence of high salary to demonstrate that the applicant is at the very top of the field in the first step of *Kazarian* analysis); *but see Rijal v. USCIS*, 772 F. Supp. 2d 1339, 1348 (W.D. Wash. 2011) (not remanding despite service center’s errors because it considered all of the evidence and remand would be “of no substantive or procedural benefit”).

¹⁰¹ See *Berardo*, No. 3:19-cv-01796-SB, at 5, 2020 U.S. Dist. LEXIS 195449, at *5 (after the applicant sued in federal court, service center reopened and vacated its original decision that the applicant did not satisfy any of the 10 criteria, finding that the applicant satisfied four criteria).

¹⁰² See, e.g., *Kinuthia v. Rosenberg*, No. 17-10255-LTS, 2017 U.S. Dist. LEXIS 219049 (D. Mass. Mar. 8, 2018) (reiterating the AAO’s reasoning in upholding the denial).

¹⁰³ *In re 10730197*, at *6 (AAO Sept. 24, 2020),

www.uscis.gov/sites/default/files/err/B2%20-%20Aliens%20with%20Extraordinary%20Ability/Decisions_Issued_in_2020/SEP242020_05B2203.pdf; see also *Kazarian v. USCIS*, 596 F.3d 1115, 1120 (9th Cir. 2010) (explaining that extraordinary ability classification is “extremely restrictive”).