ARROWS IN YOUR QUIVER: ARM YOURSELF TO WIN APPROVALS

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INTRODUCTION

In creating the Priority Worker classification in the Immigration Act of 1990,[1] encompassing not only the EB-1-1 Extraordinary Alien category and the EB-1-2 Outstanding Professor and Researcher category, but also the EB-1-3 Multinational Executive or Manager category, Congress expressly noted that the enactment of the Priority Worker classification was to serve the national interest by enhancing the "ability of such workers to enter the U.S. promptly."[2] In the nearly one-and-one-half decades since passage of IMMACT90, there has been very little guidance on adjudication of petitions for classification as EB-1-1 Aliens of Extraordinary Ability under INA §203(b)(1)(A), EB-1-2 Outstanding Professors or Researchers under INA §203(b)(1)(B), and O-1 nonimmigrant Aliens Of Extraordinary Ability in science, education, business, or athletics under INA §101(a)(15)(O)(i). No precedent decisions have been issued by the Administrative Appeals Office (AAO);[3] few and inconsistent federal court cases have been reported; and there are only a handful of policy directives from legacy Immigration and Naturalization Service (INS) headquarters or U.S. Citizenship and Immigration Services (USCIS) headquarters. As a result, adjudicators and the AAO have at times devised criteria not supported by the law or the regulations, leading to widespread inconsistency in adjudication, a belief that adjudication is a "roll of the dice," and the perception that the sole test of what constitutes an alien of extraordinary ability or an outstanding professor or researcher is the immigration law variant on Justice Stewart's definition of pornography: "I know it when I see it. . . ."[4]

Faced with a notable lack of controlling guidance, advocates must rely on unpublished AAO decisions and other material to convince individual examiners of the merit of each petition. This article identifies some language found in the few reported cases on Priority Workers, language found in precedent decisions, and language in nonprecedent AAO decisions that can be cited and quoted in preparing petitions, replying to Requests for Evidence (RFEs), and in briefs for motions to reopen and appeals. This survey is not meant to be encyclopedic, but rather a quiver of arrows, if you will, to let fly in support of petitions.

The first arrow is a demand for application of the correct burden of proof in adjudicating decisions.

BURDEN OF PROOF

In many AAO decisions, the appeal is dismissed with language that reads something like this: "The documentation submitted in support of a claim of extraordinary ability must *clearly* demonstrate that the alien has achieved sustained national or international acclaim. . . . "[5] (Italics added.) This misstates the burden of proof.

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[1] Pub. L. No. 101-649, 104 Stat. 4798 (Nov. 29, 1990) (IMMACT90).

[2] *See* H.R. Rep. No. 101-723, part 1, 101st Cong., 2nd Sess. 59 (Sept. 19, 1990), *reprinted in* 1990 *U.S. Code Cong, & Admin. News*, 6710, accompanying H.R. 4300, at 59.

[3] The Administrative Appeals Unit (AAU) was renamed the Administrative Appeals Office (AAO).

[4] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring).

[5] *See, e.g., Matter of [name not provided]*, SRC 01 195 52247 (AAO July 8, 2003), *available at http://uscis.gov/graphics/lawsregs/admindec3/b2/2003/jul0803_01b2203.pdf* (last visited Oct. 25, 2004) ("Meteorologist"); *Matter of [name not provided]*, EAC 02 088 54040 (AAO June 12, 2003) *available at http://uscis.gov/graphics/lawsregs/admindec3/b2/2003/JUN1203_01B2203.pdf* (last visited Oct. 9, 2004) ("Child psychiatrist"). In the service center denial in the latter case, the center director formulated the burden of proof thusly: "The record lacks demonstrable and sufficient unequivocal evidence of extraordinary ability

continued

The burden of proof in visa petition proceedings is the "preponderance of the evidence,"[6] unless there is a higher burden of proof standard in the statute.[7] "Preponderance of the evidence" means "probably true"[8] or "more likely than not."[9] In reviewing the denial of an adjustment of status application under INA §245A, the Board of Immigration Appeals (BIA) offered the following discussion of the definition of the term "preponderance of the evidence":

> The preponderance of the evidence standard may be best understood by contrasting it with other standards of proof.
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> First, preponderance of the evidence is not evidence that must establish beyond a doubt that the applicant is eligible under section 245A of the Act. In other words, the director can still have doubts but, nevertheless, the applicant can establish eligibility. Second, preponderance of the evidence is not the clear, unequivocal, and convincing evidence applicable in deportation proceedings. See *Woodby v. INS*, 385 U.S. 276 (1966). (Service must prove by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true). An alien does not have to prove by clear, unequivocal, and convincing evidence that he has established eligibility under section 245A of the Act. Preponderance of the evidence requires a lesser showing than these two standards. (Footnote omitted.)
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> How much of a showing is sufficient to establish eligibility by a preponderance of the evidence will often turn upon the factual circumstances of each case. There are no magic words or mathematical formulas that can describe a preponderance of the evidence so it can be applied mechanically in every case. Nonetheless, when we consider that the purpose of evidence is to ascertain the truth, then we can make certain generalizations. For example, when something has to be proved beyond a reasonable doubt, the proof must demonstrate that something must be almost certainly true. And when something has to be proved by clear and convincing evidence, the proof must demonstrate that it is highly probably true. But, when something is to be established by a preponderance of the evidence it is sufficient that the proof only establish that it is probably true. See generally E. Cleary, *McCormick's Handbook of the Law of Evidence* §339 (2d ed. 1972).[10]

In the footnote, the BIA cited with approval this depiction of the "preponderance of the evidence" test: "As characterized by one court, 'in American law a preponderance of the evidence is rock bottom at the fact finding level of civil litigation.' *Charlton v. FTC*, 543 F.2d 903, 907 (D.C. Cir. 1976)."[11]

When an RFE or a denial states that the petitioner has not "clearly persuaded this Service" that the alien is extraordinary or outstanding, rebuttal begins with a reminder of the correct burden of proof.

DEFINING THE "AREA OF EXTRAORDINARY ABILITY"

Defining the "area of extraordinary ability" or the "field" can be a critical question, particularly when the RFE or the denial asserts, for example, that "everybody in the field publishes," or "serving as a reviewer of manuscripts for peer-review publications is common in the field." Defining the "field" or "area of extraordinary ability" broadly may provide a way to place in perspective the alien's extraordinary ability and recognition for achievements.

The definition of an "alien of extraordinary ability" for EB-1-1 and O-1 purposes, other than for an O-1 alien claiming extraordinary ability the arts or in motion picture and television productions, is identical. To be eligible for classification as an alien of extraordinary ability, the alien must be one who:

> has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation, [and who] seeks to enter the United States to continue work in the area of extraordinary ability.[12]

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through pertinent extensive documentation, as it relates to the beneficiary as an individual."

[6] *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Martinez*, 21 I&N Dec. 1035 (BIA 1997).

[7] *See, e.g.*, the "clear and convincing" standard required to rebut the presumption of a prior fraudulent marriage under INA §204(a)(2)(A)(ii).

[8] *Matter of E_ M_*, 20 I&N Dec. 77 (Comm. 1989).

[9] *Matter of J–E*, 23 I&N Dec. 291 (BIA 2002).

[10] *Matter of E_ M_*, 20 I&N Dec. at 79–80.

[11] *Id.*

[12] INA §§101(a)(15)(O)(i), 203(b)(1)(A)(i) and (ii).

The alien seeking classification as an Outstanding Professor or Researcher has to demonstrate international recognition as outstanding in a "specific academic area."[13]

While what constitutes a "specific academic area" may be amenable to easier definition, the same cannot be said of "field" and "area of extraordinary ability." At least one court has defined the terms narrowly,[14] while another court has defined them broadly.[15]

In *Lee v. Ziglar*, the court readily acceded to the restrictive interpretation of the term "area of extraordinary ability" adopted by legacy INS in a series of AAO decisions involving athletes who sought classification as coaches. Although "field" is not defined in the regulations, the court stated that the "regulations regarding this preference classification are extremely restrictive," and found that it is "reasonable to interpret continuing to work in one's 'area of extraordinary ability' as working in the same profession in which one has extraordinary ability, not necessarily in any profession in that field."[16] The case involved a Korean baseball player whom legacy INS agreed was an "extraordinary alien" as a baseball player, but whose petition was denied because his services were sought as a coach. Congress expressed its opinion in creating this category that it is in the national interest to bring "Priority Workers" to the United States, and one wonders why the agency implementing the statute takes pains to exclude an admittedly "extraordinary alien" by narrowing the field of endeavor.

Contrasting the narrow interpretation adopted by the court in *Lee v. Ziglar* is the more expansive interpretation of "area of extraordinary ability" adopted by the court in *Buletini v. INS.* Rather than simply adopting the interpretation espoused by legacy INS without discussion of the statutory framework, as did the *Lee* court, the court in *Buletini* looked more closely both at the history behind the "extraordinary ability" classification and the statutory language. The "extraordinary ability" classification was intended by Congress to be comparable to the Department of Labor's "Schedule A, Group II" category of occupations for which the Secretary of Labor has precertified the existence of a shortage of qualified United States workers.[17] To qualify, the alien had to be of "exceptional ability in the sciences or arts."[18] "Sciences or arts" were further defined as "any field of knowledge and/or skill with respect to which colleges and universities commonly offer specialized courses leading to a degree in the knowledge and/or skill."[19]

The *Buletini* court then looked at the current statute and the regulations. In the denial of the petition under review, legacy INS had required the petitioner to demonstrate extraordinary ability in the narrow field of nephrology research, though the petitioner would be employed as a general practice physician. The court strongly criticized legacy INS for this narrow interpretation, saying:

> First, the Director inaccurately characterizes the plaintiff narrowly as a scientific researcher in the field of nephrology, rather than as a doctor of medicine.
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> . . . .
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> The 1990 Amendment requires that the alien demonstrate extraordinary ability in the sciences "by sustained national acclaim" and seek to enter "the United States to continue work in the area of extraordinary ability." *8 U.S.C. §1153(b)(1)(A)(i)-(ii).* The statute speaks in general terms. It does not demand that the alien's extraordinary ability be narrowed to a specific topic or scientific study or that the plaintiff show that he is seeking to enter the United States to continue work in the specific areas for which he has gained acclaim in the past. Plaintiff's extraordinary ability is not limited to the specific study of nephrology, but rather is with the general field of medicine.[20]

In a footnote, the court suggested that even this interpretation impermissibly narrowed the "field" to "medicine" from "science."[21]

By defining the "area of extraordinary ability" and the "field" broadly, the task of showing that an alien is at the "top" of the "field of endeavor" may be made easier. If the field is defined narrowly, for example, as

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[13] INA §203(b)(1)(B).

[14] *Lee v. Ziglar*, 237 F. Supp. 2d 914 (N.D. Ill. 2002).

[15] *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994).

[16] *Lee v. Ziglar*, 237 F. Supp. 2d at 918.

[17] Under the schedule of precertified occupations, an employer did not need to obtain an individual labor certification order to petition for an alien. One category was for aliens of exceptional ability. *See* 20 CFR §656.10 (1991).

[18] *Id.*

[19] *Id.*

[20] *Buletini*, 860 F. Supp. at 1229.

[21] *Id.*

nephrology or medieval literature, distinguishing the alien from all others in that "field" becomes more difficult, because, almost by definition, those who have established themselves in specific specializations may not be as easily distinguished from others who have entered the field of specialization. On the other hand, if the field is defined as "medicine" or "literature," the very first level of distinction is reached by proving specialization within the broader field.[22]

How does this come into play in the preparation of a petition or the rebuttal of an RFE or on appeal? Here is a case example: A recent AAO decision calls to task the alien's claims of eligibility for EB-1-1 classification on a number of grounds. With respect to the publication of articles in peer-reviewed publications, the AAO said "the petitioner has not shown that peer review is unusual in the field, rather than the accepted standard."[23] In another passage, this discussing citation of the alien's work by other researchers, the AAO says: "Citation is common, expected practice in scientific research; the beneficiary's own articles contain dozens of citations, but there is no indication that the beneficiary, in compiling his research, cites only the best-known or most accomplished authors."[24]

In both quoted passages, the term "field" is used. If the "field" is high-end scientific research, then there may be some truth to the assertions of the AAO. On the other hand, if the "field" is defined more broadly, to include all individuals engaged in "science," then the position of the AAO weakens considerably, because not everyone who is engaged in an activity in "science" publishes, or has had published works reviewed by peers, or, for that matter, if published, has only cited the "best-known or most accomplished authors."

But, both the size of the fish in the pond, and the size of the pond with the fish can determine the outcome, and there will certainly be cases where narrow definition of the field can work to the petitioner's advantage.

An example of narrow field definition is the case of a mathematics professor and researcher. She defined her field as pure mathematics, particularly set theory, and argued she should not be compared to others involved in applied mathematics. The AAU agreed, "A review of the record establishes that the petitioner, while involved in a relatively obscure branch of mathematical study, has distinguished herself to such an extent that she may be said to have achieved national or international acclaim and to be within the small percentage at the very top of her field."[25] Accordingly, advocates should carefully define the "area" or "field" in which alien has excelled, and distinguish his or her achievements from "the norm" in that field or area.

COLLABORATIVE WORK

All too frequently, denials denigrate the significance of the alien's work because it is conducted in collaboration with others. There are several AAO decisions that can be cited in rebutting such conclusions.

In a February 2003 decision that ultimately sustained the denial from the service center, the AAO challenged the service center's disparagement of collaboration. The self-petitioner had developed and patented a new method of microanalysis that resulted in the discovery of several new minerals registered with the International Mineralogical Association. He submitted evidence of his collaborative discovery, with four others, of bismutocolumbite. The AAO found:

> In denying the petition, the director noted that the documentation regarding the IMA acceptance of bismutocolumbite names four co-discoverers in addition to the petitioner. The director stated that his sharing of credit diminished it significance . . . [T]he director's reasoning is flawed. Even the Nobel prize, arguably the most famous and prestigious award in the world . . ., is often split and shared between two or more recipients. While sharing of the prize diminishes the very substantial

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[22] An example: According to the AMA, there were 853,000 physicians licensed to practice in the United States in 2002. (Pasko T, Smart DR. Physician Characteristics and Distribution in the U.S., 2004 ed. Chicago: AMA Press; 2004:9). According to the American Association of Medical Colleges, there were just 89,000 on medical school faculties in clinical sciences. (*www.aamc.org/data/facultyroster/usmsf03/03table1.pdf*). It may be far easier to distinguish a physician-scientist from the total physician population of 850,000 than to distinguish one physician-scientist from a community numbering 89,000.

[23] *Matter of [name not provided]*, File No. [not provided] (AAO Jan. 14, 2003), *available at http://uscis.gov/graphics/lawsregs/admindec3/b2/2003/jan1403_01b2203.pdf* (last visited Oct. 9, 2004) ("spasticity researcher").

[24] *Id.*

[25] *Matter of [name not provided]*. EAC 95 060 50139 (AAU May 29, 1996), *reprinted in* 16 Immig. Rptr. B2-93. ("mathematician").

> sum paid to each laureate, the prestige of the award is unaffected.[26]

In another decision, the AAO, drawing on an analogy from the world of sports, said the following:

> We find nothing about the nature of working with a team that diminishes the ability of the members of that team. The Bureau does not disregard Olympic team medals. We see no reason to discount contributions and publications simply because they represent the work of a research team.[27]

Moreover, the AAO has found that an alien's collaboration with others, far from being a negative factor is more rightly considered a positive factor. In one case, the AAO declared:

> The director did not explain why the beneficiary's evidence is diminished simply because the research is collaborative by nature. As counsel observes on appeal, most modern scientific research is collaborative by nature. . . . That the beneficiary succeeded in organizing such an international effort says something about his reputation in the international research community.
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> . . . .
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> While many of the witnesses are the beneficiary's collaborators, not all of them are; and furthermore, the nature of the LISCOM collaboration is, if anything, a testament to the beneficiary's ability to assemble and hold together a multinational group of researchers working autonomously toward a common goal.[28]

One district court, addressing a petition by a noted professional hockey player, agreed:

> First, the INS found that Muni's role in the Oilers' three Stanley Cup victories had not been established. This conclusion overlooks some rather obvious facts. As Muni points out, there is a direct correlation between a team's performance and its players' performances, and the correlation is even stronger where key players are concerned. The facts that Muni was a starting defenseman for the Oilers and had one of the team's top plus-minus ratios strongly suggest that he was a key player. Thus the team's performance reflects his individual ability. The INS seems to believe that being a good player on a great team does not establish one's ability, but it offers no explanation why we should accept such a counterintuitive belief.[29]

Neither should we accept such a counterintuitive belief, and these strong statements of the AAO and a federal district court in *Muni* should figure prominently in any response to an RFE or brief on appeal where collaborative or team work is disparaged.

CO-AUTHORSHIP

In a similar vein to denigrating the significance of collaborative work is discounting the significance of co-authorship of scholarly articles. Significance is attributed to the place in which the beneficiary's name appears in the author's list for a journal article, or in the ranking of investigators and other participants in a research project, with great weight frequently placed on being "first author."

Interestingly, this question has been the subject of investigation and debate in the realm of scientific and academic scholarship and publication. In an article in the *Journal of the American Medical Association*, the significance of sequence in listings was studied. The scientists found:

> [T]he nature or extent of contributions of authors cannot be reliably discerned by authorship or order of authorship. Neither can the contributions of authors be discounted by their authorship position, for many middle and last authors make extensive contributions to the research.[30]

The place of listing rightfully should not be determinative of whether the alien has presented evidence of authorship of scholarly or scientific articles.

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[26] *Matter of [name not provided]*, WAC 01 230 53255 (AAO Feb. 28, 2003) *available at http://uscis.gov/graphics/lawsregs/admindec3/b2/2003/feb2803_01b2203.pdf* (last visited Oct. 9, 2004) ("mineral discoverer").

[27] *Matter of [name not provided]*, EAC 01 108 53232 (AAO July 8, 2003) *available at http://uscis.gov/graphics/lawsregs/admindec3/b2/2003/jul0803_02b2203.pdf* (last visited Oct. 9, 2004) ("Harvard Medical School researcher").

[28] *Matter of [name not provided]*, WAC 99 051 51587 (AAO October 2, 2001), *reprinted in* 24 Immig. Rptr. B2-55 ("LISCOM researcher").

[29] *Muni vs. INS*, 891 F. Supp 440 (N.D. Ill. 1995).

[30] *See* DW Shapiro *et al.*, "The Contributions of Authors to Multiauthored Biomedical Research Papers," 271 *JAMA* 438–42 (1994). A companion editorial noted that "clinical trials are only as strong as the weakest elements. . . ." *See* D. Rennie, & A. Flanagan, "Authorship! Authorship! Guests, Ghosts, Grafters, and the Two-Sided Coin," editorial, 271 *JAMA* 469–71 (1994).

In a 1996 decision, the AAU matter-of-factly noted: "The record indicates that the petitioner was the first author on a number of published papers, as well as second and third author on a number of other papers."[31] The 1994 JAMA article shows that the AAU got it right in 1996, and recent opinions departing from recognition of research reality should be targeted with these statements.

REFERENCES FROM COLLABORATORS

Vexing is the practice of disregarding the written testimony of collaborators and associates, simply because they are associated with the alien. Often, such testimony is dismissed with the cynical assertion that the witnesses have their own interests in mind when they offer praise for the alien and the alien's work. Moreover, letters from collaborators and associates are frequently rebuffed on the rationale that, because the letters come from within the alien's circle or institution, they cannot represent recognition at the national or international level.

Another approach has been taken by the AAU in evaluating references from witnesses with ties to the alien. The AAU said this:

> While the initial witnesses have business or political ties to the petitioner, several of these witnesses are so highly placed within their fields that their testimony carries considerable weight. Indeed, the very fact that the petitioner is close to several ranking figures lends circumstantial support to the petitioner's claim of eligibility.[32]

The company one keeps should help establish qualification as an EB-1.[33]

WHY ISN'T PUBLISHING ENOUGH?

The AAO regularly confuses two tests: publication of scholarly articles and the significance of the contributions that are reported in those articles. Because of this intermingling of the two tests, the AAO fails to give proper weight to the fact of publication, requiring, in addition, evidence of the acceptance of the publications in the community. To paraphrase, the AAO will state, "Publishing scholarly articles and making presentations at professional meetings is the norm in the professions and is not, in and of itself, sufficient to establish the requisite recognition in the field of medicine necessary to sustain a claim of extraordinary ability as contemplated under the provision." This rationale is rooted in a report published in 1998 by the Association of American Universities, studying postdoctoral appointments at selected major research universities and recommending systematization of postdoctoral education. The reports notes that while "postdoctoral education has grown rapidly, it remains a highly concentrated enterprise: . . . more than two-thirds of 1995 doctoral appointments were studying in just 50 institutions out of the nearly 350 doctorate-granting institutions surveyed." Those 50 universities will be recognized as the most prestigious in the United States. The report references "the increasingly prominent role played by postdoctoral education in the national research enterprise," but its relevance to adjudication of priority worker cases is elusive. An example of the way the AAO relies on the report is found in this language:

> The Association of American Universities' Committee on Postdoctoral education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that 'the appointment is viewed as preparatory for a full-time academic and/or research career,' and that 'the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment.' Thus, this national organization considers publication of one's work to be 'expected,' even among researchers who have not yet begun 'a full time academic and/or research career.' This report reinforces the Service's position that publication of scholarly articles is not automatically evidence of sustained acclaim; we must consider the research community's reaction to those articles.[34]

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[31] *Matter of [name not provided]*, EAC 95 086 52548 (AAU Apr. 30, 1996), *reprinted in* 16 Immig. Rptr. B2-51 ("CMV researcher").

[32] *Matter of [name not provided]*, EAC 99 001 50557 (AAU Sept. 19, 2000), *reprinted in* 23 Immig. Rptr. B2-5 ("Passenger Fleet Division head").

[33] The AAU was impressed that a letter of support came from a Nobel prize winner in *Matter of [name not provided]*, EAC 98 210 52250, (AAU, Mar. 7, 2000) *reprinted in* 21 Immig. Rptr. B2-23 ("quality management standardization and certification expert").

[34] *Matter of [name not provided]*, LIN 00 263 53123 (AAO Aug. 19, 2003), *available at http://uscis.gov/graphics/lawsregs/admindec3/b2/2003/AUG1903_03B2203.pdf* (last visited Oct. 25, 2004) ("periodontist"); Meteorologist, *supra* note 5.

This finding distorts the law and regulations, which merely require authorship of works in scholarly journals. Measuring the acceptance of the findings announced in the publications is relevant to the originality and significance of the findings, a separate question from the fact of publication.

Legacy INS leadership recognized the relevance and probative value of evidence of scholarly publications very soon after the passage of IMMACT90. Acting Assistant Commissioner Lawrence Weinig issued guidance addressing a number of questions involving the adjudication of EB-1-1 and EB-1-2 petitions.[35] In discussing published work by others about the alien's work, evidence of the alien's participation as a judge of the work of others, and evidence of either the alien's original research contributions or authorship of scholarly books and articles, Mr. Weinig suggested this:

> Generally, we maintain that a book by the alien published by a "vanity" press, a footnoted reference to the alien's work without evaluation, an unevaluated listing in a subject matter index, or a negative or neutral review of the alien's work would be of little or no value. On the other hand, peer reviewed presentations at academic symposia or peer-reviewed articles in scholarly journals, testimony from other scholars on how the alien has contributed to the academic field, entries (particularly a goodly number) in a citation index which cite the alien's work as authoritative in the field, or participation by the alien as a reviewer for a peer-reviewed scholarly journal would more than likely be solid pieces of evidence.

Again the service centers fall into the tautology rejected by the district court in *Buletini*, insisting on "proof he is a doctor of extraordinary ability in order to prove that he is a doctor of extraordinary ability."

NUMBER OF PUBLICATIONS

How many publications is enough? In a very recent decision, the AAO found that the alien "authored twenty-eight articles for professional journal publications or presentations at professional conferences." They concluded, "The beneficiary has published extensively."[36] In another case, the AAO found the beneficiary's record of over 50 publications was significant, and the significance was enhanced by letters from "competent and highly-placed witnesses" attesting to the influence of the petitioner's publications.[37] And, the AAO has somewhat begrudgingly found that the alien's record of a case report, nine articles, and 16 abstracts "marginally" meets the criterion.[38]

The regulations require only evidence of authorship of scholarly articles in professional publications, or international scholarly journals for professors and researchers. These cases show that somewhat modest numbers have resulted in approvals, and advocates can use them to take aim at the AAO numbers game.

CITATIONS TO THE ALIEN'S WORK

Citation to an alien's work is often proffered as evidence of the existence of published material about the alien and the alien's work. The AAO does not accept that general proposition.[39] However, in the Weinig Guidance, the door is left open for the argument that citation may be evidence of published material about the alien and the alien's work. As noted above, Weinig observes only that a "footnoted reference to the alien's work without evaluation [or] an unevaluated listing in a subject matter index . . . would be of little or no value."[40] But, Weinig goes on to suggest that "entries (particularly a goodly number) in a citation index which cite the alien's work as authoritative in the field . . . would more likely be solid pieces of evidence."[41]

The AAO adopts the view that the significance of citations is not that they are evidence of published

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[35] Reply from Lawrence Weinig, Acting Associate Commissioner for Examinations, to James Bailey, Nebraska Service Center Director, HQ 204.23-O, July 30, 1992 (hereinafter Weinig Guidance), *reproduced in* 69 *Interpreter Releases* 1037–38, 1049–53 (Aug. 24, 1992).

[36] *Matter of [name not provided]*, LIN 02 184 53385 (AAO, Sept. 17, 2002) *reprinted in* 26 Immig. Rptr. B2-92) ("stem cell researcher").

[37] Quality management standardization and certification expert, *supra* note 33.

[38] *Matter of [name not provided]*, File No. [not provided] (AAO Sept. 10, 2003) *available at http://uscis.gov/graphics/lawsregs/admindec3/b2/2003/SEP1003_04B2203.pdf* (last visited Oct. 9, 2004) ("orthopedics professor").

[39] *Matter of [name not provided]*, LIN XX 093 52241 (AAO July 18 2003) *available at http://uscis.gov/graphics/lawsregs/admindec3/b2/2003/jul1803_02b2203.pdf* (last visited Oct. 23, 2004) ("research chemist).

[40] Weinig Guidance, *supra* note 35.

[41] *Id.*

material about the alien, but rather, they are evidence of the impact of the alien's work:

> Articles which cite the petitioner's work are primarily about the author's own work, not the petitioner. Even review articles focus on several developments in the field and are not primarily about the petitioner and his work in the field.[42]

And:

> The citations demonstrate the impact of the petitioner's own work, but it is unrealistic to claim that an article is "about" the petitioner's work because that work is mentioned in passing, along with the work of perhaps dozens of other cited researchers.[43]

Compare that view to the following where the AAO also rejected citations as evidence of published work about the alien:

> The petitioner initially provided a computer generated listing showing that his work was cited over eighty times in various scientific journals. . . . The heavy independent citation of the petitioner's published work bolsters the witnesses' claims that the petitioner's computational biology methods have been of major significance in his field.[44]

In other words, without accepting citations as "published materials about the alien," the AAO still looks favorably on an alien when "a substantial number of citations of the petitioner's published articles demonstrates widespread interest in, and reliance on, the petitioner's work."[45] Thus, when presenting evidence of the citation of the alien's work, the arrow should be aimed at demonstrating the significance of the alien's work, rather than as evidence of published material about the alien and the alien's work.

JUDGING THE WORK OF OTHERS

Evidence of an alien's service "judging the work of others" comes in many forms: *ad hoc* peer review of manuscripts and abstracts, serving on conference organizing committees, and directing graduate student research, to name three. Each of these activities is the subject of challenge.

Service centers often reject thesis direction as evidence meeting the criterion of "judging the work of others." This directly contradicts the Weinig Guidance on the adjudication of EB-1-1 and EB-1-2 petitions. He stated, "We are also inclined to believe that thesis direction (particularly of a Ph.D. thesis), would demonstrate an alien's outstanding ability as a judge of the work of others."[46]

With other evidence of "judging the work of others," service centers often request evidence that a beneficiary was chosen to review the work of others because the beneficiary is renowned in his field. While that is often the case, it is an inappropriate approach to the issue, and was soundly rejected by the district court in *Buletini*, where the court stated:

> The fourth criterion, however, only requires evidence that the alien participated as a judge of others in his field; it does not include a requirement that an alien also demonstrate such participation was the result of his having extraordinary ability. Such a requirement would be a circular exercise: the criterion is designed to serve as proof that plaintiff is a doctor of extraordinary ability; the Director's requirement would mean that the plaintiff must prove he is a doctor of extraordinary ability in order to prove that he is a doctor of extraordinary ability.[47]

WHAT IS THE "ORGANIZATION" FOR WHICH THE ALIEN MUST FILL A CRITICAL ROLE?

The AAO is examining what constitutes the "organization" for which the alien may show employment in a critical capacity. In a recent decision, the AAO remanded a case with instructions that the director must determine whether the alien is employed in a leading or critical role for a distinguished organization "as a whole," reminding the director that the examination must consider "whether the petitioner played a leading or critical role for merely a division of a larger organization with a distinguished reputation or for the organization as a whole."[48]

In contrast, in a case of a researcher at Baylor College of Medicine, the AAO, in sustaining an appeal,

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[42] Research chemist, *supra* note 39.

[43] *Matter of [name not provided]*, WAS 01 254 55882 (AAO Jan. 17, 2003) *available at http://uscis.gov/graphics/lawsregs/admindec3/b2/2003/jan1703_08b2203.pdf* (last visited Oct. 23, 2004) ("computational biologist").

[44] *Matter of [name not provided]*, WAC 01 109 53910 (AAO Apr. 11, 2003) ("Burnham Institute Researcher").

[45] *Matter of [name not provided]*, WAC 02 070 52665 (AAO Feb. 27, 2003) ("LBNL biophysicist").

[46] Weinig Guidance, *supra* note 35.

[47] *Buletini v. INS*, 860 F. Supp. 1222, 1228 (ED Mich. 1994).

[48] Harvard Medical School researcher, *supra* note 27.

observed: "The fact that the beneficiary heads a research team and lab indicates that she has been employed in a critical capacity at Baylor Medical College, a distinguished institution."[49] This smaller target meets the regulatory requirement of a leading role in an "organization" or "establishment," and in contrast to archery, this smaller target may be easier to hit.

WHAT IS A SATISFACTORY OFFER OF EMPLOYMENT?

An alien seeking classification as an Outstanding Professor or Researcher must demonstrate an offer of tenure or tenure-track employment as a teacher, or, if a researcher, a "comparable position."[50] Regulations interpret the term "comparable position" to mean "permanent," analogous to the tenured or tenure-track position required for a professor.[51] At least one service center is looking at what constitutes a "permanent" offer of employment in the context of "at will" employment,[52] as well as what kind of documentation is necessary to prove that the alien has received an offer of employment. In the latter instance, the service center is asking for a contemporaneous contract or employment letter.

The AAU looked at this question a decade ago. In a researcher case where the petitioner was an institution of higher education and research, the AAU found a simple letter confirming the permanent employment of the alien to be satisfactory. The AAU concluded:

> The record contains a letter dated November 9, 1993 from the acting director of the [department] of the [university and research institution] stating that the beneficiary is working as a research scientist associate I at the university in a full-time, permanent research position at an annual salary of $25,704. Based on this information, the petitioner has established that the beneficiary had been offered a permanent research position in the academic field.[53]

This quite simple formulation eliminates the need to delve further.

THE PROPOSED EMPLOYMENT NEED NOT REQUIRE AN ALIEN OF EXTRAORDINARY ABILITY

Related to the question of what is a satisfactory offer of employment for professors and researchers is the question of the nature of the proposed employment for aliens of extraordinary ability. Simply put, must the proposed employment require an alien of extraordinary ability, or must the proposed employment simply be in the "field" of endeavor? Though it was thought that this question was settled by regulations in 1994, it periodically returns. For example, in a case from 2002, the center director stated:

> The evidence is insufficient to establish that the position actually requires a person of extraordinary ability. The proffered position of Assistant Professor of Medicine is a position that appears to have been offered in the past at the institution without the requirement of an individual of extraordinary ability.
>
> It is determined that the petitioner has failed to submit sufficient documentation to establish that the requirements of Title 8, Code of Federal Regulations, Part 214.2(o)(3)(iii), supra, have been met. Therefore, it is concluded that the petitioner has not established that position or services to be preformed [sic] require an alien of extraordinary ability.[54]

This is a clear misstatement of the law and regulations. In fact, legacy INS had expressly rejected this standard. Proposed rules on O-1 petitions issued in 1994 included this requirement, but it was eliminated from the final, current regulations governing O-1 petitions:

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[49] *Matter of [name not provided]*, File No. [not provided] (AAO Nov. 1, 2002)("Baylor medical researcher").

[50] INA §203(b)(1)(B).

[51] 8 CFR §§204.5(i)(2) and 204.5(i)(3)(iii)(A)–(C).

[52] For a short discussion of "at-will" employment in this context, see DC Horne, "Requests for Evidence: Are the Outstanding Researcher Regulations Authorized by the INA?" 9 *Bender's Immigration Bulletin* 956 (Aug. 15, 2004).

[53] *Matter of [name not provided]*, NSC A72 685 599, (AAU Oct. 21, 1994), *reprinted in* 13 Immig. Rptr. B2-236 ("marine sciences researcher").

[54] *Matter of [name not provided]*, LIN 02 184 53385, decision on file with the authors; appeal sustained in *Matter of [name not provided]*, LIN 02 184 53385, (AAO Sept. 17, 2002), *reprinted in* 26 Immig. Rptr. B2-92) ("stem cell researcher").

> After careful consideration, the Service agrees that there is no statutory support for the requirement than an O-1 alien must be coming to the U.S. to perform services requiring an alien of O-1 caliber. As a result, this paragraph has been deleted from the final rule.[55]

The AAO recognized this clearly erroneous statement of the law. In the decision reversing the denial, the AAO concluded: "The director denied the petition, in part, because he determined that the evidence is insufficient to establish that the position actually requires a person of extraordinary ability. Counsel asserts that the director applied an incorrect legal standard in making this determination." After quoting the passage from the final regulation just cited, the AAO went on to say: "In review, the director applied an incorrect legal standard."[56]

This confirmation of the law is one comfort in presenting petitions for extraordinary aliens, and this "arrow" must be ready to fly as service centers continue to issue improper notices requesting evidence that the position requires an alien of extraordinary ability.

REQUIRING SPECIFIC EVIDENCE

Finally, service centers frequently demand evidence in specific categories listed in the regulations. USCIS may not pick and choose categories it wishes to see when the petition has clearly demonstrated that the beneficiary has extraordinary ability through documentation satisfying three or more criteria, or has achieved recognition as an outstanding professor or researcher through documentation satisfying two or more criteria.

The AAO has soundly rejected attempts to require specific evidence. In a 2003 case, where the director had required a prize of the level of a Nobel, the AAO held:

> [C]ounsel is correct regarding the plain language of the law and regulations. If a petitioner has not received a major award on the level of the Nobel prizes, the petitioner may establish her eligibility through meeting three of the ten regulatory criteria quoted [ ]. Only one of the ten criteria relates to awards and the regulations never specify that a petitioner must meet certain criteria instead of others. Thus, the director erred in implying that a petitioner could not establish eligibility without a major award such as a Nobel prize.[57]

CONCLUSION

"Standard creep," similar to the tax problem of "bracket creep," may have affected agency decision-making, but the law has not changed since the Priority Worker category was created in IMMACT90, and the regulations have not changed since 1994. Arm yourself with favorable court decisions, agency adjudications, and memoranda to present successful petitions. Begin each case with a reminder to the agency of the appropriate "rock bottom" burden of proof. Point out that the purpose of the criteria is to demonstrate sustained acclaim, that the documentation offered for each of the criteria is to be evaluated to determine whether it is "more likely than not" that the criteria has been satisfied, and, if the criteria are satisfied, the conclusion must be reached that the petitioner has met the burden of proof. The agency acknowledges this, perhaps grudgingly, when a petition is approved, using these words: "The petitioner has satisfied three of the lesser regulatory criteria required for classification as an alien of extraordinary ability. Pursuant to the statute and regulations as they are currently constituted, the petitioner qualifies for the classification sought."[58] The cases and documents cited in this article remind adjudicators of the correct statutory and regulatory standards, and provide arrows in your quiver to hit the bull's-eye and win an approval.

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[55] 59 Fed. Reg. 41818, 41820 (Aug. 15, 1994).

[56] Stem cell researcher, *supra* note 54, at 6.

[57] Harvard Medical School researcher, *supra* note 27.

[58] Burnham Institute Researcher, *supra* note 44; LBNL biophysicist, *supra* note 45.