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United States Citizenship & Immigration Services
Office of Public Engagement
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VIA E-Mail: opefeedback@uscis.dhs.gov

RE: Interim Memo for Comment
Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions, PM-602-0005
(*AFM* Update AD 10-41)

Sir or Madam:

The American Immigration Lawyers Association (AILA) submits these comments in connection with the Interim Policy Memo (PM) for Comment "Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions," PM-602-0005, (*AFM* Update AD 10-41), August 18, 2010.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent U.S. citizens, immigrant and nonimmigrant aliens, their family members, and businesses that receive their services, in proceedings with DHS.

AILA applauds USCIS for initiating this important new process in the development of policy and guidance. By publishing proposed policy memoranda in draft form for public review and comment and interim memoranda for comment, USCIS is taking an important step toward the goal of transparency, uniformity and consistency in the development of policy and guidance, informing the stakeholders of the direction it is contemplating, and providing an opportunity to the stakeholders to provide input and comment as the Service shapes legal interpretation, policy and procedure.

AILA welcomes the opportunity to collaborate with USCIS in framing guidance for the evaluation of evidence submitted in support of petitions for aliens of extraordinary ability under Section 203(b)(1)(A)

of the Immigration and Nationality Act (INA or Act), for outstanding professors and researchers under Section 203(b)(1)(B) of the Act, and for aliens of exceptional ability under Section 203(b)(2) of the Act.

Executive Summary and Introduction

The first part of this comment addresses each of the regulatory criteria in turn, providing feedback in parallel with the PM. AILA recognizes the similarities between the statutory and regulatory framework for the alien of extraordinary ability classification[1] and the outstanding professor/researcher classification,[2] and our comment addresses both, noting differences where warranted.

The second part of this comment addresses the final merits determination. The PM cites *Kazarian v. USCIS*,[3] as establishing the "two-part approach where the evidence is first counted and then considered in the context of a final merits determination."[4] This two-part approach is not new or unique to *Kazarian*. As discussed in detail in the second section of this comment, the two-part approach has been at the core of federal court decisions since the EB-1 classifications were first introduced.[5] It would be inaccurate to define the final merits determination based only on *Kazarian*, without regard to other federal court decisions on point. Incorporating the two-part analysis from cases that preceded *Kazarian* will provide an analytical framework that an ISO may apply in order to determine whether a petitioner has met the "preponderance of the evidence" test.

In the third and final part, AILA suggests that discussion of evidentiary criteria to establish "exceptional ability" under INA §203(b)(2) should be the subject of separate treatment, and should not be included in this guidance.

PART A: A Framework to Understand and Apply the Regulatory Criteria

AILA appreciates that the PM recognizes that the plain meaning of the regulations holds, reminding ISOs to not "unilaterally impose novel substantive or evidentiary requirements."[6] In this vein, we offer suggestions to guide a consistent and full interpretation of the regulatory criteria, ensuring that both petitioners and adjudicators understand what is required to meet these regulatory standards.

We are concerned, however, about the PM's statement that meeting three criteria is only the beginning of the analysis. The PM misinterprets *Kazarian*, as the decision does not

[1] INA §203(b)(1)(A).
[2] INA §203(b)(1)(B).
[3] 596 F.3d 1115 (9th Cir. 2010).
[4] USCIS, Evaluation of Evidentiary Criteria in Certain Form I-140 Petitions, USCIS PM-603-005 (hereinafter "PM"), at 3 (Aug. 18, 2010), *at* www.uscis.gov/USCIS/Outreach/Interim%20Guidance%20for%20Comment/Kazarian%20Guidance%20AD10-41.pdf.
[5] *See, e.g.*, *Buletini v. INS*, 860 F. Supp. 1222, 1231 (E.D. Mich. 1994); *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995).
[6] PM, *supra* note 4, at 3.

limit the first part of the analysis to a simple counting exercise. Rather, in reviewing the evidence presented, the *Kazarian* court performed a substantive evaluation of each criterion to determine if the evidence supported a finding that a specific criterion was met. Finding that only two criteria were met, the court held that "the applicant has failed to satisfy the regulatory requirement of three types of evidence."[7] Therefore, *Kazarian* recognized that there is a qualitative aspect of this review, as "the examiner must evaluate the evidence presented."[8]

As discussed in more detail in Part B of this comment, the final merits determination mentioned in *Kazarian* was not presented as an opportunity to second-guess the three criteria. Rather, as clearly articulated in *Buletini v. INS*, "[o]nce it is established that the alien's evidence is sufficient to meet three of the criteria…, the alien must be deemed to have extraordinary ability unless the INS sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard."[9] We contend that any other interpretation belittles the significance of having met at least three criteria, rendering the whole purpose of meeting three criteria meaningless. Another federal district court recently concurred in this view, finding that the USCIS' Administrative Appeals Office (AAO) had "already concluded that [the petitioner] met" two of the criteria and that "if we are able to identify one other…we must conclude that the AAO's denial…was contrary to law."[10]

To facilitate the substantive evaluation of each criterion, we offer the following comments and suggestions:

Receipt of Lesser Nationally or Internationally Recognized Prizes or Awards
8 C.F.R. §204.5(h)(3)(i)
Receipt of Major Prizes or Awards for Outstanding Achievement
8 C.F.R. §204.5(i)(3)(i)(A)

This first criterion is one in which there are differences between the regulatory standards for an alien of extraordinary ability and outstanding researchers/professors. Looking first at the alien of extraordinary ability standards, in reviewing evidence submitted in support of this criterion, the following should be taken into consideration:

- The regulations specifically allow "lesser" prizes or awards, indicating that the prizes or awards do not have to be "major";
- The lesser prizes or awards may be nationally **or** internationally recognized;

[7] *Kazarian*, 596 F.3d 1115.
[8] *Buletini*, 860 F. Supp. at 1233 (citing letter from Lawrence Weinig, INS Acting Assistant Commissioner for Examinations to James Bailey, Director of the INS Nebraska Service Center (July 30, 1992) [hereinafter "Weinig letter"]).
[9] *Id*. at 1234 (emphasis added). *See also Muni*, 891 F. Supp. at 445–46 (recognizing that the burden is on the INS to explain why, despite having met three criteria, the evidence did not establish the acclaim and recognition standard).
[10] *Gulen v. Chertoff*, 2008 U.S. Dist. LEXIS 54607 (E.D. Pa. July 16, 2008).

- The lesser prizes or awards must be received or directly attributable to the alien, keeping in mind that collaborative team work is inherent in many fields of endeavor, and group or collective prizes or awards should be given equal merit;
- The prizes or awards must be nationally or internationally **recognized**, though not necessarily nationally or internationally distributed; and
- It is the prize or award itself that should have national or international recognition through this distinct criterion, and not the alien. To hold otherwise would be "imposing …requirements beyond those set forth"[11] in the regulations.

The PM suggests that ISOs should consider whether the awards are "reported in the media."[12] We strongly disagree, as this is precisely the type of "novel substantive or evidentiary standard"[13] that *Kazarian* warns against. Such a requirement fails to recognize that while a prize or an award may be nationally or internationally recognized within a particular field of endeavor, it may not constitute national or international news, since not all fields of endeavor are of sufficient interest to the general public. Moreover, regarding the extraordinary ability classification, the regulatory language employs the term "lesser," distinguishing it from more substantial awards that may meet the one-time achievement standard.[14]

More appropriate lines of inquiry include, for example, the PM's suggestion to consider the number of awardees.[15] In addition, ISOs may also consider the criteria by which awardees are selected, the selection process itself, the entity that granted the award, and evidence that addresses the reputation of the award within the field.

Though there are differences between the regulatory standards for extraordinary ability and for outstanding professors or researchers, this type of analysis can be applied to both classifications, as it provides room to appreciate the differences. The primary difference for the outstanding professor or researcher classification is that there is no requirement that the prize or award be nationally or internationally recognized, only that it be "major." In addition, as with the alien of extraordinary ability, we agree that the prize or award must be received or directly attributable to the alien, keeping in mind that collaborative team work is inherent in many fields of endeavor, and group or collective prizes or awards should be given equal merit.

AILA would like to take this opportunity to comment on a few examples of honors, awards, and prizes that seem to consistently raise doubts for ISOs in adjudicating petitions filed under both classifications. At the top of this list would be research funding, which USCIS routinely rejects as not satisfying this criterion. An example of USCIS' treatment of research funding is found in an AAO decision that states, "…research grants simply fund a scientist's work. A substantial amount of scientific

[11] PM, *supra* note 4, at 3.
[12] *Id.* at 5.
[13] *Id.*
[14] 8 C.F.R. §204.5(h)(3).
[15] PM, *supra* note 4, at 5.

research is funded by research grants from a variety of public and private sources. Every successful scientist engaged in research, of which there are hundreds of thousands, receives funding from somewhere."[16] The AAO simply dismissed the receipt of funding, without any consideration of evidence of the competitive nature of the grant, on what basis grant recipients were selected, the amount of the grant, et cetera. AILA suggests that all these points are appropriate lines of inquiry.

In another decision, the AAO refused to consider funding as an award by stating: "[W]e cannot ignore the fact that research funding through competitive grants is inherent to many fields within the basic and applied sciences. Although prestigious grants may indicate the recognized value of the recipient's research, they are not prizes or awards for documented achievements."[17] While acknowledging that some grants do indicate recognition of the alien's excellence, the AAO, without explanation, nevertheless finds that grants may not be treated as awards.

Certain sources of funding are more competitive, and more prestigious, than others and are recognized as such throughout academia, and USCIS should not reject what is a well-established industry standard, without considering the specific nature of the research grant. As just one example, the National Institutes of Health (NIH) reports historically low grant success rates.[18] In 2008 (the most recent year reported), the NIH grant approval rate was only 21.8%, meaning that barely more than one in five applications for NIH funding was successful. The peer-review process specifically calls for proof of scientific significance and innovation, and the NIH funds only those projects that are deemed to meet its very high threshold. NIH funds are awarded only after an expert review of an applicant's record of scientific achievement, significance and innovation.[19]

USCIS routinely rejects evidence of a beneficiary's receipt of fellowship awards and grants as meeting this criterion,[20] based on the faulty assumption that they are "student-level scholarships" that do not rise to the level of "lesser nationally or internationally recognized prizes" (for extraordinary ability) or "major prizes for outstanding achievement" (for outstanding researchers). There are many types of fellowships, some of which do meet these standards, and should be considered on their own merits. Some examples include the Woodrow Wilson International Center for Scholars fellowship, a highly competitive and prestigious fellowship requiring "outstanding capabilities and experience" as judged by "external interdisciplinary panels of distinguished scholars and practitioners."[21] Another example would be the Fulbright Scholar Program, which includes several different programs both for students and more established scholars. The Fulbright New Century Scholars global program is designed to bring together a group of "outstanding" research scholars and professionals, from the U.S. and participating

[16] Matter of [name not provided], LIN 07 050 50034 (AAO July 16, 2009).
[17] Matter of [name not provided], LIN 08 158 52452 (AAO May 29, 2009).
[18] *See* http://report.nih.gov/success_rates/index.aspx.
[19] *See* http://grants.nih.gov/grants/peer_review_process.htm.
[20] AFM 22.2(i)(1)(E) 1. **NOTE.**
[21] www.wilsoncenter.org/index.cfm?fuseaction=Fellowships.welcome.

countries around the world, who are selected through an open international competition to conduct multi-disciplinary research on a global theme of significance to mankind.[22]

AILA urges USCIS to recognize that competitive research grants and competitive fellowships awarded based on prior accomplishments can satisfy the criteria in 8 C.F.R. §204.5(h)(3)(i) and 8 C.F.R. §204.5(i)(3)(i)(A).

Membership in Associations That Require Outstanding Achievements
8 C.F.R. §204.5(h)(3)(ii)
8 C.F.R. §204.5(i)(3)(i)(B)

With respect to the analysis in the PM of 8 C.F.R. §204.5(h)(3)(ii) and 8 C.F.R. §204.5(i)(3)(i)(B), AILA agrees with USCIS that where membership in professional associations may require **only** a certain level of education, a payment of a membership fee, or where membership is an entry requirement for certain professions, such membership would not rise to the level required in the regulations. However, we believe that the specific example provided, membership in the National Academy of Sciences as a Foreign Associate, will give ISOs the impression that this evidentiary category may only be satisfied if a selective association only admits a small number of members. This misapprehension may be compounded by the sentence that states, "The petitioner must show that membership in the associations is ***exclusive***."[23] The regulatory definition contains no requirement of "exclusivity," and to add such would amount to the type of "novel substantive or evidentiary standard"[24] that *Kazarian* warns against.

There are several highly selective professional organizations with large memberships that require aspiring members to go through rigorous nomination and review processes that satisfy the dictates of 8 C.F.R. §204.5(h)(3)(ii). Examples include the International Astronomical Union, Royal Societies for various professions in the United Kingdom, and the American Society for Clinical Pharmacology and Therapeutics. There is nothing in the regulations to support the suggestion that the exclusivity of an organization satisfies this evidentiary criterion. The focus of inquiry should be on the organization's membership requirements and processes, and the factors an organization takes into consideration in determining whether an individual has the requisite level of achievement, rather than the number of members. While admission to membership in the National Academy of Sciences would certainly qualify as membership in an association requiring outstanding achievements, the universe of organizations that may satisfy this evidentiary category is larger than the PM's example would indicate.

Moreover, in both the extraordinary ability and outstanding professor or researcher contexts, USCIS should recognize that there are professional associations that have different levels of membership, and in those associations, higher levels of membership

[22] www.cies.org/ncs/.
[23] PM, *supra* note 4, at 5 (emphasis added).
[24] *Id.*

may satisfy extraordinary ability or outstanding researcher or professor criteria. For example, the American College of Clinical Pharmacology (ACCP) is dedicated to advancing the science of clinical pharmacology. ACCP has four levels of membership, ranging from Student Member at the entry level to Fellow at the highest level of membership. Although all membership levels have annual fees, the full Member and Fellow levels of membership require certain substantial accomplishments in the field. Arguably, an applicant who is a Fellow of the ACCP could rely on this status as evidence of membership in associations that require outstanding achievements. The Institute of Electrical and Electronics Engineers (IEEE) is another similarly structured organization, with senior membership reserved for those with significant professional technical accomplishments. AILA asks that USCIS amend the PM to remind ISOs that membership in multi-level professional organizations, at a level indicating outstanding achievement, may also be considered to satisfy this evidentiary category.

Published Material About the Alien
8 C.F.R. §204.5(h)(3)(iii)
8 C.F.R. §204.5(i)(3)(i)(C)

The regulatory definition for this criterion is rather straightforward, leaving little room for misinterpretation or misunderstanding. While there are slight differences in the regulatory language in 8 C.F.R. §204.5(3)(i)(C) and 8 C.F.R. §204.5(h)(3)(ii), both state that the documentation must demonstrate that material is published:

1) about the alien;
2) relating to the alien's work in the field;
3) in "professional" publications (for outstanding researchers) or "professional, major trade, or other major media" (for extraordinary ability); and
4) shall include the title, date, and author of the material.

AILA welcomes the clarification that media can be on-line or in print.

In *Russell v. INS*,[25] the district court opined on what constitutes "major media." The court rejected INS' position that articles from Chicago newspapers did not demonstrate that Russell had "major media" attention because the newspapers were not *national* media. The court noted, "Nowhere in the relevant language of the INS regulation is there a requirement that the submitted media publications be from news outlets throughout the country."[26] The PM's suggestion to focus on the circulation of the publication would be a more relevant line of inquiry than whether the publication is *national* media. There may be other factors to consider too, such as evidence of the editorial influence of the media source.

[25] *Russell v. INS*, 2001 U.S. Dist. LEXIS 52 (E.D. Ill. Jan. 4, 2001).
[26] *Id*. at *15 n.5.

The PM should clarify that an ISO may consider the intended audience as a factor in determining whether the publication is a professional or trade publication.

Participation as a Judge of the Work of Others
8 C.F.R. §204.5(h)(3)(iv)
8 C.F.R. §204.5(i)(3)(i)(D)

The PM specifically mentions that *Kazarian* was concerned with USCIS' interpretation of 8 C.F.R. §204.5(h)(3)(iv). Yet the PM offers no instruction on this criterion.

AILA suggests that some discussion of the kind of evidence to satisfy the "judge of the work of others" criterion would be helpful as the question of service as the judge of the work of others has been the subject of commentary, liaison discussion, and judicial analysis. For example, a 1992 letter by Lawrence Weinig, a senior legacy INS official, recognizes that "participation by the alien as a reviewer for a peer reviewed scholarly journal would more than likely be a solid piece of evidence."[27] Moreover, legacy INS has consistently recognized that peer-review satisfies this criterion. This includes the June 3, 2002 approved AILA-TSC Liaison minutes, and again in the October 7, 2002 AILA-TSC Liaison minutes, which reiterate that "serving as a reviewer for a recognized scholarly or scientific journal is one of the types of evidence which will be considered in the adjudication of EB-1 cases."[28] The October 2002 liaison minutes further recognize that reviewing for a "notable journal is not the only manner in which to satisfy…[this] criteria….one may be deemed to be a judge of the work of others … by providing thesis direction in the academic setting or by serving as a reviewer for significant research grants...."[29]

Therefore, as guidance for ISOs and the public alike, USCIS should include these examples in the AFM. AILA also notes that there are a number of similar positions that should satisfy this criterion.[30] For example, a position on a journal editorial board would certainly meet this standard, as it is the editorial board that, *inter alia*, selects the peer reviewers, thereby judging the judges, so to speak. Likewise, conference organizers are often involved in reviewing abstracts and selecting speakers, deciding whose work merits presentation, as well as selecting the appropriate experts to speak on a particular topic. Authorship of review articles and textbook chapters may also fall within this criterion, as these are frequently a comprehensive review and commentary on a specific area. Review articles and chapters tend to carry significant authority because they synthesize and analyze the results of many independent studies, making strong conclusions that are used

[27] Weinig letter, *supra* note 8.
[28] AILA/TSC June 3, 2002 Liaison Meeting Approved by TSC for Publication August 14, 2002, *published on* AILA InfoNet at Doc. No. 02082742 (*posted* Aug. 27, 2002); Questions and Answers from October 7, 2002 AILA/TSC Liaison Meeting, *published on* AILA InfoNet at Doc. No. 0212641 (*posted* Dec. 16, 2002).
[29] *Id.*
[30] AILA is not attempting to generate an exhaustive list, but rather to provide some examples that may be of use to ISOs.

in the field. Other examples include moderating and/or chairing conference presentations, seats on advisory boards, or positions on committees.

The common thread with all of these examples is that they involve evaluating and analyzing the work of others in the field, and making an assessment of the importance of the others' work. This would be the appropriate line of inquiry to determine whether someone has met this criterion; namely, to determine if they did in fact judge the work of others. As the court held in *Buletini*, "The fourth criterion … 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 that such participation was the result of his having extraordinary ability. Such a requirement would be a circular exercise."[31] Therefore, the focus of the inquiry should be on the nature of the activity itself, and how it evidences that the alien has in fact judged the work of others.

Original Scientific, Scholarly, Artistic, Athletic, or Business Related Contributions of Major Significance
8 C.F.R. §204.5(h)(3)(v)
Original Scientific or Scholarly Research Contributions
8 C.F.R. §204.5(i)(3)(i)(E)

There are a number of ways to establish the original character of, and where appropriate, the significance of, contributions, and the PM highlights several, recognizing that work that is published, presented, and cited "may be probative of the significance of the alien's contributions."[32] The burden is on the petitioner to establish this criterion and it is incumbent on the petitioner to provide evidence that is comprehensible to the ISO, to facilitate the ISO's analysis of this criterion. We do not expect ISOs to have expertise in every field of endeavor, much less to be able to judge the merits of what are frequently very technical contributions. It is towards this end that reference letters and expert testimonials can be of tremendous value.

USCIS has a long history of accepting expert letters as evidence. Expert letters were listed in the 1992 Weinig letter as among the acceptable types of evidence to support these classifications.[33] A number of non-precedent AAO decisions reinforced this view. For example, one AAO decision noted that "[t]he significance of the Beneficiary's research work is evidenced by the numerous letters from doctors and researchers in Canada, China and the United States, attesting to the merits of the beneficiary's contributions to his field and to his international reputation."[34] In addition, the court in *Buletini* held that expert statements respecting the petitioner's contributions must be fully considered, even if the expert opinions came from people who knew or had worked with

[31] *Buletini*, at 1231.
[32] PM, *supra* note 4, at 7.
[33] Weinig letter, *supra* note 8.
[34] Matter of [name not provided], 1997 WL 33171069 (AAO 1997); *see also* Matter of [name not provided], AAU LIN 95 08951447, 1997 WL 33171273 (AAO 1997).

the beneficiary.[35] Similarly, the court in *Muni v. INS* found that dismissal of expert letters without full consideration was "clear evidence that [the INS] did not adequately evaluate the facts before it."[36]

Kazarian did not change this analysis. Rather, *Kazarian* noted that expert opinion letters cannot be vague and should specifically identify contributions and give examples of how they influenced the field.[37] A letter which satisfies these requirements is objective testimonial evidence which must be considered, and which may provide critical insight to understand the nature and significance of the contributions. Given that many of these petitions involve complex scientific and technical work, such letters should be valued as a way to comprehend what the work is all about. Our concern is that the expert letters do not receive fair consideration, and are instead frequently summarily dismissed as suspect. ISOs should determine how much weight to give the letters based on content and the credentials of the referee. An expert letter may not be dismissed without some specific, cogent reason for finding that it is not credible evidence in support of the petition.

Expert letters are not the only way to establish original contributions. There are myriad ways to show original contributions, based on the nature of the field of expertise and the nature of the claimed contribution. While we do not discount the PM's suggestions, we do not want this to limit the range of acceptable documentation. For example, a professor of architectural design might make an original contribution by creating an actual innovative design rather than writing an article, or an engineer may have established standards for corporations to develop cutting-edge technology, which may be evidenced by minutes of different meetings, recommendations based on the contributions, et cetera.

We appreciate and applaud the PM's recognition that "in certain cases, evidence submitted to establish one criterion may be sufficient to satisfy more than one."[38] Publication of scholarly or research work is an important way to demonstrate the originality of a scholar's work and reputation in the community. For instance, publishing in top journals such as *Proceedings of the National Academy of Sciences of the U.S.A.*, *The New England Journal of Medicine*, *Lancet*, *Science*, and *Nature*, is highly competitive and is open only to researchers reporting cutting-edge information. A record of publication in these journals, in and of itself, may mean that a scientist is recognized for original scientific or scholarly contributions, and that those contributions are "of major significance."

Publication in scholarly journals is not an easy task. Not every academic succeeds in publishing in peer-reviewed professional journals recognized as key to their particular field of study or research. ISOs may assess whether a particular author's articles were published in a non-professional journal lacking any built-in peer-review safeguards,

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[35] *Buletini* at 1232.
[36] *Muni v. INS*, 891 F. Supp. 440, 445 (N.D. Ill. 1995). See also *Racine v. INS*, 1995 U.S. Dist. LEXIS 4336, 1995 WL 153319 (N.D. Ill. Feb. 16, 1995).
[37] *Kazarian*, at 1122.
[38] PM, *supra* note 4, at 4–5.

whether the trade publication is "minor," or whether or not the publication is a "trade publication" or other "major media outlet." ISOs should also keep in mind that there are a large number of highly respected specialized journals publishing critical scientific material that is grounded in specialized research. Such journals are often included in large subject-matter categories and do not show in the rankings. In these scenarios, ISOs should refer to these publications' peer-review processes and acceptance rates.

Finally, we are concerned that there was no guidance for 8 C.F.R. §204.5(i)(3)(i)(E), the criterion of "original research" applicable to Section 203(b)(1)(B) petitions for outstanding professors and researchers. It is important to note that the criterion at 8 C.F.R. §204.5(i)(3)(i)(E) differs substantially from 8 C.F.R. §204.5(h)(3)(v). The former only requires that contributions be original, while the latter requires they be of "major significance." The PM should remind examiners of this difference, particularly in light of the PM's discussion of how something may be "original" but not "significant,"[39] and given the propensity of ISOs to find that **all** scientific research is by definition "original" and therefore proving an "original" contribution is insufficient for purposes of 8 C.F.R. §204.5(i)(3)(i)(E). AILA requests that this be amended in the PM.

Authorship of Scholarly Articles
8 C.F.R. §204.5(h)(3)(vi)

AILA is concerned that the PM offers a definition of what constitutes a "scholarly article" that is restrictive and misleading. The regulatory criterion discusses "authorship of scholarly articles in the field, in professional or major trade publications, or major media." The list of elements in the PM that would characterize a "scholarly article," such as footnotes, endnotes, or bibliography, are not features necessarily found in professional or trade publications, or major media. AILA suggests the use of a judicial definition of "scholarly." *Gulen v. Chertoff* explains the concept of "scholarly" in the following way: "… a work becomes scholarly by virtue of its author and its subject matter, not its intended audience."[40] The definition in *Gulen* better lends itself to application where the material being proffered as a "scholarly article" is being published in a medium such as a major newspaper, periodical, or trade or professional publication. ISOs should keep in mind that a scholar may author articles in a variety of formats, with or without footnotes, endnotes, or a bibliography. For example, an article written by a scholar in a major trade publication (e.g., *Forbes*) or other major media (e.g., the *New York Times*) would not include footnotes, endnotes or a bibliography, due to the formatting and editorial requirements of these publications.

USCIS should adhere to the plain meaning of the regulatory definition. We are concerned that USCIS has often stated that researchers are expected to publish and that aliens seeking to qualify as extraordinary must show that their publications establish national or international acclaim or international recognition. As held in *Buletini,* this

[39] *Id* at 7.
[40] *Gulen, supra* note 10.

would constitute an abuse of discretion because it would require a "plaintiff to prove he is a doctor of extraordinary ability in order to prove that he is a doctor of extraordinary ability."[41]

The regulations simply ask for "evidence of authorship of scholarly articles in the field, in professional journals." The regulations do not require that the journals be prominent or that the alien's publications be of particular caliber. As such, the PM should remind ISOs to accept evidence of authorship of scholarly articles without requiring additional information. While it is accurate to state that publishing alone does not necessarily equal sustained acclaim or international recognition, publishing alone *does* satisfy the "authorship of scholarly articles in the field" criterion.

The AFM at chapter 22.2(i)(1)(E) 6. **NOTE** references a 1998 report by the Association of American Universities' (AAU) Committee on Graduate Education, which states that postdoctoral appointees are expected to publish the results of their research.[42] USCIS has taken that statement out of context. USCIS must analyze the report as a whole. For instance, the same report also notes that postdoctoral appointees perform a significant portion of the nation's research and augment the role of graduate faculty in providing research instruction to graduate students. This confirms that postdocs are an important scholarly force.

Research and similar activities that are conducted for proprietary purposes, such as industrial research and product development pose special issues. Consideration should be given to petitioners who would normally publish their findings in professional publications, major trade publications or other major media, but due to national security, trade secret, or proprietary reasons, are unable to publish in the public domain. Under these circumstances, ISOs should consider comparable evidence (e.g., invention reports, technical reports, internal presentations to senior management or a larger consortium, submissions to government agencies, etc.) for this regulatory criterion.

Display of Work in Artistic Exhibitions or Showcases
8 C.F.R. §204.5(h)(3)(vii)

The regulation at 8 C.F.R. §204.5(h)(3)(vii) asks for evidence of the display of the alien's work in the field at artistic exhibitions or showcases. This criterion readily applies only to artistic fields and may exclude aliens practicing in other fields of endeavor from using it directly. However, 8 C.F.R. §204.5(h)(4) allows submission of comparable evidence in a situation where a criterion does not readily apply to the beneficiary's occupation. ISOs should consider such comparable evidence if it is submitted.

To evaluate evidence submitted to satisfy this criterion, consider whether the work displayed is the alien's work, including the collaborative work product of a team. For

[41] *Buletini*, at 1231.
[42] Committee on Graduate Education, Ass'n of American Universities, Report and Recommendations (1998), *at* www.aau.edu/WorkArea/showcontent.aspx?id=6720.

instance, where an alien is part of a group (not a solo artist who is the star of his/her own show), the display of the alien's artistic work should satisfy this criterion. As an example, an alien actor's appearance as a character in a television show (which has other characters played by other actors) should meet the standard.

The most obvious examples of exhibitions and showcases are art galleries or museums, film, television or theatrical productions, etc. However, ISOs should also consider less conventional venues as equally valid. In essence, this criterion calls for confirmation that the alien's work has been presented to an audience of viewers, which whould suggest the public's interest in the alien's work. As such, other venues that display the alien's work to the public could include artistic exhibitions on public streets (e.g., Marc Chagall's Four Seasons mosaic sculpture at the Exelon Plaza / The First National Plaza in Chicago), exhibitions at public libraries (see http://www.loc.gov/exhibits/ for exhibitions at the Library of Congress), art displayed at places or worship (e.g., Tiffany stained glass windows displayed at numerous churches around the U.S.), etc. There are many ways in which artists display their work for public viewership. ISOs should consider submitted evidence with that in mind.

This is one of three criteria of the extraordinary ability regulations limited to a specific field of endeavor (the arts) and excludes other fields.[43] Since this criterion as drafted applies only to the arts, it disqualifies aliens working in other fields from using it. Because it does not readily apply to any occupation outside of the arts, ISOs should consider comparable evidence if it is submitted. In other words, although the specific language of this criterion is designed for artists, other individuals should be able to use it if they can demonstrate that their work has been comparably displayed.

Leading and Critical Role for Distinguished Organization
8 C.F.R. §204.5(h)(3)(viii)

In evaluating this criterion, the regulation requests "evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation." AILA commends the draft PM as providing useful and common sense guidance on both parts of this criterion.

The PM notes that "a key question may be whether the alien's role was leading or critical to the organization as a whole." AILA appreciates the use of the word "may," but still suggests that this be clarified to note that many larger organizations, such as universities, nonprofits or corporations may have many parts, and that an alien may play a leading or critical role for a key function or component of the organization.

[43] The other two criteria that are also limited to specific fields are evidence of authorship of scholarly articles (applies only to scholars) and evidence of commercial successes in the performing arts (applies only to performing artists). *See* 8 C.F.R. §204.5(h)(3)(vi), (x).

It is easiest to identify someone who has played a leading or critical role at a distinguished institution when that institution is very small, and the alien can be said to be wholly responsible for the organization's reputation.

Below is an example to consider:

Dr. X was the Principal Investigator (PI) on a number of projects at a major medical research center, including a highly competitive federal "Core Center of Excellence Grant." That Dr. X was awarded this grant as the PI demonstrates that he is recognized as an expert in the field who is leading research that is of substantial interest to the federal government and medical community. This fact is supported by testimony from both collaborators and independent experts, all of whom confirm that Dr. X is widely recognized as the lead researcher of, and therefore primarily responsible for, the aforementioned scientific projects spearheaded at the research center.

However, this project may be only one of many major medical research projects undertaken at the center. No one individual can be responsible for the standing of such a large and prestigious institution. The center's reputation allows it to recruit from among the very best researchers in the world. That Dr. X was selected from this pool of the world's best medical researchers to lead cutting-edge, federally funded research projects sets him apart from even this elite group. Top-tier researchers like Dr. X, who distinguish themselves even when surrounded by the best scientists in the world, are precisely the reason that the research center and institutions like it are able to maintain and build upon their excellent reputations.

As a rule, all research institutions employ researchers, but not all researchers lead critical research efforts at internationally-recognized research facilities and produce critical breakthrough research discoveries that significantly advance the research agenda at such highly respected institutions. For this reason, Dr. X should be considered to meet the criterion for performing a critical role for laboratories that have distinguished reputations in the field.

Other examples would be a petroleum engineer leading a research group at a large oil company, the director of a regional program at an international aid organization, or the director of an athletics program at a university with a distinguished record in that field of sports.

Finally, AILA appreciates the common sense use of a dictionary definition of the term "distinguished." The PM should remind ISOs that the second part of that definition – befitting an eminent person – provides an alternative method of analysis of this criterion. In addition to showing the reputation of the institution or its key component, the alien could also show that others who hold similar positions are in their own right "eminent." Common examples would be editors of journals where the other editors besides the alien have distinguished reputations, or research programs where the other researchers at the

same level (or who have held the alien's position previously) can document that they are "distinguished."

High Salary in Relation to Others in the Field
8 C.F.R. §204.5(h)(3)(ix)

AILA appreciates the clear guidance that the PM provides for this criterion.

The PM provides ISOs three specific websites that offer federal databases of wages in specific fields.[44] These websites will help in evaluating these cases. In addition, at least one AAO decision refers to www.bls.gov/oco/ocos091.htm#earnings, which specifically references the salary range for the top percent of video editors in the petitioner's geographic region.[45] The third database listed in the PM, the DOL's Office of Foreign Labor Certification Online Wage Library, is a particularly strong and long-standing tool, as it forms the basis for wage determinations in H-1B and labor certification cases.

The PM should also remind ISOs that the basis for judging the salary is to compare the petitioner and others in his or her field in comparable situations, which means comparable economies. For example, a Japanese doctor's salary should be judged based on the comparable salaries of physicians in Japan, as paid in Japanese yen.[46] Aliens working in countries with different economies should be evaluated based on the wage statistics or comparable evidence there, rather than by simply converting the salary to U.S. dollars and then viewing whether that salary would be considered high in the United States.[47]

Commercial Success in the Performing Arts
8 C.F.R. §204.5(h)(3)(x)

The PM should remind ISOs that comparable evidence is often used in this category for those showing commercial success in the performing arts, as some fields do not have box office receipts or cassette, compact disk, or video sales. In the evolving world of technology, for example, downloads of songs from iTunes might be as appropriate a measure of success as compact disk sales.[48]

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[44] PM, *supra* note 4, at 9.
[45] Matter of [name not provided], LIN 08 003 53005, at 9 (AAO Aug. 26, 2009).
[46] *Buletini*, at 1232 n.12.
[47] *Id*.
[48] *See, e.g.*, Joseph Plambeck, "Platinum Is So Passé. In iTunes Era, the Singles Count," *New York Times* (Aug. 30, 2010), at www.nytimes.com/2010/08/30/business/media/30hits.html ("For decades, the music industry has been looking to the album charts to establish what made a hit. In the past 10 years, though, album sales have plummeted, sales of singles have surged and new sources of revenue have emerged — like fees for music streamed online and ringtone purchases — that are changing the definition of a hot artist.").

Comparable Evidence
8 C.F.R. §204.5(h)(4)

The PM's guidance on comparable evidence determinations is a step in the right direction, but falls short of articulating a clear adjudicatory standard. Where regulatory criteria do not readily apply, the regulation at 8 C.F.R. §204.5(h)(4) provides much-needed relief. The PM should clarify that 8 C.F.R. §204.5(h)(4) allows for both the provision of evidence that is comparable to any of the ten listed criteria, and other evidence of equivalent persuasive value to demonstrate extraordinary ability.

In the past, the AAO has held that it would allow the submission of comparable evidence only if none of the ten criteria of 8 C.F.R. §204.5(h)(3) apply to the beneficiary's occupation.[49] However, this renders the "comparable evidence" criterion practically unusable. AILA encourages USCIS to clarify that this is an inappropriate application of the comparable evidence regulation. To conclude that the threshold for eligibility under the "comparable evidence" regulation is establishing that none of the ten criteria apply to the beneficiary's occupation is to strip this regulation of any meaning. The ten regulatory criteria are sufficiently diverse such that they apply, at least partially, to most existing occupations. Thus, under this reasoning, the "comparable evidence" regulation would be used only for the most obscure fields in extremely rare circumstances. This interpretation of the regulations is too narrow, as nothing suggests that the "comparable evidence" regulation is reserved only for such extreme scenarios.

The "comparable evidence" regulation is ameliorative, as it permits the use of evidence that does not naturally fall into one or more of the ten criteria and expands the alien's options for proving extraordinary ability. The logical construction of the regulation, therefore, is that if the alien does not readily meet at least one of the enumerated criteria, he may provide comparable evidence that demonstrates extraordinary ability. Any other interpretation of the interplay between the regulatory criteria in 8 C.F.R. §204.5(h)(3)(i)-(x) and the "comparable evidence" regulation would render the latter meaningless. Thus, if an alien can demonstrate that certain criteria do not readily apply to his occupation (e.g., inability to publish due to proprietary reasons, or new and emerging occupations), comparable evidence should be considered to allow for a fair evaluation of eligibility.

Part B – The Final Merits Determination

The PM articulates a two-part analysis of the evidence submitted in support of immigrant petitions filed for the extraordinary ability category, following *Kazarian v. USCIS*:[50]

> The ISO must first evaluate the evidence on an individual basis to determine if it meets the criteria, and then must consider all of the evidence in totality in making the final merits determination.[51]

[49] *See, e.g.*, Matter of [name not provided], EAC 04 033 50279 (AAO May 25, 2007).
[50] *Kazarian*, at 1122.
[51] PM, *supra* note 4, at 3.

Where the *Kazarian* court falls short, however, is in not providing a structure for making the merits determination.

AILA believes that the scheme of analysis articulated by *Buletini* provides an approach that will best achieve USCIS' goals of consistent and transparent adjudication. The *Buletini* court first analyzed whether the plaintiff met three of the ten criteria enumerated in 8 C.F.R. §204.5(h)(3). Having determined that the plaintiff did provide sufficient evidence of three of the ten enumerated criteria, the court stated:

> Once it is established that the alien's evidence is sufficient to meet three of the criteria listed in 8 C.F.R. §204.5(h)(3), the alien must be deemed to have extraordinary ability unless the INS sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard.[52]

The court in *Buletini* recognized that USCIS' intention in creating specific enumerated evidentiary criteria for immigrant petitions for extraordinary ability was to "make compliance easier by apprising aliens of the evidence they need to present."[53] Accordingly, the court concluded that once the petitioner provides documentation required under the regulation, the petitioner has demonstrated *prima facie* eligibility for approval. The burden of proof then shifts to USCIS to demonstrate by "specific and substantiated reasons" why the alien is nonetheless not qualified for the benefit.[54]

Simply put, once a petitioner presents evidence to satisfy three, or two, of the regulatory criteria, the petitioner has demonstrated, by the preponderance of the evidence, eligibility for the classification sought, and it is the burden of USCIS to show, by competent and substantial evidence, that the petitioner has not met its burden. Under this approach, an ISO could address any specific and concrete basis to question eligibility - despite meeting the evidentiary criteria – via a request for evidence (RFE), explaining those reasons and providing the countervailing evidence.

AILA believes that the approach taken by the court in *Buletini* is the correct framework for USCIS analysis of extraordinary ability petitions. This approach meets USCIS' goals of transparency and consistency in adjudication. It preserves and supports the clear regulatory language of what evidence is required for a *prima facie* approvable petition. Moreover, it provides USCIS adjudicators with a clearer standard of review.

In addition, this approach reconciles what could otherwise be construed as inconsistencies in various federal court decisions. In addition to *Buletini*, the courts in *Muni v. INS, Racine v. INS,* and *Gulen v. Chertoff,* all evaluated whether the plaintiffs met at least three of the ten criteria, and held that having met the required evidentiary

[52] *Id.* at 1234.
[53] *Id.* (summarizing and referencing Weinig letter, *supra* note 8).
[54] *Id.*

burden of proof, plaintiffs were eligible as aliens of extraordinary ability, absent any evidence indicating the contrary. The courts in *Muni* and *Racine* emphasized that legacy INS offered no specific explanation or evidence why plaintiff was ineligible, despite meeting the evidentiary requirements, suggesting that the courts would have been open to consider such countervailing evidence. This approach is consistent with *Kazarian*. The court in *Kazarian* found that the plaintiff failed to provide evidence to meet three of the ten criteria and upheld USCIS' denial solely on that basis.[55] The *Kazarian* court never reached the issue of how the second step in the analysis should be conducted.

AILA urges USCIS to revise the second part of its two-part analysis to recognize that once a petitioner demonstrates the existence of evidence from the requisite categories, the petitioner has met its burden of proof, and that the burden then shifts to USCIS. Such a change would make USCIS guidance to the field consistent with its regulation. It would provide petitioners with a clear evidentiary requirement articulated in the regulation. It would provide ISOs with clearer standard of adjudication. It would retain USCIS' flexibility to question and deny petitions that involve those anomalous circumstances where an alien may meet the evidentiary requirements of the regulation, but where concrete and articulated reasons exist to believe that they are not among those contemplated under the definition of extraordinary ability.

PART C: Aliens of Exceptional Ability Do Not Belong in the PM

AILA recognizes the similarities between the statutory and regulatory framework for the alien of extraordinary ability classification (INA §203(b)(1)(A) and the outstanding professor or researcher classification (INA §203(b)(1)(B). Both are employment based first preference (EB-1), neither requires a labor certification, and there are strong similarities between the evidentiary criteria for these classifications. For example, both consider an alien's publication record, honors and awards, material published about the alien, and the alien's membership in societies that require outstanding achievement.[56] It therefore makes sense that guidance on evaluating evidentiary criteria for both of these classifications would be included in one PM.

However, AILA respectfully submits that the alien of exceptional ability classification (INA § 203(b)(2)(A)) does not fit within this PM. While petitions based on exceptional ability do involve an evaluation of lists of regulatory criteria, the criteria at 8 C.F.R. §204.5(k)(3)(ii) differ from those noted above. For example, a petition to qualify as an

[55] *Kazarian*, at 1122 (9th Cir. 2010) ("Whether an applicant for an extraordinary visa presents two types of evidence or none, the proper procedure is to count the types of evidence provided (which the AAO did), and the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded).") (citing 8 C.F.R. §204.5(h)(3)).

[56] One significant difference between these two classifications is that whereas extraordinary ability is compared to others in the field to qualify as "one of a few at the top," this is not a requirement for the outstanding professor or researcher. Rather, outstanding researchers and professors need only establish that they are themselves outstanding, without comparison to others. Therefore, the PM's discussion of the appropriate field in which to compare the outstanding professor or researcher adds an evidentiary requirement beyond the scope of the statute and the regulations.

alien of exceptional ability must be accompanied by, *inter alia*, proof that the alien has a degree, is licensed or certified for a particular occupation, has memberships in professional societies (but does not require outstanding achievement), has at least ten years of full time experience, and has received recognition for achievements. The evidentiary criteria for exceptional ability therefore suggest a much lower threshold – degree, licensure, and experience – than those for extraordinary or outstanding ability – publications, material published about the alien, honors and awards. Moreover, we note that the PM does not provide a detailed analysis of the criteria at 8 C.F.R. §204.5(k)(3)(ii) as it does with the criteria at 8 C.F.R. §204.5(h)(3) and 8 C.F.R. §204.5(i)(3)(i).

The substantive differences are also reflected by the fact that both the alien of extraordinary ability and the outstanding professor or researcher classifications are EB-1, whereas the alien of exceptional ability is employment-based second preference (EB-2). This is significant in and of itself, but also because the EB-2 classification normally requires a labor certification while the EB-1 classifications do not. According to 8 C.F.R. §204.5(k)((4)(i)-(ii), "[E]very petition under this classification must be accompanied by an individual labor certification from the Department of Labor" or qualify for an exemption of the job offer "and thus of a labor certification…if exemption would be in the national interest." This is also clear from the statute, as INA §203(b)(2)(A)-(B) stipulates that the alien of exceptional ability's services must be "sought by an employer in the United States" or must establish that it is in the "national interest [to] waive th[is] requirement." Petitions claiming a national interest exemption to the labor certification are adjudicated under the standard established by *Matter of New York State Transportation*.[57] This again indicates that that the alien of exceptional ability classification falls outside the scope of this guidance. Moreover, this distinction was recognized in the *Kazarian* decision.[58]

Finally, the fact that extraordinary ability and outstanding professor/researcher classifications are distinct from the alien of exceptional ability classification was emphasized in the publication of the regulations. Specifically, in the final rule, legacy INS characterized it as "unfortunate" that "IMMACT … uses the term 'exceptional ability' when referring to certain immigrants under the new second employment-based classification."[59] The rule recognized that this created "undesirable confusion, however, the Service must use the terms selected by Congress."[60] In distinguishing the terms, legacy INS found it dispositive that under IMMACT, aliens of exceptional ability must obtain a labor certification, indicating that "'exceptional ability' classification is a less restrictive one than … 'extraordinary ability' classification."[61] Therefore, aliens of exceptional ability should be removed from this PM.

[57] 22 I &N Dec. 215 (INS Acting Assoc. Comm'r 1998).
[58] *Kazarian*, at 1120.
[59] 56 Fed. Reg. 60,897 (Nov. 29, 1991) (supplementary information to final rule).
[60] *Id*.
[61] *Id*.

CONCLUSION

This PM provides welcome guidance and clarification in a number of areas. The Ninth Circuit's decision in *Kazarian* is an important step toward development of a proper legal framework for the adjudication of petitions for aliens of extraordinary ability, and by extension, for the adjudication of petitions for outstanding professors and researchers. *Kazarian* must not be read alone, as the principles found in *Buletini*, *Muni*, *Gulen*, and other cases that address the statutory and regulatory framework are essential to the "merits determination" portion of the analysis. AILA urges USCIS to revise this PM to incorporate the principles in those decisions. By doing so, USCIS will provide the necessary framework to guide ISOs in making the "merits determination" based upon the preponderance of the evidence.

AILA thanks USCIS for the opportunity to offer these comments.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION