

AILA National Office Suite 300 1331 G Street, NW Washington, DC 20005

> Tel: 202.507.7600 Fax: 202.783.7853 www.aila.org

February 5, 2013

USCIS RFE Project

Submitted via email: scopsrfe@dhs.gov

Re: RFE Template for Comment: Form I-129 O-1A Extraordinary Ability in Science, Education, Business, and Athletics (SEBA)

Dear Sir or Madam:

The American Immigration Lawyers Association (AILA) submits the following comments on the proposed USCIS Request for Evidence (RFE) template for Form I-129, O-1A Extraordinary Ability in Science, Education, Business and Athletics (SEBA).

AILA is a voluntary bar association of more than 12,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes advancing the law pertaining to immigration and nationality and facilitating justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, U.S. permanent residents, and foreign nationals regarding the application and interpretation of U.S immigration laws. We appreciate the opportunity to comment on this RFE template and believe that our members' collective expertise provides experience that makes us qualified to offer views that will benefit both the public and the government.

Standard of Proof

We recommend that eligibility for the O-1A visa category be clarified by including language in the RFE template that highlights the applicable standard of proof. We suggest the following:

You must demonstrate eligibility by a preponderance of the evidence. That is, the evidence must demonstrate that it is more likely than not that the eligibility requirements are met.

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General Comments

The proposed template should clarify that the petitioner must prove that the beneficiary has enjoyed either sustained national **or** international acclaim, but not both. See 8 CFR $\S214.2(0)(1)(ii)(A)(1)$.

To clarify the roles of the parties throughout the RFE, the term "employer/petitioner" should be substituted for the word "you." Not all petitioners are employers. For example, an agent can be a petitioner, but is not an employer. In addition, the term "performer," where it is used, should be substituted with the term, "beneficiary." Beneficiaries in SEBA fields are usually not performers. The term "performer" is more likely applicable to O-1B cases.

Request for Translations (Page 3)

Current Language (First Paragraph): "All foreign language documents must have a complete English translation to establish eligibility."

Suggested Change: "All foreign language documents must have an English translation of pertinent parts to establish eligibility."

Suggested Insert after Bullets: "Note: In some cases, only a full translation will provide the significance of the evidence. Where a partial translation does not demonstrate that the beneficiary meets a specific regulatory criterion, please submit a full translation."

Reasoning: Some documents for an O-1 can be quite lengthy, e.g., a book, a playbill, etc. A complete English translation should not be required for all documents. The addition of the note warns the petitioner that translating only parts of a document could affect eligibility for O-1 classification.

Written Contracts (Page 4)

We suggest revising the language in the proposed RFE template to read:

All petitions seeking O-1A classification must be supported by a contract (written or oral) between the employer/petitioner and beneficiary. If a written contact exists, this document should be submitted. If a written contract does not exist, please submit a detailed summary of the terms of the oral agreement between employer/petitioner and the beneficiary.

Consultation Organization Opinion (Page 5)

We suggest that the second paragraph in this section be revised to read:

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You did not submit a consultation with the petition. In order to satisfy this requirement, please submit a consultation, or evidence demonstrating that you attempted to obtain a consultation and that the consulting organization would not provide an appropriate consultation letter.

In addition, on Page 6, line 2, in describing what the advisory opinion must state, we note that O-1A eligibility does not hinge on whether the sponsored position requires the services of an alien of extraordinary ability. The regulation at 8 CFR §214.2(o)(1)(ii)(A)(1) requires only that the beneficiary be coming to the United States "to continue work in the area of extraordinary ability." By suggesting that the position require extraordinary ability misstates the O-1A requirements and will lead to adjudication errors.

Evidence of a Major, Internationally Recognized Award (Page 6)

The suggestion that evidence of "previous winners of the award who enjoyed international acclaim at the time of receiving the award" may indicate that an award is major and internationally recognized is likely to lead to confusion. Before including this in the final RFE template, we ask that USCIS clarify how this is relevant to the regulations or otherwise suggestive of meeting the specified criteria.

Awards (Page 7)

There is a typographical error on page 7 under "Awards" in the last bullet point, second line from the bottom. The word "ins" should read "in."

Memberships in Associations (Page 8)

The regulation concerning memberships in associations calls for "documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields." 8 CFR §214.2(o)(3)(iii)(B)(2).

We recommend that the first bullet point, "The minimum requirements and criteria used to apply for membership" be changed to "The minimum requirements and criteria used to accept a person for membership." Whatever information may be used to "apply for membership" in an association is not a reliable predictor of whether membership in the association requires outstanding achievements.

The second bullet point, "The number of members in the association" should be deleted. The number of members in the association does not objectively relate to whether membership in the association requires outstanding achievements. It is the quality of the members in the association, not the quantity of members that is relevant.

The third bullet point, "The beneficiary's rank within the association," is similarly irrelevant. This item has no direct correlation to whether membership is predicated on

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having outstanding achievements. This item is likely to confuse adjudicators and is not consistent with the regulations.

Published Material (Page 8):

Please correct the first sentence to read "professional **or** major trade journals," and add to the end of the first sentence, " ... other forms of media, **including electronic media."**

The second bullet point, which references published material that "Identifies the beneficiary as a person who has risen to the very top of the field of endeavor" misstates the regulation. Under 8 CFR §214.2(o)(3)(iii)(B)(3), this evidentiary criteria is described as "Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation." It does not require that the content contain a conclusion that the beneficiary is at the very top of the field. Published material about the beneficiary is by itself such evidence, and it is unnecessary that the published material recognize the beneficiary as one who has risen to the very top of the field.

Judging the Work of Others (Pages 8-9)

The first bullet point states that evidence under this criterion may include "evidence showing the significance of the work judged by the beneficiary." However, 8 CFR §214.2(o)(3)(iii)(B)(4) does not require that the work being judged have any particular level of significance, but rather only requires that the beneficiary has been selected as a "judge of the work of others" in the same or an allied field. Imposing a requirement that the "judging be significant" adds a subjective factor into the adjudication that is not recognized or supported by the regulations.

Similarly, the second bullet point, "Information identifying the criteria used to select judges" is also not supported by the statute or the regulation, nor is the third bullet point, "an explanation describing how and why the beneficiary received an invitation to be a judge." The regulation is very clearly limited to evidence that the person was a judge of the work of others, and the RFE template should include suggestions for evidence that are limited to the narrow scope of the regulation.

Original Contributions (Page 9)

The first sentence omits the word "athletics," which should be inserted prior to the word "sciences."

In the second bullet point, "Objective documentary evidence of the significance of the beneficiary's contribution to the field," the word "documentary" should be deleted. Evidence to support this criterion is not limited to documentary evidence.

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We also suggest that the word "currently" be removed from the third bullet point. Previous achievements in the field may be equally or even more important to demonstrate sustained criteria and achievements in the field.

Scholarly Articles (Page 10)

We suggest the following changes:

- "Evidence may include, but is not limited to, **information** showing":
- First bullet point: "The significance and importance of the articles within the beneficiary's field of expertise."
- Second bullet point: "The significance and importance of the professional or major trade publications or other major media that have published the beneficiary's scholarly articles within the beneficiary's field of expertise."
- **Sixth bullet point:** This bullet point should be deleted. The number of citations to the beneficiary's written work is not required to demonstrate that the information qualifies under the regulation.

Employment in a Critical or Essential Capacity (Page 10)

The one bullet point under this section should be revised to read: "**Documentation** which establishes the beneficiary's employment in a critical capacity with an organization or establishment that has a distinguished reputation."

Remuneration (Page 11)

The first sentence should be revised to read: "You may submit evidence that the beneficiary has commanded, now commands, or will command a high salary or other substantial remuneration."

Evidence may include, but is not limited to:

First bullet point: "Copies of contracts or other reliable evidence."

Comparable Evidence (Page 11)

The plain language of 8 CFR §214.2(o)(3)(iii)(C) allows for the submission of comparable evidence if "the criteria ... do not readily apply." The RFE template suggests that comparable evidence can only be submitted if none of the O-1 criteria apply. To make this abundantly clear, we suggest that this section of the template be revised to read:

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Comparable Evidence. If any of the above criteria (i.e. one or more of the preceding) do not readily apply to the beneficiary's occupation, you may submit comparable evidence to establish the beneficiary's eligibility.

You submitted comparable evidence. However, you have not indicated which of the above criteria do not readily apply to the beneficiary's occupation. You may still submit comparable evidence if you indicate which of the criteria do not readily apply to the beneficiary's occupation.

Agents (Page 12)

The agent section does not include a section for "Agents filing on behalf of a traditionally self-employed beneficiary." This section should be added, with reasonable suggestions for evidence such as a written contact between the agent and beneficiary or a summary of the terms of the agreement and summary of the services provided.

Conclusion

We appreciate the opportunity to provide comments on this RFE template and look forward to continuing dialogue with USCIS on these important visa classifications.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION